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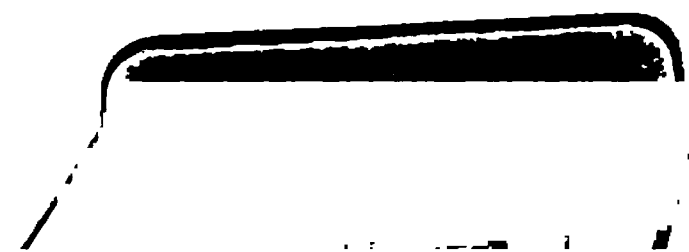


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CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 12, 1835, TO JULY 27, 1836.

REPORTED BY

ALEXANDER DUNLOP, J. M. BELL, AND JOHN MURRAY
ESQUIRES, ADVOCATES.

VOL. XIV.

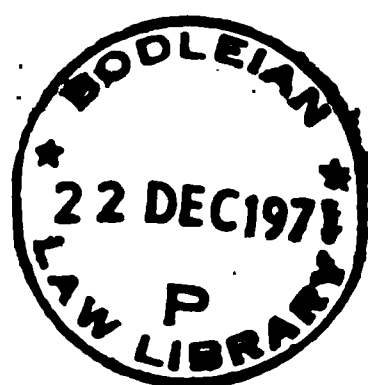
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McClelland's Law Agency

CASES

DECIDED IN

THE COURT OF SESSION.

WINTER, 1835.

WILLIAM EWING, Pursuer.—*Rutherford—Paterson.*
ADAM CUMINE and OTHERS (Burnett's Trustees and Executors),
Defenders.—*H. J. Robertson.*

Bill of Exchange—Prescription—Personal Exception.—1. A party intimated to the law-agents of an alleged debtor, that he had a claim to make, and, at the agent's request, transmitted a statement of his claim, which rested on a bill of exchange: both parties then allowed the matter to lie over for nine years: Held, that the course of prescription on the bill had not been interrupted. 2. Circumstances in which, held, that a party was not barred personal exceptions from pleading the prescription of bill of exchange.

THE late Kilpatrick Burnett, who died in 1822, executed a trust-deed in favour of Adam Cumine and Others, one of whom also obtained confirmation as Burnett's executor. On December 22, 1823, William Ewing, as executor-creditor of the deceased John Buchan, W.S., wrote to Mackenzie and Innes, the law-agents of Burnett's trustees, intimating, "I believe I shall have a claim to make for the late John Buchan, Esq., W.S. Be so good as to inform me what Mr Burnett's estate is to pay. I am, &c." Next day, the agents answered: "If you will transmit to us a statement of any claim you may have as executor-creditor of Mr Buchan against the late Mr Burnett of Monboddo, we will communicate it to Mr Burnett's trustees, and let you know their answer." On the following day, Ewing wrote to them, enclosing "state of debt due by the late Mr Burnett to Mr Buchan, W.S., amount £72, 11s. 1d." This claim was founded on a bill for £68, dated 3d February, 1821, drawn, at Buchan upon, and accepted by, Burnett. It had been

No. 1. found in Buchan's repositories, having been blank indorsed by Buchan to the Bank of Scotland, and afterwards retired by him. The addition of certain interest and expenses made up Ewing's claim.

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After the letter of Ewing stating his claim, the matter lay over, without any farther step being taken on either side, until December 20, 1832, when Ewing wrote to Mackenzie and Innes, reminding them of the claim, and requesting to be informed if he was now to receive any payment. They replied that they must again communicate with Burnett's trustees, in consequence of the matter having lain so long over, and they finally intimated to Ewing, that under an investigation now instituted into the circumstances, they had recovered satisfactory evidence that the bill had been retired by another bill, which was duly retired, at maturity, by Burnett himself. Ewing's demand was therefore refused, and he raised an action to enforce it against Burnett's trustees and executor, who pleaded in defence, first, that the bill was prescribed, and therefore, by the statute, it was inhabile to produce any action in Court; and, second, that, if the action was competently maintainable, it was groundless, as the bill had been paid. Ewing answered, that as the agents of the defenders had asked him to state his claim, and promised an answer, which they never returned, he was led to believe that they had acquiesced in his claim as well founded. He was thus thrown off his guard, and allowed the term of the sexennial prescription to run without raising action or diligence. The defenders were therefore barred, *personali exceptione*, from pleading prescription, and he was ready to show there was no proof of the bill having ever been paid.

The Lord Ordinary "sustained the plea of prescription stated for the defenders, assoilzied them from the conclusions of the libel, and decerned; and found the pursuer liable in expenses."

Ewing reclaimed. The Court did not require the defender's counsel to support the interlocutor.

LORD BALGRAY.—The question is, whether the plea of prescription can be effectually elided by the pursuer. I see no sufficient ground to enable him to do so. It was not enough that he intimated a claim to the trustees of his alleged debtor. It was necessary that he should obtain some written acknowledgment of the debt, or ranking of his claim, before the course of prescription could be interrupted. Nothing of this kind took place. On the contrary, Ewing got no answer; and that was just the reason why he should not have let the matter fall asleep, if he had intended to interrupt prescription. But he did nothing, and the term of prescription ran on. I think the Lord Ordinary's interlocutor well founded.

LORD PRESIDENT.—I am of the same opinion. It is not enough for the pursuer to say, that, because the claim lay over on all hands, the defenders must not be allowed to plead prescription against him. Unless he can show that he effectually interrupted prescription, I see nothing to prevent the defenders from pleading it; and I see no effectual interruption.

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LORD GILLIES.—I consider it impossible to hold that interruption of prescription was effectually made in this case. The pursuer intimated to the agents of the private trustees of his debtor, that he believed he had a claim to make. The agents asked him to make a statement of his claim, and he did so. But can this interrupt prescription? There is neither the writ of the party, nor any thing like it, founded on; and I think the statute, the words of which are very strong, would be entirely defeated, if a proceeding like this could be held to interrupt prescription.

LORD MACKENZIE.—I am of the same opinion. The words of the act of Parliament, which establishes this prescription, are peculiarly strong, and must receive full effect from the Court. The pursuer made a claim, after which both parties neglected the subject, and thought no more about it until the years of prescription had run. This is just a state of things to which the statutory prescription applies.

THE COURT adhered, and allowed additional expenses to the defenders.

WITHERSPOON and MACFARLANE, W.S.—MACKENZIE and INNES, W.S.—Agents.

WILLIAM BELL, Pursuer.—R. Bell—G. G. Bell.
SIR WILLIAM F. ELLIOTT, Defender.—Neaves.

Right in Security—Trust—Clause.—Terms of a heritable trust-bond of a life rent annuity, under which, held, that the expense of a conveyance of part of the annuity to a new creditor should be borne by the creditor and not by the debtor.

In 1828, Sir William F. Elliott granted a heritable bond of annuity in favour of William Bell, W.S., for £1100 per annum, to endure during the granter's lifetime, or until redemption. The annuity was to run from 13th May, 1828, and to be termly payable thereafter. The bond was granted in trust, 1st, That Bell might discharge certain annuities affecting Sir William's estate; 2d, To enable a certain security to be granted in favour of Lady Elliott; 3d, To apply £500 per annum in relief of a specific obligation and guarantee, "after payment of the costs of this trust, and of the deeds constituting the same, or arising out of it;" and 4th, To pay the interest of £4439, 11s. 1d., being a debt due to Bell, together with the interest of some other sums for which Bell might be placed under advance, and, after the obligation and guarantee above mentioned was satisfied, Bell was to apply £250 annually in extinction of the principal sum due to him. It was declared, "that the said William Bell, as trustee foresaid, shall have full and unlimited power to carry into effect the purposes before expressed, and to grant all deeds necessary for that purpose, binding me in absolute warrandice." In the precept of assignment it was declared that the annuity should be redeemable at any term of years, and that the sum advanced by Bell in discharge of

No. 2. the previous annuities, in terms of the first purpose of the trust, and of
 13, 1835. the sum of £4439, 11s. 1d., due to Bell; "with all expenses incurred by
 v. Elliott. the said William Bell, as trustee foresaid, or his foresaids, under this
 trust, or in making the said annuities effectual;" and by guaranteeing
 Bell against the obligations undertaken by him in implement of the trust.
 The following clause was subjoined:—"Declaring that, when the said
 redemption takes place, I and my foresaids shall be at the whole expense
 of all the writings necessary for carrying the same into execution. And
 farther, I bind and oblige myself and my foresaids, to be at the whole
 expense of any discharge or discharges of these presents, or conveyance
 of the same, or any part thereof, made to any person or persons; and it
 is hereby declared that a copy hereof, or of the instrument of seisin hereon,
 is and shall be as sufficient for using, following out, and enforcing such
 order of redemption," &c.

In 1834, Bell raised a summons against Sir William Elliott, setting forth the tenor of the bond of annuity; and that, on 8th February, 1830, with consent of the defender, he had disposed a clear yearly sum of £405, being a proportional part of the annuity of £1100, to George Scott Malleny: That, on 10th February, 1830, he had disposed a clear yearly sum of £504, 9s. 7d. to the Edinburgh Life Assurance Company, being another part of the foresaid annuity: That the balance of the annuity of £1100, for nine terms past, remained due to him, the pursuer, and a farther business account of £351 was also due. Bell concluded for payment of the balance and the account.

Sir William Elliott objected that the business account included a charge of £104, 14s., 3d., as the expense of the transfer of that part of the bond of annuity which had been conveyed to the Edinburgh Life Assurance Company; and that, as the bond of annuity otherwise provided for payment of the debt due to the pursuer, he must bear the expense of transferring it, since he had chosen to take that step for the purpose of raising money upon the annuity, so as to anticipate what was fairly contemplated in the bond itself, as the term when the pursuer's debt was to be satisfied. The clause in the bond, regarding the expense of conveyances of the annuity, occurred only in the precept of sasine, and in reference to the power of redemption there referred to. It could not be made applicable to a conveyance by the creditor, made for his own convenience, and having no reference whatever to the power of redemption. And this case was different from that of a common heritable bond, where a creditor, after the term of payment, could at once call up the principal sum from the debtor, and, accordingly, the debtor was always burdened with the expense of conveyance to a new creditor, since he did not choose to prevent such conveyance by paying up the debt to the creditor.

The pursuer answered that there was an express clause inserted in the bond, for the special purpose of subjecting the defender in the expense of such conveyances of the annuity as might be found necessary or expe-

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dient in carrying on the trust. But, independently of such a clause, it was the universal practice to subject the debtor, in any heritable bond, whether of annuity or otherwise, in the expense of a transference to a new creditor.

No record was made up, but revised minutes were lodged by the parties, after which, the Lord Ordinary “having heard counsel for the parties, on the objection contained in the foregoing answers for the defender, to the sum of £104, 14s. 3d., with corresponding interest, sustained the objection, and found that the said sum and interest must be deducted from the sums concluded for in the summons.”

The pursuer reclaimed, and asked leave to make a statement on the record, of the circumstances attending the conveyance of the annuity to the Edinburgh Life Assurance Company. But their Lordships considered it too late to allow any new statement to be now made, after a revised minute had been lodged by the pursuer, which was done after the defender had taken his objection to the item in question.

LORD MACKENZIE.—I think the Lord Ordinary’s interlocutor well founded. It might have been more satisfactory to have a fuller statement of the circumstances connected with the partial transference of the annuity ; but, in so far as it appears on these papers, I see no ground for imposing the expense of that transference upon the debtor. The special clause founded on by the pursuer may be proper enough in itself, but I do not think it fairly applies to such a transference as occurred here. If the debtor had to pay the expense of this transference, he might have to pay the expense of any number of transferees ; and was it ever heard of, that, if a heritable bond was conveyed fifty times over, from one creditor to another, that the whole cost of these transmissions was to fall on the unfortunate debtor ? Even if an obligation had been expressly undertaken by any man in such terms as to subject him to a hardship like that, I should doubt whether such obligation would not fall under the exception of being *pactum illicitum*.

His Lordship was understood to add, that he considered the scope of the clause to refer to such a case as that of the debtor proposing to redeem the annuity, but requiring to have a portion of it conveyed to a new creditor, as part of the arrangement for redeeming it, in which case, or in any similar case, the expense of the conveyance of such portion ought clearly to fall on the debtor.

Grahame Bell, for the pursuer, intimated, that he did not plead the case so high as to contend that the expense of any nimious or excessive conveyancing of the bond should fall on the debtor ; but merely, that, where the creditor acted bona fide, and in the fair administration of his powers as trustee, the expense of the conveyance of any part of the trust-annuity should fall on the debtor, and that the special clause was framed for the purpose of embracing all such cases.

LORD PRESIDENT.—I concur with the Lord Ordinary and Lord Mackenzie. In principle, it is quite the same thing whether the bond is conveyed fifty times over, or only half a dozen of times, the expense of such conveyance ought not, for this deed, to be laid on the debtor.

D. 2. LORD GILLIES concurred.
 — LORD BALGRAY was absent.
13, 1835.

8 v. THE COURT adhered, and subjected the pursuer in the expenses of the dis-
18. cussion in the Inner-House.

BELLS and RUTHERFORD, W.S.—A. STUART, W.S.—Agents.

D. 3. EBENEZER BEATTIE, Suspender.—*Sol. Gen. Cunningham.*
 PETER RODGER, Procurator Fiscal of Selkirk, Charger.—*Whigham.*

Breach of Interdict—Process.—1. A party having been fined L.20 by a Sheriff, on a complaint, for breach of interdict, at the instance of the heritors of a parish and the procurator fiscal of a county, for the public behoof, suspension of a charge for payment of the fine and expenses of process refused. 2. The Lord Ordinary having refused a bill of suspension, and the suspender, on presenting a second bill, having objected to the interlocutor specially on the ground that it did not contain findings of the facts held to be established by the proof in the inferior court,—Question, Whether the 6 Geo. IV. c. 120, § 40, applies to such a case?

14, 1835. THE suspender, Beattie, is proprietor of the lands of Ettrickhall, in
 — Selkirkshire, on part of which the school and schoolmaster's house of the
DIVISION. Moncreiff parish of Ettrick are built. In front of those buildings is a piece of un-
Moncreiff enclosed ground, extending to about seventy feet, and dividing the pre-
Lockburn. mises from the Selkirk and Moffat road. In the spring of 1832, Beattie
F. was proceeding to fence this ground, and convert it to his own uses, when the Duke of Buccleuch and other heritors of the parish applied to the sheriff for an interdict, to prohibit him and all others from enclosing or altering in any way the ground in question, until the rights of the parties in regard to it were defined and settled. The sheriff granted an interim interdict, as craved, which was duly intimated.

In May, 1833, Beattie having again commenced operations on the ground in front of the schoolhouse, the heritors, with concurrence of the procurator fiscal of Selkirk, presented a complaint to the sheriff for breach of interdict, alleging that he had caused the ground to be ploughed up and sown with barley, and praying the sheriff to decern against him for the sum of £20 of damages, payable to the petitioners, and to fine him in the farther sum of £20, payable to the procurator fiscal, for the public interest, in respect of the contempt of Court. He was accordingly cited to appear before the sheriff; and, on being judicially examined, declared that he gave no orders to his servants to plough the ground, that he was not present when it was ploughed, and was ignorant whether it was ploughed or not. The sheriff ordered a condescence and answers; and a record having been regularly made up and closed, a proof was al-

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lowed to both parties. The proof was led in absence of Beattie; but the introduction to the depositions bore, that "the sheriff-substitute had been previously satisfied that this diet of proof had been sufficiently intimated to the opposite party." From the evidence of four witnesses it appeared, that one of Beattie's servants had ploughed up the piece of ground opposite to the school, that Beattie was present on the occasion, and assisted the servant by holding down the plough and leading the horses, and that the ground was subsequently sown and harrowed. On advising the proof, the sheriff fined him in £20 to the procurator fiscal of Court for the public interest. A reclaiming petition was refused by the sheriff-substitute, who added the following note:—"The petition seems to be an attempt at justification of an admitted breach of the interdict, together with a denial of the sheriff's power to maintain his authority in this matter of imposing a penalty. The petitioner assigns what cannot be considered a satisfactory reason for absenting himself from the proof led by the complainers, and further states, incorrectly, that he was not allowed an opportunity to adduce the conjunct probation allowed to himself."

These judgments were not appealed from, and the Procurator Fiscal having given a charge for payment of the fine and expenses, Beattie presented a bill of suspension, on the grounds, *inter alia*, that the original petition for interdict was incompetent, that the subsequent proceedings were unauthorized by the heritors; that damage to the private party, by reason of the act complained of, was the only legitimate ground of complaint for breach of interdict; and that the proceedings in the inferior court, especially in regard to the proof, were irregular.

The procurator fiscal, in answer, contended, that the competency of the petition for interdict was not the subject matter of discussion, but simply whether the authority of the court was broken; that the heritors had authorized the proceedings; and, at all events, the respondent, as procurator fiscal, had himself a sufficient title to vindicate the authority of the court, complaining of the violation of its interdict; that, in the case of a private party claiming damages for breach of interdict, he must prove his damage, and it is only damage he can recover under his complaint; but the authority of the law may be vindicated by a complaint at the instance of the procurator fiscal, praying for the infliction of a fine for the public behoof—and to this part of the prayer the sheriff had given effect; and that if there was any thing irregular in regard to the proof, the proceedings ought to have been brought under review by advocacy. The Lord Ordinary (Cockburn) refused the bill, adding to his interlocutor the *objoined note*.^a

^a *Disobedience of the sheriff's authority requires that his decrees for a fine be sustained on frivolous grounds. The merits of the original*

No. 3. The suspender then presented a second bill, in which, besides going over his previous reasons, he objected, that, according to the 7th section of the Act of Sedurent, 11th July, 1828 (which refers to 6 Geo. IV., c. 120, § 40), the Lord Ordinary, when he refused a bill of suspension of the judgment of an inferior court, proceeding on a proof, ought to have specified in his interlocutor the several facts material to the case which he might find to be established by the proof.¹

14, 1835.
the v.
ger.

The Lord Ordinary (Moncreiff) refused the bill by the following interlocutor:—

“ The Lord Ordinary having considered this bill, with the former bill and answers, and the inferior court process, Finds it proved and admitted, that, on the 10th April, 1832, the Sheriff of Selkirkshire did, in a regular process, referred to, pronounce judgment, granting an interdict against the complainer, prohibiting him and all others ‘ from proceeding with the enclosing, or making any alterations whatever, upon the said piece of ground (the ground in dispute, to which this bill has reference) between the public road and front of the said parish school, and schoolmaster’s dwellinghouse, until the rights of the parties thereto are properly defined and settled:’ Finds, that that interdict is admitted to have been duly intimated to the complainer, that it was never removed, and that the complainer took no legal measures for having the matter of legal right discussed, so as to relieve himself from the effect thereof: Finds, that the petition, complaining of a breach of the said interdict, was competently and legally presented to the said sheriff, by the parties having the acknowledged interest therein, with the concurrence of the procurator-fiscal of the county, for the public interest, in vindication of the judicial authority of the sheriff: Finds, that the said complaint was legally and correctly proceeded in, in so far as the present complainer was cited to appear before the sheriff to be judicially examined on the breach of interdict alleged against him: Finds, that upon the complainer appearing, in compliance with the said order, he did solemnly and judicially declare, ‘ that he did not, about the first day of the present month, give orders to Walter Clerk, or any of his servants, to plough up the part of the said piece of ground in front of the said parish school, nor did the declarant plough or assist in ploughing it, nor does he know whether it is ploughed or not:’ Finds, that after the said declaration was taken, a record by condescendence and

action or actions are not now here.* The question now at issue is, merely whether the interdict was broken? The proof establishes clearly that it was, and whatever the suspender may make of his objections, in any reduction he may be advised to try, none of them warrant the immediate suspension of the decree.”

¹ Laird, ante, X, 84; Halley (ante, XI., 948).

* See *Beattie v. Lord Napier and Others*, 27th May, 1831 (ante, IX. 639).

answers was duly and regularly made up in terms of the statute, and was, upon full notice, closed, as the record on which the case should be tried, with consent of the complainer: Finds, that thereafter a proof was allowed to both parties: Finds, that the record bears, that due notice of the diet, or day appointed for taking the proof, was given to the suspender's agent, both apud acta in curia and otherwise: Finds it clearly proved, by four eyewitnesses, of sufficient age and competency, well acquainted with the ground in question, and substantially concurring, that on the first day of May, 1833, Walter Clerk, servant to the defender,' did 'plough that part of the said piece of ground which is opposite to the said schoolroom,' and that 'the defender, Mr Beattie, was present on the occasion,' and the witnesses 'saw him assist Clerk in ploughing the ground, by holding down the plough,' or otherwise, and that 'on the same day the ground was sown and harrowed: ' Finds, that the first witness, Jean Tait, aged 20, from whose deposition the above extracts are taken, farther depones, that she 'understands that the said Walter Clerk has left this country for America: ' Finds, that the proof so taken, was all taken and concluded on the 18th June, 1834: Finds, that no judgment on the proof so led was pronounced till the 15th September, 1834: and Finds, that in the interval, no application appears to have been made by the suspender for leave to lead any other proof: Finds, that though the suspender presented a reclaiming petition against that interlocutor, on various grounds, which appear to the Lord Ordinary to have been very untenable, he did not therein renew his averment, that he knew nothing of the ploughing, which was proved to have taken place in his presence, on the 1st May, or state that that ploughing was not of the ground in dispute: Finds, therefore, that the breach of interdict complained of is fully proved under proceedings fairly and regularly conducted, with full opportunity given to the suspender to state and prove his own case: Finds, that the merits of the original application for interdict are wholly foreign to the present case: Finds, that, in this suspension of a charge on an extracted decree, no relevant or sufficient plea has been advanced: And, on the whole matter, refuses the bill, and of new, Finds expenses due, and remits the account, when lodged, to the auditor to be taxed; but prohibits the clerk from issuing a certificate of refusal till the first box-day, in order that the complainer may apply to the Court, if so advised." *

* "NOTE.—The complainer objects to the judgment of Lord Cockburn refusing the former bill of suspension, specially on the ground that it does not contain findings of the facts which he held to be proved. Though it may well be doubted whether the clause of the act of Parliament referred to applies to such a case, the present Lord Ordinary has thought it proper to comply with the apparent demand of the complainer, by expressing specifically all the grounds of his judgment. If these grounds are wrong, it is very proper that they should be plainly stated, that the judgment itself may be corrected by the competent authority. But, if the

No. 3. Beattie reclaimed.

Nov. 14, 1835.
Leishman v.
Robertson.

THE COURT adhered.

MACKINTOSH and GEMMEL, S.S.C.—JAMES POTT, W.S.—Agents.

No. 4. THOMAS LEISHMAN and DAVID DUNLOP, Petitioners.—D. F. Hope—Shaw.

MRS MARION ROBERTSON, Respondent.—Rutherford—Cowan.

Inhibition—Partnership.—Circumstances in which held that inhibition, on the dependence of an action concluding against surviving partners for caution to the effect of securing a share of stock, payable at distant periods, was both competent and well founded.

Nov. 14, 1835.
D Division.
S. LEISHMAN, DUNLOP, and ROBERTSON, were copartners in trade as cotton-spinners. Besides the usual stock in trade they were possessed of heritable property, consisting of the cotton-mill and machinery. They had executed no regular contract of copartnery, but in December 1831, a minute of agreement was entered into and engrossed in the books of the company, by which it was stipulated, that “in the event of the death or insolvency of any one of the partners, his share in the concern shall be ascertained from the annual balance previous to his death or insolvency (provided that balance be docqueted and subscribed by all the partners), and paid out as follows:—One-third to be paid six months after his death or insolvency, another twelve months, and the remaining third eighteen months after his death or insolvency. They also agree that bank interest shall be allowed for the two last payments, during the time they remain in the concern, after the first payment has been made.”

On the 28th December, 1834, Robertson died. The last docqueted balance previous to his death was on the 1st July, 1833, when the sum at his credit amounted to £2891, which, by subsequent drafts, was reduced at the time of his decease to £2451. The several instalments

should be found to be right according to the record of the case, it will be remembered, that it is on the suspender's requisition that they are embodied in a judicial sentence.

“The instance of the Duke of Buccleuch and the other heritors, with the concurrence of the procurator fiscal, was quite sufficient to sustain the complaint, and to prevent any nullity in the proceedings from the death of one of the heritors unknown at the time.

“The fine may be higher than what is usually imposed in such cases. But, in the circumstances, the Lord Ordinary does not think that there is any cause for interfering with that in this suspension.

“If the suspender reclaims, the answer to the first bill must of course be printed.”

No. 4. in the mean time the petitioners were allowed, without any sort of control, to dispose of their effects at pleasure, and so disappoint the decree which the respondent might obtain.

Nov. 17, 1835.
Smellie v.
Miller.

When the case came to be advised on the petition and answers (July 10, 1835), the Court were of opinion that, in the circumstances, the diligence of inhibition was neither incompetent nor nimious and oppressive, but, wishing some farther information, their Lordships ordered replies and duplies. About the beginning of November, however, the money due to Robertson's representatives was consigned in bank by the petitioners, and accordingly, when the petition came to be finally advised,

THE COURT recalled the inhibition in respect of the consignation, and found the respondent entitled to expenses.

DAVID WILLIAMSON, W.S.—A. NAIRNE, Writer.—Agents.

No. 5. MISS MARGARET SMELLIE, Pursuer.—*D. F. Hope—Turnbull.*
JAMES MILLER and OTHERS (Miller's Representatives), Defenders.—*Rutherford—Sandford.*

Triennial Prescription—Master and Servant.—Circumstances in which held, that a claim of remuneration was substantially a claim for wages, as a housekeeper or servant; and therefore fell under the triennial prescription, though there had been no express agreement as to the remuneration.

Nov, 17, 1835. THIS was an action by Miss Smellie, against her brother-in-law, William Miller, farmer, in which the summons was laid, verbatim, in the same terms with those quoted in reporting the action at her instance, against another brother-in-law, Cochrane.¹ The circumstances in this action were the same as in that against Cochrane. The pursuer had got the charge of the children of Miller and Cochrane, as well as of another brother-in-law, named Gillespie, for several years, as more particularly mentioned in the report above quoted, and in the report of the action which she raised against Gillespie.² She now concluded against Miller for remuneration, on account of her trouble in superintending the children, during a period of nearly nine years, at the rate of £15 per annum. Miller died, after which she insisted against his representatives. The triennial prescription was stated in defence, which cut off the claim as to all the years except the last. The Lord Ordinary “sustained the plea of prescription against the pursuer's claim, except in so far as the same consists of a charge for wages during the last year of her service.”

¹ Feb. 25, 1835 (ante, XIII. 544).

² Nov. 23, 1833 (ante, XII. 125).

No. 5. being hired for a succession of distinct termly periods, but once for all, and that one contract of location applied to the whole nine years, I think it clear that such a contract could only be proved by writ or oath. I have no hesitation in concurring with the Lord Ordinary.

LORD PRESIDENT was understood also to concur.

THE COURT adhered, but allowed no expenses to the defender.

WOTHERSPOON and MACK, W.S.—J. B. WATT, W.S.—Agents.

No. 6. LACHLAN M'NEILL, Pursuer.—*Rutherford*—J. M. Bell.
WALTER and JOHN BLAIR, Defenders.—M'Neill—W. Bell.

Right in Security—Exhibition of Title-Deeds.—The creditor in an heritable bond having raised action against the debtor, before the magistrates of a burgh, concluding for exhibition and delivery of the title-deeds of the subject conveyed, “to be used and disposed of as his writs and evidents of the subjects,” and the magistrates having decreed in terms of the libel, and the creditor given a charge accordingly, the Court, although there were circumstances in the conduct of the debtor tending to show that the deeds were not safe when in his custody, reduced the decree as too extensive, reserving to the creditor his legal right to call for exhibition of the titles, according to law.

ov. 17, 1835. THE pursuer, Lachlan M'Neill, was proprietor of certain heritable subjects in the town of Paisley. In December, 1825, he borrowed £900 from the Reverend Walter Blair, and granted an heritable bond over the property. The bond was in the ordinary form, and contained the usual clause of assignation to the writs and title-deeds. It was made payable at Whitsunday, 1830; but Mr Blair, of the date of the bond, granted to M'Neill a letter of obligation, by which he engaged not to demand the money before Martinmas, 1835. In 1832, Mr Blair died. He was succeeded by his brother, John Blair, who, in order to have himself infeft, applied to M'Neill for a precept of clare constat.

The title-deeds of the property had hitherto remained in the custody of M'Neill, to whom, in September, 1832, Blair's law agents addressed the following letter :—“In consequence of your repeated refusal to grant a precept of clare constat in favour of Mr John Blair, Clashmore, as heir of his brother, the late Rev. Walter Blair, Paisley, in subjects held by the deceased, in security of your bond to him for £900, it has become necessary to serve Mr John Blair, as heir in general of his said brother, and also in special in said subjects, by which measures he is now in a situation to compel you to grant the precept of clare constat asked from you; and we have therefore to intimate, that unless you execute the precept of clare constat which we some time ago prepared and left with your agents, in your presence, and by your desire, or unless you execute a precept of clare constat for infesting Mr John Blair, as heir of his deceased

No. 6. the incarcerators ought to get the books balanced to show how the debt stands, the deponent being persuaded he owes nothing. Depones, That he has not wherewithal to aliment himself in jail: That his wife collects what rents she can get, and he has been supported by his wife; and she has supported herself and family since he was put in jail: That there was £15 paid to the incarcerators' agents: That his wife told the deponent that she got £2 on the title-deeds. Depones, That he will consult with his wife about giving up the titles.

Nov. 17, 1835.
M'Neill v.
Blairs.

“*Eo. die.*—The supplicant being desired in writing to execute a disposition omnium bonorum, declines to do so immediately.”

Previous to his incarceration, M'Neill had granted a precept of clare constat to Blair, on receiving a charge of horning, in virtue of a special service which the latter had expedite. On this precept Blair was infeft, but proceeded nevertheless with his action, in support of which he alleged, that the value of the subjects in question was greatly depreciated, so as to render the debtor's reversionary interest of little or no account; that the debtor had threatened to destroy the title-deeds, and that they were also in danger of being hypothecated for law agents' accounts.

The magistrates decerned in terms of the libel, and continued the interdict; upon which Blair, without restricting or qualifying the decree, gave a charge in terms thereof. M'Neill disobeyed the charge, and raised the present action of reduction of the magistrates' decree. Blair, who was called as defender, died after the summons was executed, and was now represented by his sons, Walter and John Blair, the present defenders.

In support of the reduction, the pursuer maintained, That the proprietor of an heritable subject, over which there is a security, is entitled to preserve the title-deeds, so as to be able at all times to instruct his heritable right against challenge; that he retains full power to sell the subject, or burden it with further debts, and, consequently, must retain the custody of his titles; that this right of custody is subject only to the obligation to produce them, when the creditor has special occasion for them, and binds himself to redeliver them, within a limited time;¹ that the defender's demand was, besides, unwarrantable in the present case, it being no part of his security that he should be put in possession of the deeds, and there being no arrears of interest due, and two years to run from the date of the demand till the term of payment.

The defenders answered, That their predecessor was entitled, in the circumstances, to insist for possession of the title-deeds, particularly since, by reason of the pursuer's insolvency and character, there was a manifest risk of his impledging or hypothecating them, whereby a

¹ Ross's Lectures, p. 381-7.

preference would have been constituted in the holder of the deeds over the prior real right of the heritable creditor;¹ that, as the defenders' predecessor had applied for exhibition of the title-deeds without effect, and the pursuer had refused even to place them in the hands of a third party, the application for delivery was well founded, and was justified by the conduct of the pursuer.

The Lord Ordinary repelled the defences, and reduced the decrees of the magistrates, adding to his interlocutor the note subjoined.*

The defenders reclaimed.

Lord MEDWYN.—I think the party, in this case, has been pushing the right of the heritable creditor farther than the law allows. The common clause of assignation in the bond gave him no right to the possession of the writs and evidents against the right which the proprietor has. The proprietor may wish to borrow money from another creditor, in order to pay off this particular creditor, and, to enable him to do so, he must have possession of his titles. The

¹ Campbell and Clason, Nov. 15, 1822 (ante, IL 16); Cameron, June 25, 1824 (ante, III. 178).

* "The magistrates were not warranted in deciding as they did without better evidence of several disputed facts. But, in reversing their judgment, the Lord Ordinary assumes the material statements of the defenders to be correct, viz. that the pursuer's affairs had become embarrassed—that his property had become depreciated—that there was reason to fear that he might pledge the title-deeds—and that the possession of them would be convenient for the defender. These circumstances might have justified an application to a court for adequate protection, but the application actually made was far too extensive. It was not merely that he should get the use of the titles, or that they should be secured, but that 'the whole writs, title-deeds, and evidents be given and delivered to the pursuer (now defenders) as heir aforesaid, for the purposes mentioned in the said summons, and to be further used and disposed of by the pursuer as his writs and evidents of the subjects before specified, aye and while the said subjects remain unredeemed.' This was as ample a demand as could have been made by any absolute proprietor against any unauthorized holder of the writs. Yet, at the date of the demand, the borrower was not bound to redeem for about two years, and there was only one-half year's interest due. The magistrates decerned as libelled; and the defenders, instead of restricting their claim, defend this judgment. The Lord Ordinary is of opinion, that the claim was neither warranted by the general assignation of writs and evidents, nor by the circumstances of the case.

"If the principal action had been well founded, the subsidiary petition for interdict might not have been improper. But as it was presented expressly in support of a claim that was groundless, it must follow the fate of the principal case. Besides, the judgment is ultra petita. The prayer is for an interdict 'during the dependence of the said process of exhibition and delivery.' It was granted at once, and thus the papers were made safe during the dependence, yet, in finally deciding the cause, the magistrates continue the interdict; and the effect of the two parts of the judgment combined was, that while, on the one hand, the present pursuer was ordered to deliver the writings to the defenders, to be disposed of as ~~either~~ ^{the} other hand, he was permanently interdicted from parting with

No. 6. proposal made by John Blair, extrajudicially, was very reasonable ; but, when that was refused, he acted incorrectly in making such an unwarrantable demand in the action before the magistrates. The hypothec which a law-agent has over title-deeds, in security of his account, might certainly have cut out the heritable creditor ; and, to guard against this, I have known a separate clause inserted in bonds, providing, that the deeds shall be put into the hands of a third party ; but, for this purpose, there must be a special clause, and here there was no such clause. In practice, the writs are never delivered over to the heritable creditor ; his right is a mere burden on the estate. If the claim had been for exhibition alone, or even to have the deeds deposited in the hands of a third party, we might have supported it. But an unlimited demand is made for their delivery, and the magistrates decern in terms of the libel, and a charge is given just as broad as the decree.

LORD GLENLEE.—As the case stands, I think the interlocutor unexceptionable. No doubt the parties had each an interest in the title-deeds ; but the interest of the proprietor is not to be sacrificed to the interest of the creditor. It is quite plain, from the letter of Blair's agent, that his intention was merely to secure the titles, so that they might be accessible—a measure which was not unadvisable, when the debtor's wife had been borrowing money on them. The same tender which was made in the letter should have been made in the process before the magistrates ; but as frequently happens, more was put into the summons than was originally proposed, and an additional conclusion was inserted for delivery of the titles, for the purpose of being “ disposed of ” by Blair. If Blair had merely taken his decree, and not given a charge, we might only have reduced, in so far as the summons concludes for delivery, but not only does he retain the decree, but charges in its very terms. I agree, therefore, with the interlocutor generally, but should wish to insert in it a reservation of the defender's right to insist for exhibition.

The **LORD JUSTICE-CLERK** and **LORD MEADOWBANK** having concurred,

THE COURT adhered to the Lord Ordinary's interlocutor, but without prejudice to the legal rights of the defenders to call for exhibition of the titles, according to law.

A. NAIRNE—MACLEAN and GIFFEN, W.S.—Agents.

No. 7. **MISS CATHARINE SCOTT and OTHERS (Scott's Trustees), Advocators.**—*Keay—Miller.*

ORPHAN HOSPITAL, Respondents.—*D. F. Hope—Penney.*

Burgh—Property.—1. Held, that magistrates of a burgh have no power to sell right to a private party to erect an arch over part of a public street or lane within the extended royalty ; at least where it cannot be absolutely demonstrated that the operation is *innocuum utilitatis*. 2. Terms of an act of parliament which held not to authorize the magistrates to grant such right in the circumstances of the case.

*Devison
referred*

In 1771, the late William Scott acquired a piece of ground, which had been feued by his ancestor from the Magistrates of Edinburgh, and which

No. 7. a communication with the Bridge-street, by throwing an arch from their building over the intervening public lane or street above mentioned, and joining the Bridge street, they could form an advantageous contract with a party who was ready to construct an edifice there, which would be ornamental to that quarter of the town. They accordingly procured a plan of the proposed building, which exhibited, as part of it, an arch, supporting a road fifty feet broad, and extending from the Bridge street to the centre of the front of the proposed building. This arch occupied only a comparatively small part of the front of the building, which extended on either side beyond it, along the hospital grounds, parallel to the Bridge street, and fronting it. The Hospital entered into a treaty with the Magistrates of Edinburgh for leave to throw the arch from their ground, over the lane or street above mentioned, and joining the Bridge street. The magistrates gave permission to make such an arch, for a price of £750, which was paid to them, but under the condition of repetition, in case the right so granted should be found to be beyond their power.

The Hospital then presented a petition to the Dean of Guild of Edinburgh, along with the plan of the building and the arch, and craved authority to erect them. The petition did not at all refer to the act of Parliament already quoted, but it was founded on in the pleadings. Appearance was made by Miss Catharine Scott and others, trustees of William Scott, now deceased, who opposed the petition. They stated that their property in Shakspeare Square would be greatly injured by the proposed erection; and that several of their tenants had given notice of their intention to remove, if it should be carried on. And they contended, that since their ground was originally feued, as bounded by the road between it and the bridge; and since that road was within the extended royalty, and an important thoroughfare, connecting with the public markets, they were entitled to object to any encroachment on it, whether by narrowing it, or by building over it. The street lay on a steep slope; the west side of it towards the bridge was bounded by a high dead wall. By the proposed building another high wall would be erected on the east side, along the front of the Hospital ground, parallel to the wall of the Bridge: the northern, or upper extremity, contained the flight of stairs already mentioned: and thus, the only access for light and air would be immediately from above, and if an arch was thrown across, above this lane or street, for an extent of fifty feet, it would have the most prejudicial effect on it, both by darkening it, and exposing it to the want of air. Both as inhabitants of the town, and as proprietors in the vicinity of this proposed erection, the respondents were entitled to object to it.¹ The act of Parliament did not empower the magistrates to consent to the proposed erection, unless, 1st, The consent of the whole proprietors on the

¹ Magistrates of Montrose, Feb. 27, 1762 (18175); Reg. Maj. l. 2, c. 74, § 1; Cockburn, Nov. 14, 1497 (18157); Miller and Dalrymple, Nov. 3, 1740 (18527); Forbes, &c. March 3, 1783 (18185); Young, Feb. 2, 1816 (F. C.)

No. 7. The Hospital reclaimed.

18, 1835. The LORD PRESIDENT declined judging, as he was a member of the Incorporation of the Hospital, and had been governor of it at the time when this question arose.

LORD GILLIES.—I think the interlocutor of the Lord Ordinary is well founded.

magistrates, on which the west abutments or piers of the arch are to stand, belongs to the town, a point not yet settled. Next, it is said, and this is the principal point on which the issue turns, that the arch will be of no detriment in any respect to the access, and is therefore justifiable, as *res innocuæ utilitatis*. The Lord Ordinary cannot so regard it. To him it appears physically impossible, that a great portion of light should not be intercepted by an arch 50 feet in breadth over this lane, the lateral walls being also 50 feet in height on both sides of the lane, extending on the one side about 90 feet, and on the other nearly double that distance, which will convert the passage, for a certain space, into a tunnel. Farther, at the north end, the buttresses raised many years ago to support the bridge, the connecting arches, and the stairs below them, have a great effect in excluding the light from that end.

“The Dean of Guild has been informed by the trades’ members of his council, that the loss of light, in consequence of the arch, will be imperceptible, but the ground on which they rest that opinion is not satisfactory. There is no resemblance between one of the arches of the North Bridge, the passage under which is fully illuminated on both sides, and this long and narrow lane, where the light is excluded by lateral walls and by obstructions at one end. A passage in the heart of the city so obscured, must be inconvenient to those who, like the advocates’ constituents, have frequent occasion to use it, and as they are entitled to enjoy their right *tanquam optimum maximum*, an encroachment of this nature may be legally resisted. The cases of the Magistrates of Montrose and Ferrier, to which the advocates refer, are, in the Lord Ordinary’s opinion, decisive precedents on the subject.

“With regard to the act of Parliament, the petition is not laid upon it, nor is it founded upon in the interlocutor of the Dean of Guild. Assuming, however, that the respondents are entitled to avail themselves of its provisions, it does not appear, on a sound construction, to afford any argument in their favour. The powers granted to the magistrates of Edinburgh to suppress the lane in question, are coupled with the condition, that they shall previously obtain the consent of the proprietors on the east of the north end of the Bridge, and of the proprietors of Shakspeare’s Square. But they have not obtained the consent of the advocates, and they cannot contract exclusively with the respondents. The attempt which is made to construe the copulative ‘and’ as a disjunctive, would defeat the declared object of the act. If, instead of taking down the east parapet on the north end of the bridge, so as to widen the access on the east side, as it has been widened on the west side, there was only to be a perforation made in it 50 feet wide, to be used, as the petition sets forth, ‘both as a road and a footpath,’ at right angles to the roadway of the bridge, a great inconvenience would be created, prejudicial to the public at large, and more particularly, to the inhabitants of Shakspeare Square. The foot-pavement on the east side would be disunited to that extent, and an obstruction created by carriages passing to the east, by a road, not a thoroughfare, but conducting exclusively to the new building proposed to be erected. Not only the foot pavement, but the carriage way of the North Bridge, would suffer from this operation, and it receives no sanction from the statute, which plainly contemplated that the buildings were to be brought forward on the east side, in the same manner as they have been on the west side, the consent of all the proprietors in the line being first obtained.”

It appears to me, that the proposed operation would be injurious to the lane or street over which the arch is meant to be projected. It is said that the Dean of Guild, proceeding upon the report of tradesmen, held that it would not, in any perceptible degree, affect the light or air of the street. But in opposition to this, we have the opinion of the Lord Ordinary, formed after actual inspection of the ground, and we have our own knowledge of the locality; and I certainly do not hold myself bound to surrender an opinion which is rested on the evidence of my senses to any opinion derive from the report of tradesmen. I consider that the advocates are entitled to object to the proposed operation, and that it cannot be done without their consent.

LORD MACKENZIE.—I am of the same opinion. The proceedings were not held under the special act of Parliament at all; and, therefore, I think the act cannot be referred to as sanctioning them. But even if it could be so, it does not authorize an operation, in the circumstances in which the hospital stands. There seems to me to be no power of altering that street or lane except on two conditions:—1st, That of giving a better access from Shakspeare Square to the grounds below the North Bridge; and, 2d, That of widening the roadway of the bridge. I think the act contemplated the possibility of the present lane being shut up; and, as it permitted, on certain conditions, buildings to be brought within twelve feet of the bridge, it is plain that such an operation would necessarily have cut off the greater part of the present street, which is thirty feet wide. But this could only be done on the condition that a better road should be made. And, in regard to the other condition, the widening of the roadway of the bridge, I think the advocates are entitled to plead it to the effect of showing that the Hospital are not acting according to the statute to which they refer, and are, therefore, not entitled to the benefit of it.

As to the question, when viewed at common law, it appears to me that this street is just in the same situation with any other public street in the city. I know this lane or street very well, and I consider it an important public way. And can it be maintained that the Magistrates have power to sanction a party in casting an arch over a public street, though opposed by inhabitants holding property in the neighbourhood—especially where this is to be done, not for any object of public benefit to the citizens, but merely to place a sum of money in the treasury of the city? It is said that the operation is *innocue utilitatis*. If indeed it could be made absolutely clear and certain, to actual demonstration, that no possible injury could result from this operation, and that the opposition to it was merely whimsical or nimious, the operation might perhaps be sanctioned by the Court, and the opposition overruled. But I am not warranted to view this operation in that light. I think the operation would very sensibly affect the light and air of the street, and I do not conceive that any report by tradesmen could induce me to regard it as a work of perfectly harmless utility. I concur with the Lord Ordinary.

LORD BALGHEY.—I am of the same opinion. I think the Magistrates had no power to grant the authority founded on by the Hospital, and I concur with the Lord Ordinary.

—The Court adhered, and awarded additional expenses.

YOUNG, W.S.—J. and W. JOXLEY, W.S.—Agents.

No. 8.

18, 1835.
 eron v.
 mail.

CAMERON and MANDATORY.—*Sol.-Gen. Cunninghame.*CHAPMAN and MANDATORY.—*Christison.*

Expenses—Auditor.—Where a party was found entitled to expenses, and he claimed L.72, and a sum of L.28 was taxed off, the Court subjected him in one-half of the Auditor's fee.

18, 1835.
 DIVISION.

UNDER a remit to the Auditor, the pursuer presented an account, amounting to £72, 10s., 11d., as his expenses in discussing a preliminary defence, which had been repelled. The Auditor taxed off £28, 18s, and this reduction did not arise from his sustaining an objection to any one class of charges, &c., but from a general reduction of over charges which pervaded the account. The defender now moved the Court, in respect of the account having been so much overcharged, and the Auditor's fee for taxing being rated according to the amount of the account claimed, to find that this fee should not be laid wholly on him, but, to the extent of one-half, on the pursuer; and he referred to the case of Hogg.¹ The Court directed one-half of the fee to be laid on the pursuer, and Lord Mackenzie observed that he thought the pursuer was very mildly dealt with.

The Court at the same time sustained an objection to the Auditor's report, in regard to the expense of a reprint of the summons which had been charged, although no reprint had been made. But it was understood that the imposition of one-half of the fee of taxation on the pursuer, was made independently of this circumstance, and expressly in conformity with the principles recognised by the Court, in the case of Hogg.

D. MANSON, S.S.C.—W. RENVY, W.S.—Agents.

No. 9.

W. F. HOME, Raiser.—*D. F. Hope—Wood.*GRIEVE'S CREDITORS, Defenders.—*Keay—Robertson.*

Process—Multiplepoinding—Trust.—A party conveyed his estate in trust for behoof of his creditors; the estate was realized, and the proceeds, with the exception of a small balance, divided among the creditors, none of whom made any objection; one of the trustees, founding on alleged irregularities in the management of the trust-estate, thereafter raised a process of multiplepoinding and exoneration—held that, as there was no double distress or conflicting claims, the process was incompetent and unnecessary.

18, 1835.
 DIVISION.
 Jeffrey.
 F.

IN June 1830, Mr Burnett Grieve of Fishwick-Mains, conveyed his whole property in trust for behoof of his creditors to certain trustees, of

¹ Feb. 11, 1835 (ante, XIII, 451).

No. 9. Home, the only real or compearing pursuer of the action, that the whole trust-estate has been realized by the acting trustees, and the whole proceeds thereof (except a very trifling sum reserved to meet expenses) divided among the creditors, without challenge or complaint from any one of them, as to the preferences or rankings assigned them in such division: finds that there is no double distress, or conflicting claims, either actual or impending, to warrant a process of multiplepoinding; and therefore, and because it would be improper to throw the trust affairs, which are now on the eve of being finally wound up, into judicial management, and to expose the numerous acceding creditors who have already received nearly the whole of their dividends, to the expense of lodging claims in this Court, for the small balance that remains, dismisses this process, as incompetent and unnecessary, and decerns."

—
 v. 18, 1835.
 Home v.
 Home's Cre-
 ditors.

Home reclaimed, and prayed the Court, in respect of the averments in the summons, to remit to the Lord Ordinary to determine whether the proceedings under the trust, and especially in relation to the division of the funds, were in conformity with the provisions of the trust-deed, so as to amount to once and single payment entitling the trustees to exoneration, and, in the event of the contrary appearing, to cause such proceedings to be rectified to the effect that any parties injured should be reponed thereagainst, and thereafter to exoner the trustees, or otherwise, if the creditors were to be held as having sufficiently sanctioned the proceedings, then to sustain the process of exoneration at the instance of the raiser.

THE COURT, on the ground that there was no double distress or conflicting claims, adhered to the Lord Ordinary's interlocutor.

HUGH MACQUEEN, W.S.—WILLIAM POLLOCK, S.S.C.—Agents.

is humbly thought, will be in the winding up of the trust, and the taking of a final discharge from all the claimants on the estate, to which there seems to be no impediment, but in his own present proceedings. When every thing has been actually divided, except a reservation of 6d. in the pound on the personal debts, it would seem to require something more than a disclaiming trustee's impatience for exoneration, to justify the institution of an action like this, calling on sixty or seventy personal creditors, 'to exhibit and produce before our Lords of Council and Session, their respective titles, whereby they lay claim to any part of the said trust-estate, to the end that they may be ranked and preferred thereon, according to their respective rights and interests,' " &c.

No. 10. considers himself entitled to rank for the whole foresaid sum of £500 sterling, as before stated.”

19, 1835.

Barbour v.
Williamson.

In the scheme of division, a dividend was set apart for Wilson, corresponding to the full amount of his claim. During the month allowed by the statute for making objections to the scheme, no creditor stated any objection.

In August, 1829, the pursuer, Barbour, who had ranked as a creditor of M'Turk in the sequestration, and who was also a creditor of Gracie's, used arrestment in the hands of Mr Williamson, the trustee on M'Turk's estate, “fencing and arresting all debts and sums of money owing or pertaining to Gracie, or to any person for his use and behoof, in any manner of way.”

Some months after the ranking on the estate had been brought to a close, Barbour followed up his arrestment by an action of forthcoming before the Sheriff of Dumfries-shire against the trustee, as arrestee, and Gracie, as common debtor. He founded on the marking, *ex facie* of the bill, and on the affidavit which had been lodged by Wilson, to show that Gracie was truly in right of that proportion of the dividend which was set aside for Wilson, effecting to the sum of £465, which he had paid towards retiring the bill; and maintained, that the trustee was debtor to Gracie to that extent.

The defence was, that Gracie, the principal debtor, never ranked on the estate, and, as no dividend was set apart for him, there was no fund in the trustee's hands which could be attached by the arrestment.

The Sheriff having sustained the defence, Barbour brought an advocacy, and, at the same time, raised action against the trustee and Wilson, to reduce the interlocutor of the Sheriff and the scheme of division, “in so far as regards the ranking of Wilson, in his own right, for any part of the sums paid by Gracie to account of the bills.” He likewise concluded to have it found and declared, that Wilson's ranking for the £500 bill was truly for the use and behoof of Gracie, to the extent, at least, of his payments to account; and, therefore, that the dividends effecting thereto were validly attached by the pursuer's arrestment.

From the defenders being different in the advocacy and the reduction, the processes, although substantially the same on the merits, were not conjoined.

In reference to the action of reduction, Barbour contended, that he was not attempting to disturb the scheme of ranking and division as amongst the creditors, but merely showing who were the parties really and truly ranked and entitled to draw the amount of the dividends. And, in the advocacy, he pleaded, that Wilson must be held to have ranked for behoof of Gracie to the extent above mentioned; and if so, that the

arrestment had been properly used, and that the action of forthcoming should be sustained.

The defenders answered, that, in so far as the action of reduction was directed against the interlocutors pronounced in the process of forthcoming, which is still in dependence, it was unusual and incompetent; that the action was irrelevantly laid, as the reductive and declaratory conclusions were inconsistent with each other; that, as the statutory period of 30 days, within which the scheme of division might have been objected to, was long expired, the scheme was now beyond challenge, more especially as Barbour himself had approved of and acquiesced in it, and was therefore barred, *personali exceptione*; that no claim of debt had been lodged by Gracie, and the trustee, consequently, could have no funds of Gracie's debtor in his hands; and that Wilson claimed and was ranked in his own right, and not as a mandatory, or for behoof of Gracie.

In the advocacy, the Lord Ordinary repelled the reasons of advocacy, adding to his interlocutor the note subjoined.*

In the reduction, his Lordship issued the following interlocutor and note:—"Finds that the scheme of division, not having been duly complained of to the Court, cannot be set aside now by this process of reduction; therefore, sustains the defence indicated in the first plea for the defenders; dismisses the action, and assoilzies the defenders."†

Barbour reclaimed.

LORD JUSTICE-CLERK.—In a proper action of repetition between the pursuer and Wilson, much of the argument of the former would be well founded. With respect to the two processes before the Court, I think the Lord Ordinary right in the advocacy, on the ground which the Sheriff has taken. For who is the arrestee? It is the trustee in the sequestration, who has had no claim for Gracie before him. As to the reduction, it is inconsistent with the provision in the Sequestration Act in regard to the statement of objections to the scheme of division. To sustain this action would be to overturn established rules of procedure in bankruptcy.

The other Judges concurring,

THE COURT adhered.

W. DALRYMPLE, S.S.C.—BRODIE and KENNEDY, W.S.—Agents.

* "The Sheriff's judgment proceeds on the principle, that the scheme of division under which Gracie, the alleged common debtor, was not ranked, must receive effect till it be competently set aside. This principle the Lord Ordinary thinks sound, and it has been correctly applied in the judgment."

† "This is an attempt to break up a scheme of division, and other proceedings in a sequestration, by an ordinary action of reduction, at the distance of years; and this by a creditor who drew dividends under that very scheme, and who, though he was not at the time an arrester, yet, even as such, stands in the place of an arrester. If the scheme be unchallengeable, the interlocutors of the Sheriff are unchallengeable also."

No. 11.

DAVID MARSHALL, Pursuer.—*D. F. Hope—Paterson.*

v. 20, 1835.

JOHN MATHER and JOHN TELFER, Defenders.—*Keay—Marshall.*Marshall v.
Mather.

Superior and Vassal—Non Entry.—Circumstances in which, held, of consent, where a vassal had lain out unentered, under some misapprehension as to the nature of his rights, that the non-entry duties, subsequent to citation in a declarator of non-entry, should not be computed for a longer period than one year.

v. 20, 1835.

Division.

Corehouse.

D.

DAVID MARSHALL of Neelsland was superior of some lands, in which four heirs-portioners were infeft, pro indiviso. The portioners were also infeft in other lands. Under a brief of division they had obtained a decree, allotting a fourth part to each heir-portioner, and it happened that the youngest heir-portioner, who was a sister consanguinean of the others, had the lands wholly allotted to her which did not hold of Marshall, while the lands holding of Marshall were wholly allotted among the other three. The heirs-portioners did not follow up the decree of division by executing conveyances of their respective portions in favour of each of them severally, and taking infeftments thereon. Their respective rights, under the decree, remained personal, and they all died infeft, pro indiviso, in the whole lands. John Mather, the son of the oldest sister was heir-at-law of her, and of her two sisters-german. John Telfer was the son and heir of the youngest sister consanguinean. Marshall called on Mather to enter to the lands, and a protracted discussion ensued, which originated apparently in Mather's apprehending that he was entitled, in consequence of the decree of division, to be entered as heir to the three sisters-german, to the whole lands holding of Marshall; while Marshall, on the other hand, intimated, that he could only be entered as heir to three-fourths of the lands in that character, and called on him to instruct a right to the remaining fourth. After a good deal of correspondence, involving some misapprehension on both sides, arising out of circumstances not requiring to be stated, Marshall raised a declarator of non-entry. He directed this against Mather alone, as he was not aware of the existence of Telfer, and, in truth, had merely refused to enter Mather to the remaining fourth part of the lands, from a belief that the youngest heir-portioner had sold her right in the lands, and that Mather, even if her heir, could not demand an entry. Mather lodged defences, stating, inter alia, the existence of Telfer, and his right to one-fourth of the lands. Marshall then raised a supplementary declarator against Mather and Telfer, which was conjoined with the first action. No appearance was made for Telfer. A record was made up, and the Lord Ordinary found, "That the lands mentioned in the summons, in which Janet, Mary, Catherine, and Ann Strang, died last vest and seized, are in non-entry, and will continue in the same situation until the defenders, John Mather and John Telfer, or their disponees, shall take an entry from the

pursuer for their respective interests: Found that non-entry duties are due to the pursuer since the death of the last vassal, and decerned; but superseded extract for six weeks, that the defenders may enter, if so advised: and found the pursuer entitled to expenses."

Mather reclaimed; and Marshall offered to consent that the non-entry duties since the date of citation, being the rent of the subjects, should not be claimed for more than one year. It was said that they truly extended to two years. Mather assented to this proposal, and the Court found accordingly.

LOCHAN, HUNTER, and WHITEHEAD, W.S.—JARDINE, STODDART and FRASER, W.S.—
Agents.

DAVID CLYNE, Pursuer.—*R. Robertson.*
SIR WILLIAM BAILLIE, Bart., and OTHERS, (Clyne's Trustees), De-
fenders.—*Sol. Gen. Cunninghame.*

Process—Preliminary Defences.—In an action of reduction on the head of deathbed, preliminary defences having been lodged, which admitted that the deed in question was executed on deathbed, and which, to all appearance, were the only defences pleadable in causa, on which it might be necessary to make up a record, the Court adhered to the Lord Ordinary's interlocutor, ordering the defenders to lodge a concordance of the grounds of their preliminary defences.

On the 1st November, 1833, the late Mr Clyne, S.S.C., executed a trust-disposition of his whole heritable and moveable property, for certain purposes therein-mentioned, and died the same day. The heritable property consisted of a house in Albany street, of the value of about £1200. By this deed, an annuity of £10 was provided to David Clyne, the pursuer, consin-german of the deceased; and he having been served heir of conquest, brought the present action against Mr Clyne's trustees, to reduce the disposition on the head of deathbed. The trustees lodged preliminary defences, in which, admitting that the deed in question had been executed on deathbed, they stated, that in 1815, the late Mr Clyne and his parents had executed settlements, by which, taken in connexion with the present deed, his heritable property was validly and effectually conveyed to the defenders; that, by these settlements, a succession of little more than £100 would have accrued on the death of the late Mr Clyne's father, in 1828, to the pursuer's family, which consisted of seven or eight individuals; that the former settlements were only superseded in so far as they interfered with the present deed, on the setting aside of which they would revive, quoad the pursuer, so that he had no interest to pursue, while they had a title to exclude, in consequence of the deed under which they had been executed agreeably to reserved powers, in the

No. 12. The Lord Ordinary appointed the defenders to lodge a condescendence of the grounds of their preliminary defences.

21, 1835.

ald. v.

tin.

The defenders relaimed against this order, and maintained, that, in the 5th section of the Judicature Act, there was no authority for the Lord Ordinary's interlocutor appointing condescendences to be lodged; that the case might have been decided on interpretation of the deeds of settlement; but, if proof were considered requisite, consideration of the preliminary defences should have been reserved till the peremptory defences were pleaded.

The pursuer answered, that the defences were founded on facts which he denied, and that the course followed by the Lord Ordinary was consistent with the statutory provision.

LORD MEDWYN.—Although there is not now great avizandum in reductions, and a remit to discuss the reasons of reduction, we are anxious always to keep the discussion on the dilatory defences, in these cases, distinct from the discussion on the merits. The course we have followed (in the Outer-House) is, first to require the production to be satisfied, and then to put the case in shape for a decision, by appointing defences on the merits, on which a record is made up. If there be an objection to satisfy the production, this, in an ordinary case, would not require a record to be made up; but the present case is so far peculiar, that, as there is no dispute as to the fact of deathbed, the whole merits may be said to be in the preliminary defences, and therefore, without affecting the general rule on the subject, I should think it proper to make up a record at this stage of the proceedings, in order to enable the pursuer to meet the distinct statement in the defences as to the deeds pleaded on as a title to exclude.

The other Judges having concurred,

THE COURT adhered.

L. M. MACARA, W.S.—D. MANSON, S.S.C.—Agent.

No. 13.

SIR JOHN OSWALD, Suspender.—*Rutherford—Dundas.*

REV. JOHN MARTIN, Charger.—*D. F. Hope—Pyper.*

Teinds—Process.—Circumstances in which the Court, on caution, passed a bill of suspension of a charge by a minister, on an interim decree of locality: the minister being insolvent, and the teinds of the other heritors being exhausted, so that there could be no ultimate relief against them; and the suspender producing a decree of valuation, under which, unless set aside in a pending reduction, the charge given would be an encroachment on the stock.

v. 21, 1835.

r Division.

l-Chamber.

Belgray
Medwyn.

In 1825, the Rev. John Martin, D.D., Minister of Kirkaldy, raised a process of augmentation, &c., and he obtained a decree of augmentation in 1826, by which above six chalders were added to his stipend. The process of locality was allowed to fall asleep, but was awakened, and re-

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—
r Division.
ll-Chamber.
a Balgray
Medwyn.

peated orders were made against the heritors to produce their interests. The heritors failed to do this, and an interim decree of locality was pronounced, by an interlocutor which became final. This decree was not pronounced till 1831; and, in the meantime, Dr Martin had become insolvent, in consequence of the failure of the Fife Bank, in which he was a partner. Sir John Oswald of Dunnikier, an heritor in the parish, afterwards lodged objections to the interim scheme, which were founded on a decree of proving the tenor, and of approbation of a sub-valuation in 1629, which decree had been pronounced in 1803. Answers were lodged for the minister, and for the Officers of State, to these objections, and the minister raised a reduction of the decree, which, of consent, was held as repeated in the process of locality. Whilst a record was in preparation, the minister gave a charge for £664, 15s. 5d., being the arrears of augmented stipend, since 1815, calculated upon the assumption that the decree of valuation should be ultimately set aside. The teinds of the other heritors were exhausted. Sir John Oswald presented a bill of suspension, and pleaded, 1st, It must be assumed, *hoc statu*, that the decree of valuation was good. But, if so, the charge amounted to an encroachment on his stock, which was wholly *ultra vires* of the Court. 2d, Even though the minister had obtained an interim decree of locality, such decree was permitted only for the convenience of the minister, and on the footing, that if any heritor suffered prejudice thereby, it could be but temporary, and he should have relief in a final adjustment with the other heritors; but here the teinds of the other heritors were exhausted, and the suspender, if he overpaid now, could have no relief afterwards from underpaying heritors, for there were none such. And, 3d, As the charger was insolvent, and any over payment now made must be irrecoverably lost, the suspender ought not, in equity, to be compelled to pay to him, after making out an *ex facie* case that the charge was ill-founded, at least without the charger finding caution to repeat; or the suspender was willing to find caution or make consignation as a condition, of having the bill passed.¹

The charger answered 1st, The decree of valuation was under reduction, and if it was to have been available against the interim decree of locality, it should have been produced before that decree was pronounced. 2d, By Act of Sederunt 1809, the interim scheme of locality was to have all the force of a final scheme, until such final scheme was decerned for. It was therefore imperative on every heritor to make payment in terms of it, so long as it was the subsisting rule of payment, and not regularly set aside. And, 3d, The object of the Act of Sederunt would be defeated, if a minister was compelled to find caution before levying his stipend; or if a charge for augmented stipend could be suspended even on consignation, which was

¹ M'Cartney, March 4, 1817 (*F.C.*) Taylor, Jan. 19, 1822.

No. 13. the necessary condition of passing any such bill ; a condition which showed how very unfavourably the law regarded any attempt to suspend a charge like the present.¹

Nov. 21, 1835.
Oswald v.
Martip.

LORD BALGRAY refused the bill, in doing which his Lordship was influenced by a previous interlocutor which had been pronounced by the Court, recalling an interlocutor of Lord Cockburn at an earlier stage of the proceedings, between the same parties. A second bill was presented, which came before Lord Medwyn, who “made avizandum”^{*} therewith to the Inner House.

LORD GILLIES.—Does Sir John Oswald offer to surrender his teinds?

Rutherford.—He is ready to make a surrender in terms of the valuation.

¹ Connel on Tithes, (2d ed.) 452, 454.

^{*} NOTE.—“If the Lord Ordinary had been obliged to dispose of this bill, he should have felt himself bound by the opinion of the Court, as implied in their interlocutor of 15th May last, and the presumption that Lord Balgray has put the right interpretation upon it, that whatever might be the effect of the objections of Sir J. Oswald, and his offered surrender as to a final locality, the interim locality must, in the meantime, be acted upon ; and, of course, would have refused the application. At the same time, the Lord Ordinary has thought it proper to avail himself of the provision of the Act of Sederunt, 11th July 1828, § 21, to admit of the opinion of the First Division to be taken, since that can be done with little delay, as it may not have been explained to them (as it does not appear to have been stated in the first bill), that the teinds of the other heritors are exhausted, so that, under the decree of the Court, 1806, which, though brought under review, stands still unreduced, and has, in fact, been sustained by Lord Cockburn, the payment would be an encroachment on the stock, and there could be no relief from the other heritors. There might, perhaps, be a right of retention against the respondent from future years’ stipend ; but then this would depend upon his continuing incumbent, with a right to draw these stipends. This may not be so strong a case as that of Kilpatrick 1817, in which one principal ground of decision was, that a final locality was adjusted, though not extracted before the charge on the interim decree was given. But that case also sanctioned the ground, that no interim decree can legally be pronounced which encroaches on the stock. In the present case, it is true, there seems to have been a good deal of delay on the part of the heritors, as to production of their rights, which led to the interim locality, and for which, therefore, the suspender may be held answerable ; but, on the other hand, there was no great anxiety on the part of the minister to benefit by his augmentation, which, the complainer says, arose from his knowledge that the teinds were already exhausted, or within a trifle of being so, which may have thrown the suspender off his guard. For, although the augmentation was in 1826, the interim decree is only pronounced in July 1831, the process having, in the meantime, fallen asleep. It is objected to in May 1832, no attempt having been made as yet to extract it, and the objections are sustained by Lord Cockburn’s interlocutor, 10th December, 1834. The charge is not given till 17th June last. Under these circumstances, except for the act of the Court, and their opinion, indicated in recalling Lord Cockburn’s interlocutor, the Lord Ordinary would have thought the present case in all respects parallel to that of Kilpatrick, to the effect of suspending the interim decree, so far as it exceeded the teinds surrendered, till the issue of the reduction which has been raised of the decree of *approbation* 1806. But it is proper that the Court should dispose of the question.”

LORD MACKENZIE.—But I doubt whether he can make a proper surrender unless it be absolute. Suppose he makes a surrender just now, and the decree of valuation is afterwards reduced, would not his whole teinds be surrendered still, though their amount in value would be extremely increased in consequence of such reduction?

LORD GILLIES.—I am not prepared at present to hold that a surrender, under a decree of valuation, would effectually deprive the heritor of all right to his teinds, even in the event of the valuation being afterwards reduced. His surrender referred to the valuation; and if the teinds, when freed from the decree of valuation, should exceed the stipend of the minister, who is to take it?

LORD BALGRAY was understood to consider that the words of the Act of Sederunt 1809 were so peremptory that the charger must be entitled to enforce payment in terms of the interim decree, until a final scheme was made up. And if the suspender suffered any prejudice, he had himself to blame for not sooner having produced the decree of valuation.

LORD PRESIDENT.—I cannot think that the Act of Sederunt was intended for a case so unusual in its circumstances as the present. The minister is confessedly insolvent. The teinds of the other heritors are exhausted; and, though the suspender has been remiss, I think he cannot be visited with so severe a penalty as to be compelled instantly to obey this charge. The Act of Sederunt allowed an interim scheme, chiefly for the convenience of the minister, and it permits individual heritors to be charged for payment, because, even if such decree be erroneous, and the heritor is made to overpay, he will have his relief ultimately from his co-heritors when a final scheme is fixed. But if the suspender be made to overpay here, he can have no relief from other heritors, their teinds being exhausted; and the charger is insolvent. I think the bill should be passed on consignation, as the decree of 1806 must be presumed good in the meantime.

LORD MACKENZIE.—I consider that an interim decree, so long as no final decree is pronounced, is just as good to the minister as a final one, and comes in the place of a final one to him. But then it is no better than a final decree would be. Now, suppose that a final scheme of locality had subjected an heritor in a certain sum, and he afterwards discovered a decree of valuation, and produced it, and offered to surrender his teinds, that would be a complete protection to him, if the valuation was admitted to be valid and regular. But there is a difficulty here, in consequence of the valuation being under reduction, and I don't think a surrender can be accepted if only made under the condition of the decree of valuation being good. Notwithstanding this difficulty, however, I conceive there is enough in the equity of the case to warrant the Court to pass the bill on consignation. I think that, pending the reduction, and while the decree of valuation stands unreduced, the Court cannot compel the suspender to make payment to a bankrupt, of a sum which cannot be due, unless that decree shall eventually be reduced. I think the Court cannot compel him to make a payment against which, if wrongfully made, he could not afterwards have relief any where. I would pass the bill in the mean time. No irreparable injury is done in this way, the money being consigned; and if the bill was refused, any injury which might be done would probably be irreparable.

LORD GILLIES.—I am of the same opinion. The decree of valuation must be presumed good until reduced, and if it be good, this charge could not be enforced

No. 13. without encroaching on the stock, which it is ultra vires of this Court to authorize in any circumstances.

Nov. 21, 1835.
Merry v. Dun.

The Court having intimated that the bill should be passed, the charger consented to this being done, on caution in place of consignation, as the Court suggested that consignation would occasion unnecessary expense, and should not be insisted in by the charger.*

DUNDAS and WILSON, W. S.—RICHARDSON and LANDALE, W. S.—Agents.

No. 14.

JAMES MERRY, Pursuer.—*D. F. Hope—Moir.*
MARY DUN, or MASON, Defender.—*Whigham.—Penney.*

Proving of the Tenor.—Circumstances in which the Court decerned in a proving of the tenor of a disposition, which was signed by notaries, though none of the names of the notaries or witnesses were specified.

Nov. 21, 1835.

1st DIVISION.
S.

THE late James Crawford, who died in 1777, left a disposition and settlement, conveying his property to his grandchild, Mary Dun, under the burden of her being obliged to dispoise one-half thereof to his widow, Marion Brown, who afterwards married the late James Merry, senior. Part of Crawford's property consisted in a small heritable subject, in the burgh of Glasgow, and Mary Dun, while a pupil, was served heir to Crawford, and infeft therein. From 1790 downwards, Merry, senior, and his son, James Merry, junior, held possession of the above heritable subject, as proprietors. In 1828, Mary Dun or Mason, whose husband was now dead, raised a reduction of their right. They produced a series of titles, conveying the subject to Crawford, and the settlement of Crawford in favour of Mary Dun and Marion Brown. They also produced a mutual contract, dated 20th March, 1787, and bearing to be between Mary Dun and her husband, on the one part, and Marion Brown and her husband, on the other, whereby Mary Dun, with consent of her husband, dispoised one-half, pro indiviso, of the subject, to Marion Brown. They also produced articles of roup, for selling the said subject, dated 19th May, 1790, and signed by James Mason and Merry, senior, as being authorized to that effect by their respective wives, and binding Mary Dun, who was feudally infeft, to grant a disposition to the purchaser. The articles of roup contained a regular testing clause. On the back of the articles of roup, minutes of roup and sale were written, bearing that the subjects had been exposed to sale; stating the several offers made at the sale, including offers by Mason; and finally preferring Merry, senior, as the highest offerer. There were farther produced entries from the books of

* The judgment of the Court was fully delivered to the above effect, but it was understood not to be written out or signed, in order that the convenience of the parties might be consulted, with a view to their making some arrangement.

T. and R. Grahame, writers, Glasgow, charging Crawford's successors with an account in 1789, for preparing the articles of roup, and for advertising the sale; and in 1790, for attendance at the sale, writing out minutes of roup and sale, and "drawing disposition by Mary Dun, &c., to James Merry"—"Stamped paper"—"Clerk for extending"—"Agency in the sale of this tenement, much trouble in getting the disposition executed, &c." These entries were all under date the 12th November, 1790. The entries also bore to be an adjustment of accounts between Mason and Merry, and the following docquet was appended:—"31st May, 1791. Settled the above account, on the above terms.—JAMES MASON. JAMES MERRY."

There was also produced an extract of a sasine in favour of Merry, dated 8th June, 1791, and recorded on the same day, in the burgh records of Glasgow. It bore to proceed upon a disposition by Mary Dun, with consent of her husband, dated 31st May, 1791.

Merry, junior, did not produce the principal disposition and sasine in favour of Merry, senior, but stated that it had been lost; but that their tenor was evident from the writs and evidence referred to, and from the peaceable possession enjoyed since 1790. In reference to the *casus amissionis*, it appeared that, on the back of one of the deeds there was written, in the hand of Merry, senior, who had died in 1815,—"James Merry—paper given or lent to Mr Bain." Bain, who was now dead, had been a coterminous proprietor, and he had stated in 1830, about two months before his death, to a party making enquiry after the disposition, that he had borrowed it from Merry, senior, on account of a dispute which he had respecting some adjoining property, and that he had given it to Robb, a writer, now deceased. All trace of it after this was lost.

Mary Dun's action of reduction was directed against the contract of 1787, on the ground that it had been fraudulently impetrated from her, and was not her deed; and bore to be with consent of her husband, Mason, though she was not married for nine days after its date. An issue went to a jury, under which they found that the contract was the true deed of Mary Dun.

The reduction against the articles of roup, dated 1790, was laid, on the ground, that being in relation to her heritage, her husband's signature was invalid, as her own had not been adhibited; that it was a transaction to which she was no party; and she alleged she had never executed any disposition of the subject. The Lord Ordinary (Moncrieff) found, that the grounds of reduction, applicable to the deed of mutual contract called for, being now finally repelled, and the defender so far assoilied from the action, the single ground of reduction applicable to the articles of roup called for and produced, is not relevant; in respect that the articles bear the subscription of James Mason, the pursuer's husband, and as having power from and taking burden upon him for ever, his wife, and that the *summons* is not so framed as to im-

No. 14. peach that subscription as false ; that a public sale followed in the year 1790, and that no challenge, either of the articles of roup or of the sale itself was brought, till the present action was brought in December, 1828, the said sale having been thus acquiesced in during a period of thirty-eight years ; and further, in respect that the instrument of seisin produced, bearing to proceed upon a disposition by the pursuer and her said husband, has stood in the public record since the 8th June, 1791, thereby legally excluding the plea of ignorance on the part of the pursuer, that such a sale had taken place :—that unless the pursuer could succeed in reducing the said articles of roup, and the sale following thereon, she has no legal interest to challenge the instrument of seisin, of date the 8th June 1791, the second deed called for by the summons, on the ground that the disposition, or warrant on which it proceeded, has not been produced : Therefore, on the whole remaining merits of the cause, sustained the defences, assoilzied the defender, and decerned ; and found the defender entitled to additional expenses.” *

Mary Dun reclaimed against this interlocutor, and the Court sisted process, until a proving of the tenor of the disposition and sasine should be brought by Merry, junior. The facts and circumstances above stated appeared in the course of that action. Mr Robert Grahame, formerly a partner of T. and R. Grahame, was examined, and deponed, on considering the entries in his books, that he had no doubt that a disposition was duly executed in favour of Merry, senior, and regularly subscribed by

* “ **NOTE.**—It is very evident to the Lord Ordinary, that the source of this action, so far as it relates to the public sale in 1790, is to be found in the circumstance that the disposition stated to have followed upon it in 1791, and on which the seisin produced bears to have proceeded, is known to be lost or mislaid, unless, indeed, it were so defective that the defender will not produce it. But it seems to the Lord Ordinary, to be a very strong proposition to say, that a public sale, followed at all events by a recorded infestment, with undisturbed possession during thirty-eight years, may be reduced, merely on the ground that the sale related to the property of a wife, and that the articles of roup were not signed by her, but only by her husband, for her behoof. The Lord Ordinary cannot consider such an instrument as articles of roup, as at all on the same footing with a deed of disposition or conveyance. It is impossible to doubt, that though the husband had no power to make an effectual conveyance, there was nothing to hinder him, by authority and for behoof of his wife, to make a personal contract for selling the property ; and if she approved of and sanctioned the proceeding, she could not be allowed afterwards to challenge it. Now, the Lord Ordinary is of opinion, that the admitted facts of the case are sufficient, without calling for proof on those points in which the pursuer refuses to admit the defender’s statements, to establish a presumption that the pursuer necessarily must have known of and sanctioned the sale, as made by her husband in her name, notwithstanding that the disposition said to have been executed by herself cannot be produced. It is very possible that the pursuer’s interest may not have been duly attended to, and the nature of the sale might have exposed it to serious objections if it had been challenged *de recenti*. But it would be too much to say, that such a sale may be reduced, after an acquiescence of thirty-eight years.”

Mary Dun and her husband. He also gave some explanation as to the entries in the books, such as, that an entry for agency in the sale of the subject, though apparently bearing date November 12, 1790, was truly of the date of the next entry, May 31, 1791, when the transaction was finally settled.

No scroll of the disposition was produced, but it appeared that a number of such papers had been burnt not long before, on the occasion of removing the writing office in Glasgow to new premises.

The chief difficulty which remained, after these facts and adminicles were founded on, arose from the circumstance, that, a few months before the date of the disposition, whose tenor was to be proved, Mary Dun had executed another disposition of a separate portion of heritage, and this was done by notaries, in respect she could not write. T. and R. Grahame had been agents in this transaction also. The summons of proving the tenor of the disposition to Merry, subsumed that it had been executed by notaries, but the name of none of the notaries or witnesses was condescended on: and the whole parties connected with the expeding of the infestment were dead. In her defences Mary Dun stated that she had been imperfectly educated, and could not write. But at the mutual contract between Mary Dun and Marion Brown, in 1787, a subscription appeared, which bore to be that of Mary Dun, and, at least, on one page could be read as that subscription. And it was said, that, at the jury trial, Grahame had sworn that Mary Dun signed that deed in his presence; and had added some particular circumstances in explanation of his recollecting many parts of this transaction better than other matters of the same date. Grahame now stated from his own experience, that, where persons of the labouring classes received only an imperfect education, it frequently happened, that, in their youth, or early life, they could, with care, make a legible subscription, but that, in a few years after, either from total disuse of writing, or from the hands being hardened by severe labour, they became incapable of making a subscription. In this way it had probably happened, that, though Mary Dun might have been able to subscribe the contract in 1787, she was unable to subscribe the disposition in 1790.

The entries in T. and R. Grahame's books made no charge for notaries in regard to either of the dispositions; and Grahame deponed that he had charged the account under the usual rate from particular circumstances, and might have made charges which he omitted.

When the case was pleaded, the Court inspected the contract of 1787, at which Mary Dun had subscribed her name.

LORD PRESIDENT.—I think the tenor of the disposition of 1791 to Merry is sufficiently proved. Is it possible to hold that all these entries in the books of that respectable firm of writers are ex post facto interpolations, made for the purpose of this cause? Yet I cannot stop short of this, if I am not to hold the disposition to Merry by Mary Dun was executed. It is, at first sight

To 14. an awkward circumstance, that the disposition bears to be signed by notaries, whereas Mary Dun had subscribed a contract some years before with her own hand. But, on looking at that contract, and at that part which professes to be Mary Dun's subscription, I cannot wonder that Mr Grahame should have taken the precaution of having the disposition signed by notaries. For I cannot consider the signatures at the contract to be an actual name or subscription at all. At least, it is as bad a signature as I ever saw, and I could not make Dun out of it. It is true, that the case is one which is not free of confusion, and not unattended with difficulty, but Mary Dun is the person who is to blame for this, as she allows thirty eight years to elapse, and all concerned to die, before she brings her reduction.

LORD BALGRAY.—I am quite satisfied, from the evidence adduced, that Merry, senior, bought the subject, and got a disposition from Mary Dun, whether she signed it by notaries, or personally. As I have no doubt of that, and the extract of the recorded sasine is extant, I am for decerning in the proving of the tenor in favour of the pursuer.

LORD GILLIES.—I am not prepared to say, that I dissent from the views now expressed; but considering the peculiar circumstances of this process, and the extreme delicacy of the jurisdiction we exercise in rearing up a deed, I am more strongly impressed with the difficulties of this case than your Lordship appears to be. It is admitted that the articles of roup of this heritable subject were signed only by the husbands, and not by the wives, who were the proprietors. This was an inept proceeding; and where is there any proof to show me that notaries signed this disposition for the wife, Mary Dun? Unless they signed for her, there was no deed executed by her; and where is the evidence that they did so? Mr Graham's books make no charge for notaries. We know that they were necessary, but are we to presume that therefore they were employed? They were just as necessary at the articles of roup, and there they were not employed at all: how is it proved that they were used at the disposition?

Besides this, I cannot help feeling that the proof, so far as rested on the books of T. and R. Grahame, is not made to rest on them as they stand by themselves, but rather as they are to be read when explained and commented on by Mr Grahame. Considering the lapse of time from the date of these entries, this is very far from satisfactory. But although I throw out these observations, as indicative of the difficulties which I experience in the case, I believe that, on the whole, I arrive at the same conclusion with your Lordship and Lord Balgray.

LORD PRESIDENT.—The articles of roup were not so formal a writ as the disposition by which they were to be immediately followed. I feel no surprise, therefore, at finding that the signature to them was less scrupulously completed, and that the husband merely signed for the wife, with her full sanction, as she could not sign herself; and the disposition, in implement of the sale at the roup, was to be duly signed by notaries. As to the absence of all charges for notaries, it appears from Mr Grahame's deposition, that he undercharged the whole account, and omitted to charge many items which he might have exacted. He was probably one of the notaries himself, and his partner may have been another.

LORD MACKENZIE.—I think the proving of the tenor sufficiently established, though I am sensible that there are difficulties in the case which render it somewhat perplexing. I think it of much importance in such a case, that a special *casus amissionis* has been proved, as this removes all suspicion of the deed having been secreted in order to conceal some essential nullity under which it might have

laboured in regard to its execution. But any such suspicion is completely out of the case. I am not surprised at the employment of notaries to sign for Mary Dun, her signatures to the contract are so extremely bad. One of them is really nothing at all : it is not writing. But another one is a great deal better, and it would rather appear, that, at the date of the contract, she had been able, though with very great difficulty and labour apparently, to make out a signature. But since this seems to have been the fact, it was likely enough that her husband alone might sign the articles of roup for her, however bona fide the whole transaction was in regard to her. It affords no presumption against the bona fides of it, and as little, I think, against the formal instrument, the disposition itself being regularly signed by notaries. The very circumstance, that such a deed was to follow on the articles of roup, might tend to make the signature of these articles less formally executed ; and it was natural for the parties to wish to save the expense of having a signature by notaries adhibited to the articles of roup, and to go into the arrangement of the husband's signing for the wife. I own that I have been, in some degree, moved by the observations of Lord Gillies on this part of the case, but, on the whole, I concur more in the view expressed by the Lord President. It would be rather a strong thing to suppose that this disposition (of the existence of which I have no doubt) was neither signed by her nor by notaries, and yet that such a deed should be sanctioned by Mr Grahame, and infestment passed on it by the town-clerk of Glasgow. I think the essentials of this deed are sufficiently proved, and that the Court are entitled and bound to find the tenor of a disposition by Mary Dun to Merry to be established.

THE COURT pronounced the usual interlocutor, decerning in the proving as libelled. No expenses were awarded.

T. and T. DARLING, W.S.—T. TAYLOR, S.S.C.—Agents.

HUGH BAIRD, Pursuer.—*D. F. Hope—Neaves.*

JAMES CORBETT and OTHERS, Defenders.—*Penney.*

Guarantee.—Circumstances in which a guarantee to a maltster for payment “ of any quantity of malt which may be furnished by you to the L. Distillery Company to the extent of £98, 6s. 8d.,” was held not to be continuous, but to cover only one transaction.

THE late John Corbett, of whom the defenders are the representatives, of date 17th August, 1827, addressed to the pursuer Baird, a maltster by trade, the following letter of guarantee :—“ SIR,—I hereby guarantee the payment of any quantity of malt which may be furnished by you to the Luggieside Distillery Company, to the extent of £98, 6s. 8d. sterling ; and am,” &c.

Three days afterwards, malt was furnished to the Distillery Company to the value of £98, 10s., for which a bill at three months was granted to Baird by the company. On the 21st September, and while this bill was current, another furnishing of malt to the value of £80 was made by the company, but it was entered in Baird's books as a cash sale,

No. 15. and was paid for in cash on the 29th, it being the usage of the trade to allow a certain period, amounting at times to two or three weeks, for the payment of the price under a cash bargain. A third furnishing was made in the beginning of October to the value of £100, which was also entered in Baird's books as a cash sale, but the price was not paid by the Distillery Company. On the 21st November, M'Gowan, one of the partners of the company, wrote Baird in these terms:—"DEAR SIR,—I see that our bill falls due on 23d. As the guarantee you hold is a general one, I wish to know if you will have malt ready to replace it when it is paid. Will you be so kind as give an answer by my young man, and a sample of your malt, and the price."

Nov. 21, 1835.
Baird v.
Corbett.

No new quantity of malt was, however, furnished, and the bill was retired by the company, who shortly afterwards became bankrupt, leaving the £100, for the third transaction above mentioned, unpaid. Baird thereupon raised action and obtained decree for this sum against the company, without having called Corbett as a party; but, in 1830, he raised the present action against Corbett, carried on after his death against his representatives, the defenders, concluding for payment of the £100 as covered by the letter of guarantee. The action was resisted on the ground that the letter was not a continuous guarantee, but applied merely to the particular transaction which immediately followed it.

Pleaded for Baird.

It has been repeatedly decided, especially in England, that the use of the word "any," in regard to furnishings or advances guaranteed, imports a continuous guarantee,¹ which besides, in the present instance, is entirely consistent with the relative situations of Baird and the Luggieside Company—the former a maltster, and the latter carrying on the business of distillers, and so requiring a continuous supply of malt, and appears, from the letter of M'Gowan, to have been the understanding of the company. Further, if a party uses ambiguous terms in a letter of a guarantee, so that another is thereby led to rely on it, he must be responsible.²

Pleaded for Corbett, &c.

The authorities relied on by the pursuer do not establish any such technical rule as that contended for, but proceed on the general principle of ascertaining from the terms of the guarantee, and whole circumstances, the real intention of the parties, while in various other cases, terms equally general with those used here have been held to be limited to a single transaction.³ The letter in question may undoubtedly bear this

¹ *Mason v. Pritchard*, 2 Campbell, 436, and 12 East, 227; *Merle v. Wells*, 2 Campbell, 413; *Bastow v. Bennet*, 3 Campbell, 220; *Hargreave v. Sime*, 6 Bingh. 244; *Simpson v. Manly*, 2 Tyrwh. 86; *Allan v. Kenning*, 9 Bingh. 618; 1 Bell, 373; *Forbes and Company v. Dundas*, June 4, 1830 (ante, VIII. 865).

² *Hargreave v. Sime*, 6 Bingh. 244.

³ *Arlington v. Merrick*, 2 Saund. 403, 411; *Horton v. Day*, Id. 414; *Liverpool*

limited construction, and all cautionary obligations fall to be construed strictly in favour of the cautioner,¹ but besides, that only one transaction was in view is apparent from these circumstances—

1. That the sum is a special sum, with odd shillings and pence, and approaching very nearly to the exact amount of the furnishing immediately thereafter made.

2. That this furnishing was the only furnishing made on credit, while two other sales entered into during the currency of the bill for the first, were expressly made as cash transactions, and no additional credit sale agreed to after the bill was paid, notwithstanding the request by M'Gowan, on the erroneous representation of the guarantee being a general one. And

3. That even while representing the 'guarantee as a general one, M'Gowan's letter shows that the Company did not consider the particular sale, the price of which is now sought to be recovered, as falling under it.

The Lord Ordinary having assoilzied Corbett, &c., adding the subjoined note, * Baird reclaimed. The Court, after hearing an argument

Water Works Company v. Atkinson, 6 East. 507; *Rankine v. Murray*, May 15, 1812 (F.C.); *Fell on Guar.* 98, 101; 1 Bell, 373.

¹ *Houston's Executors v. Speirs*, March 4, 1820 (F.C.), affirmed May 22 1829, (3 W. & S. 392); *Ross v. Greig*, Feb. 11, 1834 (ante, XII. 427); *Evans v. White*, 5 Bingh. 485; *Melville v. Hayden*, 3 B. and A. 593.

* "The question here is, whether the letter of guarantee founded on be a continuous guarantee, or only for a single transaction. The use of the word 'any' in such letters is no doubt important, but can scarcely be held to be decisive. It does admit of a construction importing a single transaction only, and circumstances may control its more general, perhaps its more usual meaning. Now, a guarantee to the extent of £98, 6s. 8d., would be a singular limitation of a continuous guarantee; and no explanation was attempted as to why such a sum, instead of £100, or some round number, was introduced into it. If a single transaction only was in contemplation of the parties, the reason is obvious; and accordingly, a quantity of malt, exceeding only by a few shillings this sum, was furnished on credit, just four days afterwards, for which a bill is granted. During the currency of this bill, another quantity is furnished on 21st September, which, however, is a cash transaction, and accordingly payment is made by cash on the 29th, and in this transaction the pursuer plainly did not rely on the guarantee. On 8th, 9th, and 10th October, 50 bolls of malt are also furnished, but the entry in the books of the pursuer also shows that this was a cash transaction, and, of course, that the pursuer did not then rely on the guarantee for its payment, which was still protecting the original furnishing, the bill for which was not payable for five weeks yet. This, then, affords no proof that the pursuer understood this as a continuous guarantee, and acted on the faith of its being so. The letter of 14th November, from M'Gowan, seems rather to imply that this was the first time the pursuer was called upon to hold it as a general guarantee but he did not, at this time at least, act upon that understanding.

"Upon the whole, the Lord Ordinary is of opinion that the more natural construction of this document is, that it applied to the single transaction about which the parties were treating at the time, and that the conduct of the pursuer in subsequent transactions, rather shows that this was the interpretation he put upon it him-

No. 15. from the bar and delaying to consider it, thus delivered their opinions
(Dec. 18, 1834) :—

Nov. 21, 1835.

Baird v.
Brett.

LORD JUSTICE-CLERK.—After the fullest consideration, I cannot concur in the Lord Ordinary's interlocutor. We must keep in view distinctly the words of the obligation—"I hereby guarantee the payment of any quantity of malt which may be furnished by you to the Luggieside Distillery Company, to the extent of £98, 6s. 8d. sterling" This was addressed to a person carrying on business as a maltster. The terms are broad and comprehensive, to guarantee payment of "any" malt, and the only limitation is as to the sum. But when we see a guarantee for payment of any malt to be furnished, and this being an establishment requiring malt from day to day, it imports, I think, a liability, to the extent of the sum specified, for any malt, though furnished continuously; and, if the cautioner had meant to confine it to one furnishing, he ought to have stated it expressly on the face of the letter, or be liable till he should recall it. These are the principles of the authorities; and I think this a continuing liability for whatever malt was furnished to the extent of the sum specified. No doubt, the extracts from Baird's book show, that immediately after, malt was furnished to the amount of £98, 10s.; and in September, a further furnishing is entered as a cash sale, though payment was not made till eight days afterwards, and another at the price of £100. A bill had been granted for the first furnishing, current till November 23, when it was paid; and it is argued on these facts, that it was clearly in contemplation of the parties that the guarantee was to be limited to the first transaction. I cannot come to that conclusion. It is, no doubt, a whimsical sum to fix on, but still, I can see no ground for inferring from that, that the guarantee was not to be continuous, though it is not explained why that sum was selected; and besides, the price of the first furnishing was not precisely the same. On the other side, however, we have a document on which I lay great stress, as showing the real understanding of the parties, viz. the letter by M'Gowan, a partner of the company. It shows distinctly that he held it a continuous guarantee. Then the whole stream of authorities, both in Scotland and England, to which last we may fairly refer in a case of this description, clearly confirms this view, that the word "any" imports a continuing guarantee; and therefore, I am for altering.

LORD GLENLEE.—If the only judgment to be pronounced were to recall the interlocutor, and remit to enquire further whether the furnishing of October was made on the faith of the guarantee, I would not object; for, though *ex figura verborum*, the letter may cover continuous furnishings, notwithstanding the remarkable sum, yet the words of the guarantee not to be exclusive of what circumstances show to have been the true understanding of the parties. Now the first thing I wonder at is, that we have not seen the decree in the action against the

self. At the same time, as the defender might easily have made his letter unambiguous, leaving no room for doubt or discussion, expenses have not been given. It was said at the bar, that, if he meant to be liable only for this transaction, he might have been a party to the bill. But many mercantile men will grant a letter of guarantee, who will not put their names to a bill. It is disadvantageous to them to have their names on bills in the circle, except for their own transactions. Besides, *they become liable to summary diligence, and lose the benefit of discussion.*"

No. 15. was the real intention of the parties, and I always understood that the principle of construction in such matters of cautionary obligation is strict in favour of the cautioner; and, even in mercantile questions, I profess to go by the law of Scotland, understanding nothing of the law of England. In the case of the *College of Glasgow v. Lord Selkirk*, it is laid down expressly, that cautionary obligations are of strict interpretation; and we lately enforced that rule in the case of *Speirs*, and, still more recently, in that of *Snell*. Then, looking at the letter here, I do not dispute that it is somewhat ambiguous; but there is quite sufficient in the circumstances to show the real intention of the parties. If the word “any” had a precise technical meaning to constitute a continuing guarantee, it is certainly found here. But I can conceive many cases where that word may be used without possibly importing a continuous obligation. It applies here, as I conceive, to any goods under the single transaction contemplated. The English cases relied on by the pursuer were very different, and there were no limiting circumstances. I would have had no hesitation in these cases in holding the guarantee continuous, but the present is totally different, and I conceive had reference to the special transaction treating of at the time; and this is confirmed by the immediate furnishing of almost exactly the amount specified. The after conduct of the parties is also material, and differs this from the English cases. I think it clear they did not transact on the faith of the guarantee, for the others were cash transactions, showing that they did not understand them to be under the guarantee; and they were not the less cash transactions that the money was not paid for a few days, and they were so entered in the books. I agree that if a party gives an ambiguous document, and another party is misled, the party giving it must abide by the consequences; but here the conduct of the pursuer shows that he was not misled, and did not rely on the guarantee for the subsequent transactions. The letter of 14th November is of importance as to that, not so much the letter, as that no answer was made to it. This, however, I infer from it, that M’Gowan did not understand the October transaction to be under the guarantee, while he refers to the other, the first, as under it, and to be replaced when the bill was paid off. It proves also Baird’s understanding, as he would have furnished more had he held it to be covered. On these grounds, I still think it not continuous, but that it applied to the particular transaction which immediately followed.

The Court being equally divided, the cause stood over, and the Judges, after reconsideration, retaining their opinions respectively, minutes of debate were ordered for the opinion of the other Division, and the Lords Ordinary.

The following unanimous opinion was returned:—“We are of opinion, with the Lord Ordinary, that the guarantee in this case cannot be considered as a current continuous credit, but one limited to the specific goods then furnished or ordered. We are of opinion that the very special amount of the sum mentioned, £98, 6s. 8d., seems strongly to point at some precise and limited order for goods, and not to a general current credit, which, as most usual, if not general, would have been expressed in round numbers; and this is strongly corroborated by the fact, that as soon as the credit for this £98, 6s. 8d. was exhausted, the parties proceeded to deal on the footing of ready money or cash payments, which seems to be quite inconsistent with the notion, that there was

No. 16. in which action she emitted the usual oath of calumny before the Commis-
Nov. 21, 1835. saries, and obtained a decree, also in absence, in the month of March
 Menzies v. thereafter.
 Menzies.

In May, 1824, Menzies entered into a second marriage with Mary Henderson, by whom he had three children. The eldest was born in September, 1825. Euphemia Christie also entered into a second marriage, some time after she had divorced Menzies, with a Mr Jackson, and of this marriage there were two children. In 1832, John Menzies died, being survived by Euphemia Christie and Mary Henderson, and their respective families. Mrs Jackson had her annuity of £55 regularly paid to her by the surviving trustee under Stewart Menzies's trust-deed, the remainder of the annual proceeds of the trust funds being paid to John Menzies, during his lifetime, and to Mary Henderson, as his widow, and her children after his death.

In these circumstances, Sir Neil Menzies, and the other tutors of Ronald Menzies, son and representative of Stewart Menzies, who was now dead, raised the present action of reduction of the decret of divorce and declarator of bastardy, against the children of John Menzies, and their tutors, and their mother, Mary Henderson, or Menzies; the summons in which narrated the trust-disposition by Stewart Menzies, and then set forth John Menzies's first marriage, and the subsequent proceedings as to the divorce, averring that those proceedings were collusive, and the result of a concerted plan on the part of John Menzies, Euphemia Christie, and Mary Henderson; that the second marriage was, in consequence, invalid, and the issue thereof illegitimate; and, therefore, that the pursuers' ward, in respect of the clause of return in the trust-deed, had now the only good title to the capital sum of £4000, subject to the annuity of £55 to Euphemia Christie, as John Menzies's widow; and it concluded for reduction of the decreets of adherence and divorce accordingly, and to have it declared that the children were illegitimate, and that the pursuers' ward had the sole right to the trust-fund.

The defenders denied the allegations of irregularity and collusion, and maintained the following pleas as preliminary defences:—

1. Euphemia Christie, her second husband and children, who have a direct and material interest, are not called as defenders.

2. The pursuers have no sufficient title. No third party can sue a reduction of a decret of divorce on a mere pecuniary title. Actions of divorce have solely in view the status of the married parties; it is the breach of the matrimonial contract, or personal injury to the innocent spouse, which gives to these parties respectively a title to seek rescision by divorce; accordingly it is the spouses alone who can sue a divorce.¹

¹ Voet, 24, 2, 3; 48, 5, 21. Stair, I., 4, 7. Dirleton, p. 199. Hume on Crimes, I., 452.

No. 16. make Euphemia Christie and her husband parties, it will only follow that the action should be sisted until they are called.

Nov. 21, 1835.
Menzies v.
Menzies.

2. This is an action having immediate reference to a competition with regard to succession; and, in such competition, the one competitor is entitled, in support of his patrimonial rights, to allege and prove the bastardy of his opponent. But, if the pursuers have a title to insist in an action of declarator of bastardy, they must also have a title to insist in a reduction of the decree of divorce, which is merely a step in the declarator of bastardy rendered necessary by the established rules of judicial procedure.

3. The "Instructions," which are alleged to limit the period for reducing decreets of divorce, were addressed to the Inferior Commissaries throughout Scotland, and not to the Commissaries of Edinburgh.¹ Besides, as the pursuers had no title or interest to raise the present question until after the death of John Menzies, and could not have insisted previously, they were non valentes agere during year and day after the decreet of divorce, and so not liable to be affected by the limitation in question.

4. The death of John Menzies can be no bar to the present action, as, before his death, the pursuers could not have insisted at all. Nor is its competency, in reference to the question of the illegitimacy of Menzies's children, affected by its being founded in an allegation of fraud on the part of the deceased parent.

5. The circumstance of John Menzies having entered into a second marriage and had children, is the cause of the present action having been brought, and can be no bar to it. Its object is to invalidate this marriage and bastardize the issue; and the defenders' plea on this head resolves into a denial of the competency of the action, because, if successful, the pursuers will attain the only object which they had in raising it.

6. The case of Ford, on which the pursuer's plea in regard to the effect of the oath of calumny is rested, differs from the present case, in so far as the present pursuers were not, and could not have been, parties to the action of divorce in which the oath was emitted.

The Lord Ordinary reported the cause on Cases.

LORD JUSTICE-CLERK.—I think it is impossible to hesitate in following the judgments in the case of Gardner, decided by Lord Reston in the Outer-House, and in the case of Donald v. Thom, which was decided on the principle of giving effect to that regulation in our consistorial law, by which prescription is applied to reductions of decreets of divorce brought after year and day.

LORD MEDWYN.—The rule as to decreets of divorce not being reducible beyond year and day ought to be adhered to as most expedient and just. The rule is not applicable to inferior commissary cases alone, but also to those of the Com-

¹ Instructions, in 1810, Art. XVI.; Balfour, 665; Erskine, l. 5, 31.

No. 17. ^{Nov. 24, 1835.} and obliged himself "to make payment to the child or children of the said intended marriage, of the following sums of money, viz.; in the event there shall be only one child of the said marriage, the sum of £5000; in case there shall be two children, the sum of £7500 sterling; and in case there shall be three or more children, the sum of £10,000 sterling; And which sums, so provided to the said children, shall be payable to them as follows, viz. To such as shall have attained majority or marriage, one-half at the first term of Whitsunday or Martinmas, which shall first happen after the death of the said Alexander Scott Broomfield, and the other half at the first term of Whitsunday or Martinmas after the death of the said Sarah Campbell, their mother, if she shall survive him; the said provisions, if she shall predecease, not being payable till after the death of the said Alexander Scott Broomfield, and to such of them as shall not have attained majority or marriage, the proportions of their several provisions shall be payable at the first of the said terms after their respective majorities or marriages, with the legal interest of the said provisions, from the respective terms of payment till paid: Declaring also, that if any child or children of the said marriage shall die before the said sum hereby provided to him, her, or them, shall be paid or become payable, then the sum provided to such child or children shall revert and belong to the surviving children of the present marriage, and their issue, who shall be entitled to their deceased parent's share."

In order farther to secure these provisions, Broomfield bound himself, within six months after the marriage, to convey £7500 to the trustees. The liferent of this sum, and of the £5000, was reserved to him.

Mrs Broomfield predeceased her husband, leaving one daughter, named Barbara. Two other daughters had been born, but died in infancy before her. In these circumstances, Broomfield raised a declarator, that Barbara's provision under the contract was only to the amount of £5000. All the provisions for the children were of a testamentary nature, and were to take effect after the father's death. It was in reference to the number of children existing at that period, that the amount of provision was apportioned; £5000 being given, if there was one, £7500, if two, and £10,000, if three. And it was in reference to the risk of the decease of any of such children, before attaining majority or marriage, but after the father's death, that the share of such child was declared to revert to the others. If the mere momentary existence of a living child, though it died in infancy and before the father, should be held to increase the provision to the only surviving child, in the same degree as it would have done if two children had ultimately remained to be provided for, in place of one, this would be irrational, and contrary to the intention of the parties, and it would give to Barbara Broomfield the sum of £10,000, merely because two other children had been born and died in infancy, whereas the sum of £5000 being the provision where one child alone was to be provided for, was clearly all which was intended for her.

The trustees under the marriage contract lodged defences, and pleaded

No. 18.

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 iv. 24, 1835.
 Anderson v.
 Marshall.

WILLIAM JAMES ANDERSON, Pursuer.—*D. F. Hope.—Neaves.*
 WILLIAM MARSHALL, Defender.—*Sol. Gen. Cunningham—Pyper.*

Expenses—Reparation—Process.—A party raised an action of damages, laid at £5000, for verbal and real injury. The defender made a tender of £50, and previous expenses, which was refused. A jury trial ensued, and the jury found for the pursuer, damages one shilling; held that the defender was entitled to expenses subsequent to the date of the tender.

iv. 24, 1835.
 —
 1st DIVISION.

SEQUEL of Jury trial reported, ante, 15th July, 1835, which see.¹ It arose out of an action of damages for an injury, alleged to consist in verbal abuse, and a blow with the fist, which was bestowed on the pursuer in his own shop. At an early stage of the proceedings, the defender made a judicial tender of £50, and all previous expenses, in order “to put an end to the action.” The tender was refused, in respect it was not accompanied by an apology. And, at a later stage, the pursuer judicially offered to discharge the action, without any damages being paid, if the defender would make an ample written apology, and grant leave to publish it, and would also pay the whole expenses. The defender rejected this offer, but stated his readiness to be a party to mutual apologies, with liberty to both parties to publish these, each party paying his own expenses; or the question of expenses being referred to a counsel mutually chosen.

As the parties could not make any extrajudicial agreement, the case went to trial; the damages being laid at £5000. It there appeared that the defender had acted in the heat of blood, excited by gross provocation given by the pursuer. The Lord President therefore charged the jury, that, though they must find for the pursuer, as no mere verbal provocation could justify a blow, yet they might justly assess the damages as low as they saw cause. The jury found for the pursuer, and assessed the damages at one shilling.

Each party now moved the Court for expenses. The pursuer pleaded, that this was a case affecting character, and that no offer of money, without an apology, accompanying it, could have prevented a trial; and that, at the trial, the verdict was in his favour. The defender answered, that where damages were laid at £5000, a tender of £50 and expenses had been made and refused, and a verdict found, with the approbation of the Court, for only one shilling, he was clearly entitled to be allowed the whole expenses subsequent to the date of the tender. And he had besides offered to be a party to mutual apologies, which was all that could ever have been required of him.

LORD GILLIES.—I think this motion may be shortly disposed of. The pursuer comes into Court, with a demand of £5000 of damages. The defender

makes a tender of £50, and all expenses, which is refused. A jury trial becomes therefore inevitable, and the pursuer recovers one shilling of damages. I think, in such a case, expenses must be found in favour of the defender, so far as incurred subsequently to the date of the offer. The general rule certainly is, that when a tender has been made and refused, and a jury afterwards found a smaller sum due, expenses should be awarded to the defender. I see nothing to take this case out of that general rule; and, indeed, I do not think the defender came bona fide into Court, with a sweeping demand of £5000, where the jury found him entitled to one shilling. It would have been better for him, in my opinion, in every point of view, to have accepted the tender of £50, than to hold a verdict for one shilling, which was found by the Jury, with the approbation of the Court, and that without any apology having been made at the trial.

LORD BALGRAY intimated, that he considered the expenses subsequent to the defender's tender were due to him.

LORD PRESIDENT.—I am of the same opinion. The pursuer says he felt bound, notwithstanding the tender of £50, to go on, for the sake of his character, as no apology was offered. No apology was offered before the jury; and yet, they, upon investigating the whole circumstances, considered him only entitled to one shilling of damages. I cannot hesitate, therefore, to subject him in the expenses subsequent to the tender; and I think he would have stood upon higher ground than he now does had he accepted the tender of £50, and stopped his action. The payment of that sum was in itself an acknowledgment, by implication, that the defender was in the wrong, and the pursuer might have been well satisfied with it. I see nothing in the case to make me think the pursuer was warranted in rejecting the tender, and, therefore, the subsequent expenses should fall on him.

LORD MACKENZIE.—I concur in holding that the defender is entitled to his expenses since the date of the tender. And certainly if the general rule is, that an award of damages, though small, shall carry expenses against a defender, the judicial offer of a larger sum than the jury's award ought to entitle the defender to his expenses. I can conceive some cases, as for instance, of damages for scandal, where a defender may have offered a sum without an apology, and afterwards, before the jury, has beat down the amount of damages by making an apology in open court; and there the defender may justly be subjected in expenses even though the award be for a smaller sum than was previously tendered; because, in such a case, the tender was without an accompanying apology, while the judicial award was made only after an apology. But in this case no apology was made, in presence of the jury, any more than prior to the trial: and the jury, in the whole circumstances, found only one shilling due. I cannot hesitate therefore in awarding expenses subsequent to the date when an offer of £50 and previous expenses was made to, and rejected by, the pursuer. In short I see no ground whatever for making an exception in this instance from the general rule,—that, where a defender makes an offer of a larger sum than is afterwards awarded by the jury, he shall be entitled to his expenses subsequent to the date of such offer.

THE COURT accordingly found the defender entitled to expenses, subsequently to the date of the tender made by him.

No. 19.

JAMES AIKMAN, Suspender.—*Rutherford—Crawfurd.*DANIEL FISHER, Charger.—*D. F. Hope—Forsyth.*

Nov. 24, 1835.

Aikman v.
Fisher.

Cautioner—Relief—Mora.—Circumstances in which held, that a creditor who took a bill for six months, and thereby gave time to one of two co-debtors whom he knew to be liable in relief to the other, had not thereby liberated the other from the debt.

Nov. 24, 1835.

1st Division.
Ed. Corehouse.
D.

IN an action which was prosecuted by Adam Luke, William Henderson, and James Aikman, baker in Edinburgh, the pursuers were unsuccessful, both in the Court of Session and the House of Lords, and a large account of expenses was incurred to their agent, Daniel Fisher, S.S.C. The action related to a presentation to a pastoral charge in Edinburgh, and had been adopted by the Magistrates and Council of Edinburgh, in such a manner as to render them liable to relieve the private pursuers, Luke, Henderson, and Aikman, of almost the whole of the expenses. But, as the town-council disputed their liability, they, on 26th February, 1833, entered into a submission of the question, and the arbiter intimated his intention to subject them in relief of the whole expenses, with a small exception, unless application for a farther hearing was made within fourteen days. No such application was made, but a decree-arbitral was never written out, the town-council having resolved to take the liability upon them in the same manner in which the decree would have imposed it. Adam G. Ellis, W.S., acted as the agent of Aikman, Luke and Henderson, in the submission. A few days before it was entered into, Fisher, who held both the town-council, and Luke, Henderson, and Aikman, jointly and severally bound for his account, presented a petition to the Court, under Act of Sederunt, 1806, to have it taxed as against them all. Ellis attended the taxation, and the auditor's report came to be moved in Court on the last day of the winter session, on which day the following memorandum of agreement was entered into between Ellis and Fisher.

“ 1. Decree to be taken against all the parties, jointly and severally, for the whole sum due to Mr Fisher for the proceedings, &c., amounting to £677, 10s. 10d.

“ 2. Whatever sum the private parties, Messrs Henderson, Luke, and Aikman, shall be found in the submission between them and the magistrates of Edinburgh, not to have a right of relief for, shall be paid down to Mr Fisher by these private parties.

“ 3. Whatever sum these private parties shall be found entitled to relief of in the said submission, Mr Fisher will allow to stand over for nine months, so far as concerns the private parties, upon their granting an obligation that their liability for such sum continues to Mr Fisher along with the magistrates, and that such part shall be paid to Mr Fisher at the end of the nine months, if the town of Edinburgh shall not previously *have paid the same.*”

No. 19. Parliament, creating a Parliamentary trust, for the purpose of realizing the effects of the town, and paying the creditors as economically as possible. Throughout the steps for carrying through these measures, it was publicly avowed, and anxiously intimated by the town, that they were resolved, at all hazards, to prevent any preference being acquired by the separate diligence of any creditor, and that the town would be rendered bankrupt, if necessary to defeat such preference.

ov. 24. 1835.
Aikman v.
Fisher.

An act of Parliament was obtained, which was finally passed on 29th August, 1833, and which enacted, that, from and after 1st June, 1833, no legal proceedings should have any effect in conferring a preference on any creditor of the town.

Throughout the course of these proceedings, Aikman refused to pay any part of the debt, or to acknowledge his liability for it; and, in July and December, 1833, Fisher used arrestments in the hands of debtors to Aikman, which appeared to be done at the request of Luke and Henderson. The letters written by Fisher to Ellis, with a view to bring about some joint arrangement, were allowed by Aikman to remain without notice, so far as he was concerned. He did not require Fisher to proceed with diligence against the town, nor did he use the means which he himself had within his reach, of proceeding against the town, by asking the arbiter to give forth his decree, or by asking an assignation to Fisher's decree. But on 28th December, 1833, he presented a bill of suspension of the charge of 8th June, and pleaded, that, in the whole circumstances of the case, he was entitled to be held discharged from all liability to Fisher, because Fisher, while in the full knowledge that the town of Edinburgh was bound to relieve the suspender, chose of his own accord to give time to the town by taking a bill at six months. During the currency of the bill, the insolvency of the town was declared, and the parliamentary trust had been created, so that the suspender, if compelled to pay Fisher now, had not the same means of relief which he would have possessed but for the indulgence which Fisher granted to the principal debtor, the town. As Fisher had obtained a letter from Luke and Henderson, consenting to such delay, and had got no such letter from the suspender, this showed his consciousness that he would lose his claim unless he got such letter, and his willingness to run the risk of losing all claim against the suspender.

Fisher answered, that the whole circumstances proved him to have granted no delay or indulgence to the town without the suspender being a party, through his agent Ellis, to the proceeding. The third article of the memorandum of agreement clearly implied liberty to Fisher to grant such delay to the town as he had done. He had granted it only after giving a charge to the suspender and Luke and Henderson on his extracted decree, and though Aikman refused to sign a similar letter to that of Luke and Henderson, acknowledging his obligation, he could not avail himself of this, which was an act of mere mala fide obstinacy. He not

No. 19. Aikman reclaimed.

Nov. 24, 1835.
Aikman v.
Fisher.

LORD PRESIDENT.—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to. The reasoning contained in the note by the Lord Ordinary seems to me to be perfectly conclusive in itself, and to be strictly applicable to the facts of the case.

LORD BALGRAY.—I am of the same opinion. I see no answer to the latter

tinctly homologated in the proceedings relative to the submission; and, though well aware of all the subsequent steps taken by Mr Ellis, he never disclaimed him as an agent. Every communication, therefore, from the charger to Mr Ellis, must be held as a communication to the suspender.

“The present question resolves into the simple issue, whether the charger, by taking bills from the town of Edinburgh, payable at six months after date, knowing that the town was bound to relieve the suspender, gave time to the principal debtor, and on that ground, released the suspender as cautioner? The general rule of law, as to giving time, is well established, but, in the Lord Ordinary’s opinion, this case is taken out of the rule by circumstances.

“All the parties were, conjunctly and severally, liable to the charger—he obtained decree against them all—he gave a charge on the decree to Messrs Henderson and Luke, and the suspender, which charge they allowed to expire, and afterwards he raised letters of caption against them. He did not charge the town of Edinburgh, for its insolvency had been previously declared, and a bill was pending in Parliament, to place its property under trust, and to prevent preferences. A charge at that time must have compelled all the town’s creditors to do diligence—it would have produced an immediate and absolute stoppage, and defeated the measures in contemplation for extricating the affairs of the town. The suspender did not make payment when required. An arrangement was proposed by the charger, by which time was to be given, both to the town and to Messrs Henderson and Luke, and the suspender, on their granting liquid obligations for the debt; and he was desired to state if he would concur. But a series of letters, written by the charger to Mr Ellis, from the 28th of March till the 26th of April, in so far as the suspender was concerned, remained unanswered. The charger then proceeded with his diligence—the suspender did not pay—he would not say whether he would consent that time should be given to the town—he did not require the charger to do diligence against the town. He did not do diligence himself for his relief, though he had the means in his hands, either by taking an assignation to the charger’s decree, or by charging on a decree, which the arbiter declared he was ready to pronounce. He refused to implement his own obligation—he refrained from taking measures for his relief—he maintained an obstinate silence for several weeks when required to say if he would or would not concur in an arrangement, for the benefit not only of the charger, but of himself and his co-obligants, Messrs Henderson and Luke, and not till then were the bills in question taken from the town. Unable, or unwilling to implement his own obligation, he was not entitled, in the Lord Ordinary’s opinion, to defeat the only reasonable plan for enforcing it, as far as was possible against his co-obligants. This accords with the law, as stated by Mr Bell, ‘that where the creditor makes a demand on the cautioner, and the cautioner either refuses, or is unable to pay the debt, and take his own relief, the creditor may take such prudent measures as, in the circumstances of his debtor’s affairs, may be advisable, without being held thereby to discharge the cautioner.’ Mr Bell’s doctrine is sanctioned by the decision in the case of Whitehead and Kirk, and by several other decisions which the charger has cited.”

No. 21.

MAXWELL SANDERS and MANDATARY, Pursuers.—

Sol.-Gen. Cunninghame—Penney.

Nov. 24, 1835.

Sanders v.

Baird.

THOMAS BAIRD and SON, and ROBERT BAIRD and MANDATARY,
Defenders.—*More.*

Proof—Process—Jury Trial—Foreign.—1. Under an issue, whether the defender wrongfully and violently took possession of certain premises in Belfast, and wrongfully ejected the pursuer therefrom—held that the question of the legal right of tenancy in the premises was raised, and it was incumbent on the pursuer to establish such right of tenancy in his own person according to the law of Ireland, in order to enable him to maintain to any effect the affirmative of the issue? 2. Question, whether, when a party has excepted at a trial to the judge's direction in law, and has had a note of such exception signed by the judge, it be competent, on a motion for a rule to show cause, to apply to have the verdict laid aside on the ground of surprise as well as of misdirection?

Nov. 24, 1835.

Ed. Fallerton.

Jury Cause.

R.

IN 1826, Maxwell Sanders was employed by Messrs Thomas Baird and Son of Glasgow, as agent for the sale of their goods in Belfast, where he occupied a warehouse in their name. In November 1829, Robert Baird, on the part of Thomas Baird and Son, came to Belfast, and, besides adopting other proceedings, took possession of the premises in question and ejected Sanders.

Sanders thereafter raised an action against Thomas Baird and Son, and Robert Baird, concluding for damages on account of his having been thus ejected, and also on account of certain slanderous expressions alleged to have been uttered concerning him by Robert Baird. In his condescendence he averred that, at Martinmas 1828, he became the tenant of the premises, and was recognised as such by the landlord. The defenders, on the other hand, alleged that the warehouse had been taken for them, and that they were regularly charged for the rent—that it was possessed by Sanders solely as their agent and for their behoof—that the landlord held them to be the tenants, and liable for the rent down to the period when Robert Baird entered into possession. There was no averment or denial on the record that the possession had by Sanders was tenancy according to Irish law.

Four issues were sent to trial, of which the first and second were as follows:—

“ 1. Whether, during the month of October 1829, the defender, Robert Baird, wrongfully and violently took possession of a certain warehouse in Commercial Court, Belfast, Ireland, or wrongfully extruded the pursuer from the same, to the loss, injury, and damage of the pursuer?

“ 2. Whether the said Robert Baird, by directions from, or authority of, the defenders, Thomas Baird and Son, or Thomas Baird, wrongfully

and violently took possession of the said warehouse, or wrongfully excluded the pursuer from the same, to the loss, injury, and damage of the pursuer?"

The two other issues related to the slander. With reference to the first and second issues the following facts appeared in evidence at the trial:—In July 1826, an agreement had been entered into, by which Sanders was to conduct an agency business in Belfast exclusively on account of Thomas Baird and Son, and to receive a certain commission, while Baird and Son were to pay all charges—the warehouse had accordingly been taken in their name, and they were entered as tenants in the landlord's books. In about a year or eighteen months afterwards some change of arrangement was made by which Sanders, besides acting as agent for Baird and Son, was allowed to sell goods for behoof of other parties, but continued to occupy the same premises. At Martinmas 1828, Sanders's name was entered in the landlord's books, but without the knowledge of the defenders. In September 1829, Robert Baird, on the part of Thomas Baird and Son, came from Glasgow to Belfast and examined Sanders's books, and, in about ten days after his arrival, accompanied by a law agent and bailiff, he turned Sanders, in open day, out of the premises, took off the lock of the door, and effaced his name from the sign-board.

Sanders adduced no evidence to prove that the possession on which he founded was tenancy by the law of Ireland. In consequence of this failure on his part, the presiding judge, in his charge to the jury, withdrew the two first issues from their consideration, and a verdict accordingly passed for the defenders on them, the pursuer being successful on the third and fourth.

The pursuer excepted to his Lordship's direction, "In so far as it is held that the decision of the question of the legal right of tenancy in the premises is indispensable to the trial of the first issue, or any part of it, and that the onus probandi lay on the pursuer to establish a legal right of tenancy in his own person, according to Irish law, in order to entitle him to maintain, to any effect, the affirmative of that issue: And in so far as, upon these grounds, the two first issues were withdrawn from the consideration of the jury."

The pursuer thereafter moved, in the Court of Session, for a rule to show cause why the verdict on the first two issues should not be set aside, and a new trial granted; and maintained, That enough had been proved to admit of the first and second issues going to the jury, without putting an Irish lawyer into the box to prove that the right of tenancy was with the pursuer; that it was not necessary in all cases where facts, occurring in a foreign country, were put in evidence, to adduce proof of the law of that country, in reference to those facts; that evidence had been made out, which, on a common sense view, was in the pursuer, and, at all events, threw the onus on

No. 21. the defenders, of taking off, by contrary evidence, the presumption in his favour; that as there was no averment in the record of the pursuer's possession not being tenancy by the law of Ireland, and, as the defenders insisted, notwithstanding, on his bringing evidence of Irish law, this was surprise, and a ground for reducing the verdict; and that the grounds of surprise and misdirection were, in a certain measure, embraced in each other; that, independent of the tenancy, there was a case to go to the jury, in the issues, in so far as they contained likewise a question of violence,—for a party may have a right, and yet not be entitled to use it in a particular way,—and thus, supposing the defenders to be tenants, they were not warranted in turning the pursuer out of the premises violently and contumeliously.

Nov. 26, 1835.
Braidwood v.
Braidwood.

LORD JUSTICE-CLERK.—I do not think the ground stated sufficient to warrant us in granting the rule. Under the word “wrongfully,” in the issue, the question of the legality of the proceedings is raised in the same way as on an issue whether diligence has been executed wrongfully, the question is raised as to the legality of the diligence. The jury must have been satisfied that the proceedings were illegal; and, with a view to this, it was necessary to have evidence of the law of Ireland on the point of tenancy, to establish with which party the legal right of tenancy was. The opposite averments of the parties on this head brought distinctly forward that the matter must be regulated by the law of Ireland, which it was requisite therefore to lay, as a fact, before the jury. This not having been done, there was no case upon the issues to go to the jury.

LORDS GLENLEE and MEADOWBANK concurred.

LORD MEDWYN had some doubts, but, on the whole, concurred.

THE COURT accordingly refused the rule.

JOHN FORRESTER, W.S.—**W. A. G.** and **R. ELLIS, W.S.**—Agents.

No. 22.

JOHN BRAIDWOOD, Pursuer.—*D. F. Hope—Paterson.*

THOMAS BRAIDWOOD, Defender.—*Keay—A. Wood.*

Implied Power—Settlement—Contract—Fraud.—A father executed a general disposition, conveying to his only son the whole heritable and moveable estate, presently belonging to him, or that should belong to him at his death, with a clause of absolute warrandice: the conveyance was under burden of paying a provision to the granter's two daughters, and also an annuity to the granter and his wife, and longest liver of them: the deed was delivered, and possession of the subjects was ceded to the son—held, that the deed was not of a revocable nature, and that the father could not revoke it—but certain allegations of fraud, &c., sent to a jury.

Nov. 26, 1835.

1ST DIVISION. **JOHN BRAIDWOOD**, mason and portioner in Uddingstone, had one son and two daughters; his wife was also alive. On 15th July 1830, being
D.

well advanced in years,* he executed a general disposition of his whole estate heritably and irredeemably, in favour of his son, Thomas Braidwood, baker in Uddingston. The deed bore to be granted “for love and favour, and for other good causes and considerations.” It embraced the grantor’s whole estate, both heritable and moveable, “presently belonging, or which shall belong to me at the time of my death,” “and particularly without prejudice to the foresaid generality, All and hail, that one-merk land of old extent, of the town and lands of Uddingston,” &c.

The disposition was granted “with and under the burden, 1st, of all the lawful debts that I may be owing at the present time, at the date hereof, which the said Thomas Braidwood and his foresaids, by acceptance hereof, oblige themselves faithfully to discharge as soon as possible, And 2d, under the burden of payment of £50 sterling to each of my daughters, Grizzle and Elizabeth Braidwoods, payable at the first term of Whitsunday or Martinmas, that shall happen after the death of the longest liver of me or my present wife, which shall be in full of all my said daughters, or their present or any future husbands, can claim by or through the decease of me or my said wife, in any manner of way whatever: Which disposition above-written, I oblige myself and my foresaids to warrant to the said Thomas Braidwood and his foresaids at all hands, and against all mortals, under the burdens above exprest: And having herewith delivered up to the said Thomas Braidwood the title-deeds of the heritable subjects specially above conveyed, I consent to the registration hereof,” &c.

Of the same date, Thomas Braidwood addressed and delivered the following letter to his parents:—“Dear Father and Mother,—In consequence of the disposition granted by my father to me, of this date, I bind and oblige myself, and heirs and successors, to pay you and the survivor of you, an annuity of £50 sterling a-year, for your liferent use allenary, and to cease at the death of the longest liver of you, payable at four terms in the year, Candlemas, Whitsunday, Lammas, and Martinmas, by equal portions, beginning the first quarter’s payment at Martinmas first, and so on, during your lives. I am,” &c.

In consequence of this deed, John Braidwood ceded possession of his heritage and farm stocking, and the chief part of his moveables, to Thomas Braidwood, and delivered up the deed to him.

On 1st June, 1833, John Braidwood executed a revocation of the disposition; and, on 6th June, he raised a reduction, libelling,

1st, That the deed was truly of a testamentary nature, and mortis causa, and therefore it was sua natura revocable. He was undoubtedly liable to indemnify his son for any advances which had been made on the faith of it, but, on that condition, he was entitled at any time to annul it; and it had been repeatedly found, that any testamentary deed which contained

* Said to be above seventy.

No. 21. no clause in gremio, declaring itself to be an irrevocable deed, was not placed beyond the power of revocation by mere delivery.

ov. 26, 1835.
Braidwood v.
Braidwood.

2d, The deed had been impetrated from him through fraud, to his enorm lesion, there being no adequate consideration given, and he being misled as to the mode of securing the provisions intended for himself, his wife, and daughters. He had also been made by his son to understand, that a full power of control over his estate remained to him, notwithstanding the execution and delivery of the deed in question.

Thomas Braidwood pleaded, in defence—

1. The deed was irrevocable, being part of an onerous arrangement, or contract. On the one part, in terms of the deed and relative letter of the same date, the defender undertook to pay his father's debts, and the provisions specified to his parents and sisters. On the other part, the disposition of his father's estate, heritable and moveable, was executed in his favour. The deed contained a clause of absolute warrandice. It was delivered; and possession of both the heritage and the chief part of the moveables had been actually ceded to him. And he was ready to prove that he had paid off his father's debts to a very large amount. There was no power on the part of the pursuer to revoke the disposition at pleasure, any more than there was on the part of the defender to renounce or revoke on his part, in case he should find the estate too small for the debts and provisions.

2. There was no fraud. The counter-obligations undertaken by the defender were both fair and onerous, and the pursuer was fully cognizant of the whole nature of the transaction at the time he entered into it.

In consequence of the parties being at issue in regard to the facts upon which the allegations of fraud and lesion were founded, the Lord Ordinary reported the case to obtain a direction from the Court, whether he should send the case straightway to the jury, or first determine if the deed was, *sua natura*, revocable, and effectually revoked by the pursuer.

The Court directed his Lordship first to determine whether the deed was revocable.

On this subject his Lordship “ Found, That the deed sought to be reduced was not revocable, and has therefore not been effectually revoked by the granter's subsequent deed of the 29th of May, 1833; sustained the defences against this reason of reduction, and decerned: and Found the pursuer liable in the expenses of this part of the discussion.” *

John Braidwood reclaimed.

* “ NOTE.—The two cases of *Sommerville*, 18th May, 1809, and of *Miller*, 11th July, 1826,¹ relied upon by the pursuer, differ from this one in all material circumstances. The deeds were expressly declared to be intended as testamentary set-

¹ *Ante*, IV. 822, and new edit. 829.

LORD PRESIDENT.—There is no question now before the Court, whether the deed was fairly executed, or was fraudulently impetrated. That question depends on disputed facts, which must go before a jury, if your Lordships think the deed irrevocable, as I do. It is not in the usual style of testamentary deeds. It contains a clause of absolute warrandice. It contains a *de presenti* conveyance of both heritable and moveable estate, which might not have been important had the deed been retained in the hands of the granter, but which is decisive, when it is followed by delivery of the deed, and actually ceding possession of the heritable and moveable estate to the disponee. I think the Lord Ordinary's interlocutor is well founded, and that, apart from the allegation of fraud, the pursuer is not entitled to revoke this deed, which formed part of a mutual agreement or contract, apparently implying onerous obligations undertaken by the defender.

LORD BALGRAY.—I think the deed is of an irrevocable nature, and it has always appeared to me in that light from the first. The subjects were delivered over to the disponee, and he undertook counter-obligations. After that the pursuer could not revoke at pleasure.

LORD GILLIES.—I incline to be of the same opinion, but do not feel free of embarrassment in deciding the point. It seems to me that it would be difficult to hold that the daughters of the pursuer had their right of legitim effectually defeated by this deed, and a provision of £50 substituted in lieu of it. Yet if

lements;—they conveyed, as the Court held, nothing but what the granter might have at his death, at which period alone they were to take effect. Here there is, 1st, A conveyance of the estate 'presently belonging' to the granter, being the estate of Uddingston; 2d, Onerous obligations undertaken by the disponee, who becomes bound not only to pay two annuities from and after the first term subsequent to the granter's death, but also to pay his present debts, and another annuity to the granter during his life, which last burden is undertaken by a separate writing bearing reference to the disposition, and set forth by the pursuer in his summons, to have been exchanged *unico contextu* with that deed; 3d, A clause of absolute warrandice; 4th, Delivery, not only of the deed, but of the subjects.

"This was rather a mutual contract than a settlement. If it had pleased the pursuer not to try to revoke the deed, but to enforce it, can it be doubted that he could have compelled the defender to pay the annuity to the granter at once, and the existing debts without any unnecessary delay? The defender, indeed, avers, that he did pay the debts, and that he was actually sued before the Sheriff for payment of the annuity. These statements, however, are not admitted without qualification, and, therefore, the Lord Ordinary does not rest upon them as facts. But he thinks the obligation clear.

"Even in the case of *Sommerville*, though divested of these conclusive indications of a present and onerous arrangement, the Court had the greatest difficulty in finding that there was an implied power of revocation. The present case is substantially the same with that of *Curdy*, 7th December, 1775, where the Court held the onerous obligations undertaken by the grantee to extinguish the power of revoking, which would otherwise remain with the granter.

"It is in obedience to a direction by the Court that the Lord Ordinary has disposed of the legal objection founded on the alleged revocability of the deed, before coming into the objections of fact."

No. 22.

Nov. 26, 1835.
Dutch v.
Webster.

the deed be not good, to the effect of cutting off their legitim, I am at a loss to hold it onerous and irrevocable as the defender pleads. The question of its fairness and full onerosity depend upon facts which will go before a jury, and are not now before the Court, but I think the power of the daughters to claim legitim, in the face of this deed, which at present I rather think belongs to them, seems to be a test of the nature of the deed, and an indication that it is not truly an irrevocable instrument.

LORD MACKENZIE.—I think the deed is irrevocable, and that its whole structure is inconsistent with any other character. In regard to the power of the daughters to claim legitim in the face of it, that may be done in the face of an irrevocable deed if it be not also a deed to take full effect against the granter during his life, and a part of this deed is a conveyance of effects belonging to the granter at the hour of death. But without going into the question whether the daughters could still claim legitim or not, such a circumstance is not an absolute test of the revocable nature of the deed, since a deed may be quite irrevocable in its tenor, and yet not sufficient to cut off the legitim. It may be that this deed is reducible on the ground of fraud or error for any thing I know, but I certainly cannot hold it revocable at the pleasure of the granter.

THE COURT pronounced this interlocutor:—"Recal the interlocutor reclaimed against, but find that the disposition of John Braidwood is *ex facie* irrevocable; and remit to the Lord Ordinary to proceed farther," &c.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—A. FLEMING, W.S.—Agents.

No. 23.

WILLIAM DUTCH, Suspendor and Pursuer.—*Semple*.

ALEXANDER WEBSTER, Charger and Defender.—*D. F. Hope—Milne*.

Process—Reduction—Expenses.—In an advocacy, decree in absence passed against the respondent, who thereupon brought a suspension and reduction of the decree, which processes were conjoined; after the production had been satisfied, the defender moved for payment of the expenses in the action in which he had obtained decree—Held, that, at this stage of the proceedings, the motion for expenses was incompetent.

Nov. 26, 1835.

2D DIVISION.
Ld Jeffrey.
F.

In an advocacy at the instance of the defender, Webster, he obtained decree in absence against the pursuer, Dutch, who was found liable in the expenses of the proceedings, both in the inferior Court and in the Court of Session. A charge having been given for payment of the expenses, Dutch raised processes of suspension and reduction, for the purpose of having the decret and charge set aside. These processes were conjoined.

After the production had been satisfied, Webster moved for payment of the expenses incurred by him in the advocacy, and the expense of diligence at his instance, and contended that those expenses ought to be

Fisher took decree for the sum of £677, 10s. 10d. against the whole parties, jointly and severally. At this time it was becoming a matter of notoriety, that the finances of the city of Edinburgh were in an embarrassed condition, allusion having been made to it at council meetings, and in the newspapers.

On 28th March, Fisher wrote to Ellis, that as he had now learnt the extent to which the arbiter held the town bound to relieve Henderson, Luke, and Aikman, the clients of Ellis, he had waited on the magistrates, but found it impossible, from the state of the city funds, to get payment at present, and that any attempt to force it would bring down the whole creditors upon the town, and cause a total stoppage of their affairs. He then added—

"In such circumstances, what occurs to me is this:—I am willing to give the town indulgence, by taking the Chamberlain's promissory-note (pay at nine months from the 9th of March last, the date of the decree), your clients giving a letter of consent to this, and holding themselves responsible to me for such parts of the accounts due as they are jointly and severally liable for to me, along with the magistrates. I trust, for the sake of the town, that your clients will at once consent to this; but, if they decline to concur in such indulgence or extension of credit to the town, then I offer, in the second place, to assign my decree to them, or to you as their agent, on their granting me a bill for this amount, payable at nine months from the 9th March, and you can then take such steps as you think fit.

"Requesting your answer in the course of to-morrow, I am," &c.

After several letters by Fisher, urging an arrangement, he sent to Ellis a draft of an obligation, to be signed by Luke, Henderson, and Aikman, in terms of his letter of 28th March. But as Aikman refused to sign that letter of obligation, or to acknowledge his liability for the expenses at all, and the other parties were unwilling to sign the letter without Aikman, Fisher extracted his decree, and, on 8th June, gave a charge to Luke, Henderson, and Aikman. After expiry of the charge, he intimated his intention of proceeding with ultimate diligence against them, upon which Messrs Luke and Henderson signed the proposed letter. Aikman refused to do so, and farther denied that Ellis was his agent, or that he was liable in any shape for the expenses. This denial was made in mala fide.

Immediately on getting the letter signed by Luke and Henderson, Fisher, on 28th June, took a bill from the City Chamberlain, at six months, for the amount of expenses due by the town. He granted an acknowledgment to the town, declaring that, when retired, his account could be paid.

The town-council, as early as the April preceding, had adopted the plan of granting bills at six months for debts similar to that due to Fisher, and were now in progress for procuring an Act o

No. 24. tendency to affect injuriously the letting of the premises. Collins, in his answer to the protest, offered to satisfy all legal obligations incumbent on him under the lease, and stated, that, as he had no copy of the missive, he was ignorant what those obligations were. He also offered to allow part of his stock to remain in the shop until the term, which was accordingly done. On the term day, Collins quitted the shop, which had not been taken by a new tenant, and delivered up the key. He was not furnished with a copy of the lease till the 2d July. Ewing having intimated to Collins that he looked to him for the damages arising from the shop not having been let, the latter made a tender, on the 16th July, either immediately to replace the shelving as it was when Chalmers and Collins entered, or to pay over the sum of £19, 18s. as its estimated value. This tender was subsequently repeated, and an alternative offer made of a reference to arbitration. Both were rejected.

—
v. 26, 1835.
Ewing v.
Chalmers.

Ewing thereafter raised an action of damages against Chalmers and Collins, in which, founding on the alleged desertion of his shop before the term of removal, and on the taking down of the shelving, and stating that the premises had, in consequence, assumed an abandoned and uninviting appearance, in consequence of which he failed to have them let, he concluded for a sum of £500 of damages. Collins, in his defences, repeated judicially his offer of the 16th July.

The case went to trial, at Glasgow, on the following issue :—

“ It being admitted, that, during the month of January, 1823, the defenders agreed to take, and did take, in lease from the pursuer, for the period of ten years from Whitsunday, 1823, a shop in Wilson Street, Glasgow, in terms of the missive, No. 3 of process, dated 4th January, 1823 :

“ Whether, in violation of the said agreement, the defenders wrongfully failed to implement the conditions of the said missives, or their obligations as tenants, to the loss, injury, and damage of the pursuer ?

“ Damages laid at £500.”

The jury found for the pursuer, and assessed the damages at £25.

The pursuer and defender then respectively moved in the Court of Session for expenses.

The pursuer referred to *Ballendene v. Turner*,¹ where, although a tender had been made by the losing party, the pursuer, who gained a verdict far within the amount at which he laid his damages, but beyond the tender, was held entitled to expenses.

¹ March 7, 1835, ante, XIII. 636.

The defender answered, that, in Ballendene's case, a sum was found by the jury, which was beyond the tender, and it was decided on the ratio, that the pursuer must be held to have been justified in persevering in his action, the tender made by the other party being ultimately found not to have been sufficient; and that this ratio was evidently inapplicable to the present case, where one alternative in the offer was to replace the shelving as it previously stood.

Lord Fullerton, who had presided at the trial, was called in, and requested by the Court to state what took place at the returning of the verdict.

LORD FULLERTON.—I directed the jury that there was, by the lease, an obligation on the defender to leave the shop, at his removal, in the same state as to shelving in which he had received it; and that some damages were due, it being admitted that this had not been done. In remarking on the evidence, I also called the attention of the jury to the estimates sworn to by the different witnesses of the sums necessary to restore the shelving, which varied from about £20 to £30. The jury first brought in a verdict finding that the pursuer had a right to the value of the shelving, viz. £25, but had no right to any thing more; and it was explained, by one of their number, that they intended by it to exclude the pursuer from any claim for expenses. It being mentioned to them that this last matter was not under their cognizance, and the verdict, in other respects, not admitting of being recorded in terminis, they then returned a verdict, finding for the pursuer, and assessing damages at £25. The question being put to me now by the Court, I can have no hesitation in stating my impression to be, that the jury meant to give damages only for the removal of the shelving.

The Court first disposed of the pursuer's motion.

LORD GLENLEE.—Here the defender made a specific offer to replace the shelving in the pursuer's shop, or to pay a sum of money in lieu of it, in which case I do not think the pursuer can claim expenses.

LORD MEADOWBANK.—I am clear the pursuer is not entitled to expenses; for, so early as the 28th of March, the defender offered to perform every obligation incumbent on him under the lease, and then he made the tender contained in the letter of the 16th of July. The principle on which the case of Ballendene was decided does not apply in the present case.

LORD MEDWYN.—If there was but one copy of the missive of lease, the pursuer was bound to have produced it to the defender, when required. But, on the ground of the offers made by the defender, I am satisfied the pursuer is not entitled to expenses. It is clear that it was not for the value of the shelving alone that he brought on this jury trial; and it appears to me, that it was only for the value of the shelving that the jury gave the sum in the verdict. In Ballendene's case, the tender was £25, and the sum found by the jury was £88, so that the cases are not similar.

LORD JUSTICE-CLERK.—I agree. The defenders said, at the first, that they

No. 24. were ready to fulfil the obligations incumbent on them ; and then the pursuer gets nothing but what was offered before the trial of the issue.

Nov. 26, 1835.

Stewart v.
Simpson.

The Court refused the pursuer's motion, and took up that of the defender.

LORD MEADOWBANK.—I am inclined to apply the principle of Hallam's case,¹ and give the defender expenses. It appears to me that this defender was substantially in the right.

LORD MEDWYN.—I concur ; and on this ground, that expenses are given, not so much as an indemnification to the successful party, or a punishment to the losing party, but in *pœnam temere litigantium*—to restrain such persons as those described in the old statutes as “ wilfull and obstinat pleyers.”² The awarding of expenses is to be regulated by the manner in which a party conducts his pleading.

LORD JUSTICE-CLERK.—I agree ; and it ought to be understood, as the result of this judgment, that those litigations which proceed on frivolous and vexatious grounds will receive no countenance from this Court.

THE COURT accordingly found the defender entitled to expenses.

WOTHERSPOON and MACK, W.S.—MOWBRAY and HOWDEN, W.S.—Agents.

No. 25. **WALTER STEWART, Pursuer.**—*D. F. Hope—A. M'Neill.*
MRS CHRISTIAN SIMPSON or STEWART, and OTHERS, Defenders.—
Sol.-Gen. Cunninghame—Marshall.

Joint Property—Partnership.—In dividing company property among the copartners, any partner is entitled to have it brought to public sale, and is not bound to fix a value at which he will either part with his own, or take the other partners' shares, although several years may have elapsed since the company was dissolved, its affairs never having been wound up.

Nov. 26, 1835.

2D DIVISION.
Lord Jeffrey.
T.

THE pursuer, Walter Stewart, and the deceased John Stewart, carried on, as copartners, the business of brewers in certain premises at Haghill, near Glasgow, which were the property of the company. In 1825, the copartnership was dissolved by the death of John Stewart, but its affairs were never wound up, nor any settlement made between the partners. Lately, however, Walter Stewart raised an action against the widow and children of John, concluding for partition and sale of the property.

The Lord Ordinary remitted to the Sheriff of Lanarkshire, to appoint a skilled person to inspect the premises, and report whether they were “ capable of division, each into two lots, of equal value ; and, if not, the most advantageous mode of disposal thereof.”

¹ *Gye v. Hallam*, Jan. 18, 1834 (ante, XII. 311).

² 1592, c. 144 ; 1587, c. 43.

The Sheriff accordingly appointed an architect, who, after inspecting the premises, reported as follows:—"In regard to the lands of Haghill, brewery, and others, before mentioned, I consider that they cannot be divided into two beneficial divisions of equal value. The whole buildings are expressly adapted for, and are in connexion with the brewery; if separated, the brewery would, in a manner, be rendered useless, and would therefore, in the apprehension of your reporter, be greatly depreciated in value. I am, therefore, of opinion, that these should constitute one lot, and be disposed of accordingly, and that either by public roup or private bargain."

The Sheriff, in transmitting this report, stated his concurrence in the opinion of the architect, and farther observed, "Although the principal part of the premises, consisting of the brewery, garden, and buildings adjacent, might be divided, if they were the sole properties belonging to the parties, into two portions, nearly equal, having a dwelling-house, and premises for brewing, and part of the garden attached to each, yet this could not be done without essential injury to the premises, as they now stand, in consequence of their connexion with the large malt-barn attached to the whole work, which is situated at a little distance, and is of such magnitude as to be altogether disproportioned to either half of the malting premises, if they were divided into two, while it itself could not, without considerable expense, be cut through the middle."

The Lord Ordinary, on considering this report, repelled a personal objection taken to the architect, and pronounced as follows:—"In regard to the lands of Haghill, brewery, dwelling-houses on said lands, malt-barn, and others, appoints the parties, within one calendar month, to prepare articles of roup, with a view to bringing the same to sale; and in the event of the parties not agreeing on the terms thereof, remits to Mr James Reddie, town-clerk of Glasgow, to hear parties thereon, and adjust the same, reserving to the parties, or either of them, in case of being dissatisfied with Mr Reddie's adjustment, to state their objections to the Lord Ordinary by the third sederunt-day in November next."

Against this interlocutor Mrs Stewart and children reclaimed, and contended, that, before one of two joint-proprietors demanding a division could insist on the common property being brought to sale, he was bound to fix a value at which he would agree either to take the other half, or part with his own, and that it was only failing this option being consented to that he was entitled to insist for a sale.¹

To this, it was answered, that, whatever might be the rule as to the ordinary case of joint property, there could be no doubt that, as to

¹ *Ersk.* iii. 3, 56; *Bell*, 64; *Milligan v. Barnhill*, Feb. 8, 1782 (2486).

No. 25. company property, the regular and legal course which every partner was entitled to insist for was a sale of the property.¹

iv. 27, 1835.

Burnet v.
Forbes.

Court.—The proper course is by public sale, and the upset price being fixed judicially, no injury can be sustained.

Solicitor-General.—There has been no copartnery here since 1825, and the subjects have lost their character of copartnery property, and should fall under the common rule.

Court.—It is in bonis of the company still, and must be dealt with according to the rules for ascertaining the interests of copartners till the affairs be wound up.

The interlocutor of the Lord Ordinary was accordingly adhered to.

A. P. HENDERSON, S.S.C.—WM. WADDELL, W.S.—Agents.

No. 26. JOHN BURNET, Pursuer and Advocator.—*D. F. Hope—J. Anderson.*
GEORGE M'KIMMING and JOHN FORBES, Defenders and Respondents.
—*Rutherford—Thomson.*

Lease—Clause—Expenses.—Terms of a holograph lease, which, although of an unusually imperfect and defective character, was held to contain all the essentials of a lease, and to be sufficient to give a real right, if followed with possession.

Expenses.—Though the Court was unanimously of opinion that an interlocutor of the Lord Ordinary, in preparation of the cause for the Jury Court, should not have been reclaimed against, their Lordships refused to subject the reclamer in any expenses, *hoc statu*, there being a question of fraud involved in the discussion still remaining.

iv. 27, 1835. JAMES M'COLL, bookbinder in Glasgow, was heritable proprietor of certain subjects at the Broomielaw of Glasgow, and in reference to them he addressed the following missive to George M'Kimming, brushmaker in Glasgow. “ Glasgow Guildry Court, November Thirteenth day, one Thousand Eight Hundred and Twenty-Eight years, George M'Kimming, Bresh Maker, Glasgow, having recevid your Letter, promising to Free and Releive Me of the Two Hundred And eighty pounds Sterling, I Borroed from you within Last Fifteen Mounths By past, upon Conditions that I, James M'Coll, Book Binder in Glasgow, hear By this My Hollygraph Missive, as heiritel prprter of thes Houses, Seatauateyd in wood Lan, Brooielaw, Glasgow, hereby upone the above considerhion, For Thirty years, commansing at Martimus next, notwithstanding the

—
IT DIVISION.
Corehouse.
B.

¹ Marshall, Feb. 23, 1813 (F.C.); Aitken's Trustees, May 18, 1830 (*ante*, VIII. 753); 2 Bell, 645.

Acontus is takeing or recaved in part payment of the Above Rent
y, you are at Liberty to Inshure the said property at youre own ex-
s as far as your Interists is Concered: For your own Advantage,
re refered to the Title Deeds for A more purticlar Descripshon of
ropety, wotch I bind and oblige Myself to ratetafy in Legell Man-
a Stamp paper, under a penalty of Four Hundred pounds Sterling,
May Dout that May Arise in this Messive of Tack shal be inter-
ted in yours Favars, thais are the Names of Tenents in posseshion;
land, John M'Niel, M'Kay, Alexander Strange, Will.
; Janet Wallace; back land, Peter Douglas, Peter Gibson, Hugh
e, Stuarat, James M'Intire; Your are at liberty to Make
Alterations or improvements you think proper one the said pro-
, at my expenses, this and the Three preceding pages are my Holly-
1 Writing. I Consent to the Regastrashion in Books of Counsell
eshion, or others Competent to Remaine For preservation. Signed
s M'COLL."

12th May, 1832, John Burnet, writer in Glasgow, raised a reduc-
of the above missive of lease. Burnet stood infest in the subjects,
r a sasine in October, 1830, which followed on a conveyance from
oll, with consent of one Steel, to whom M'Coll was said to have
the subjects, on 29th December, 1828.

urnet alleged, inter alia, that the Missive to M'Kimming was false
e date; and, being holograph, did not even ex facie prove its own
; that it was truly posterior to his (Burnet's) right; that there was
fficient stipulation for rent, and the rent was merely nominal and

No. 26. **endurance, the subjects let (including even the names of the tenants), and finally, the amount of rent payable. That, though the rent was not the full rent which the subjects could yield, this was because a large price was paid for a favourable lease, and that possession had followed upon the missive, from Martinmas, 1829, at which period the right founded on by Burnet was, even on his own showing, personal and latent in its nature, and did not become public till his infestment in October, 1830; that the defenders were ignorant of the existence of his right until then, and had acted in bona fide; and that the missive of lease, being thus followed by possession, and obtained in bona fide, gave an effectual real right of an unimpeachable kind.**

Nov. 27, 1835.
Burnet v.
Arbes.

Parties were at issue as to many important facts forming the basis of their respective pleas and requiring investigation. The Lord Ordinary found “that the missive under reduction, dated 13th of November, 1828, if followed with possession of the subjects, is not objectionable, on the ground that it does not expressly bear to be a lease of the subjects, or that it does not sufficiently specify or identify them, or that it does not contain an acceptance by M’Kimming, or that it does not contain a sufficient stipulation or obligation as to the rent or term of payment, or that the rent, supposing it to be under the value of the subjects, is elusory; and, with these findings, remits the case to the roll of jury causes.”

Burnet reclaimed.

LORD BALGRAY.—The legal principles laid down in the interlocutor of the Lord Ordinary are perfectly undoubted. It is impossible to alter any one of them.

LORD GILLIES.—There can be but two questions to be considered in reference to this interlocutor, 1st, Are the legal principles correct which are involved in it? and, 2d, If so, is it expedient to lay them down before sending the rest of the case to the jury? As to the first of these, I concur with Lord Balgray and the Lord Ordinary, and, as to the second, I approve of the course taken by the Lord Ordinary. The findings which he has inserted in his interlocutor are all proper for the Court in reference to the legal character and import of the missive under challenge, and the disputed facts as to possession will now go before the jury.

LORD MACKENZIE.—I am of opinion that the interlocutor ought not to be recalled. The findings are correct in themselves, and though there would probably have been no great risk incurred in sending the case to a jury without these findings, yet there is no reason whatever for altering the interlocutor containing them.

LORD PRESIDENT.—I concur. It is impossible to shake the interlocutor.

Rutherford, for Respondents.—As your Lordships have unanimously found this interlocutor to be unimpeachable, and as the reclaimer ought undoubtedly to have acquiesced in it, I move for an award of the expenses subsequent to the date of that interlocutor.

LORD MACKENZIE.—There is a question of mala fides and fraud involved in this case. I am decidedly of opinion, therefore, that no expenses should be found.

No. 27. other proposal. In terms of this offer, as qualified in the letter of acceptance, a formal deed of renunciation and conveyance was executed by Johnston on the 26th of December. The effects on the farm were immediately afterwards sequestrated at the instance of Lord Abercorn and his commissioner, and the stock and cropping judicially sold, and the sale regularly reported. The produce amounted to £1249, which was put to Johnston's credit. In 1833, the Marquis of Abercorn presented Johnston, as an old and respected tenant, with an annuity of £50 during his life. In 1834, Johnston died; and thereafter, a summons of wakening and transference was raised by Fraser against his representatives, and, no appearance being made, an interlocutor in absence pronounced against them.

Nov. 27, 1835.
Fraser v.
Marquis of
Abercorn.

Fraser then brought a reduction of the missive letters and deed of renunciation above-mentioned, against the Marquis of Abercorn and Mr Guthrie Wright, on the grounds, 1. That they had been unwarrantably and illegally obtained from Johnston by fraud and collusion, and with the purpose of defeating the rights of Johnston's creditors, especially the pursuer; and, 2dly, That the deeds in question were struck at by the pursuer's inhibition. The summons likewise concluded that it should be found and declared, that the defenders, having disregarded the inhibition, and taken benefit by the renunciation of the lease, were liable in payment to the pursuer of the sum due to him by Johnston; and that they should be ordained to make payment accordingly. The pursuer in his condescendence repeated his allegations of fraud, but inserted no plea in law in reference to them, and did not insist on them at the bar. In regard to the effect of the inhibition, he maintained, that the renunciation of the tack by Johnston was an alienation of an heritable subject, and so reducible *ex capite inhibitionis*, the diligence having been anterior to it in date, and published within the statutory period.

The defenders denied the allegations of fraud and collusion, as to which the pursuer stated no plea in law; and pleaded, that, as the lease was not transmissible, nor attachable by creditors, the pursuer's inhibition could not affect the renunciation thereof; that, independent of the renunciation, the lease became *ipso facto* extinct, the tenant having failed to implement its conditions; that there was no evidence of the debt claimed by the pursuer being due to him by Johnston, and, if there were, that the inhibition could not have the effect of rendering the defenders liable for a debt of the party inhibited.

The Lord Ordinary sustained the defences, and assoilzied with expenses, and prefixing to his interlocutor the following observation, adding the note subjoined.* “ This interlocutor assumes, that the pursuer has got

* “ The defenders have now produced sufficient evidence of the arrear of rent due by the tenant; but the interlocutor, in absence, against Samuel Johnston, produced by the defender, is not a sufficient constitution of the debt said to be due to him by John Johnston, the tacksman.

decree in his action against Johnston, and that the defenders have proved that, at the date of the missive and deed of renunciation, Johnston was a year in arrear."

The pursuer reclaimed.

LORD MEDWYN.—I have no doubts in this case, and am for adhering.

LORD MEADOWBANK.—I agree. As there is no plea in law in reference to the allegations of fraud, it is unnecessary to say any thing as to that part of the case. But, seeing that one of the defenders is an officer of this Court, and that very serious charges are made against him, I have examined the pleadings with great attention, and I cannot discover a vestige of ground for this attack on Mr Guthrie Wright. I think he has shown great forbearance towards the tenant, Johnston. A more gross and injurious attack on a gentleman never was made.

LORD MEDWYN concurred entirely in these observations.

LORD JUSTICE-CLERK.—So far from there being any ground for imputing blame to Lord Abercorn, or Mr Guthrie Wright, they have behaved with great forbearance throughout, and with great kindness to the tenant. I agree with your Lordships, that, as those charges of fraud have not been seriously persisted in, they should never have been made, and the party making them ought to be answerable for the consequences.

LORD GLENLEE concurred.

THE COURT accordingly adhered, and found the pursuer liable in expenses, and, in respect of the auditor being a party, remitted the account to Mr Richard Mackenzie, senior deputy keeper of the signet, to be taxed.

J. J. FRASER, W.S.—J. and C. NAIRNE, W.S.—Agents.

" But, assuming the debt to have been constituted, the Lord Ordinary is of opinion that the pursuer's case cannot be maintained.

" This case is rested in the summons and in the condescendence, partly on a charge of fraud against the defenders at common law; but this charge must be held to have been departed from, as none of their pleas are applicable to it.

" As to the inhibition, which is the only other ground of action, 1st, Subtenants and assignees, legal and conventional, are excluded, and therefore this diligence could not secure the lease to the creditor; and even though the tenant could, as has been argued, have put in a manager, the inhibiting creditor could not have compelled him to do so; 2d, The tenant being a year in arrear when the missive of renunciation was granted, was under a legal obligation, by his lease, to remove; and, 3d, Even though the missive were struck at by the inhibition, the tenant was soon afterwards sequestrated, and, by his tack, this sequestration terminated his connexion with the farm, and superseded the diligence independently of the missive."

No. 28.

WILLIAM ALLAN and SON, Suspenders.—*M'Neill—Moir.*ARCHIBALD FYFE, Charger.—*W. Bell.*

Nov. 28, 1835.

Allan v. Fyfe.

Bankrupt—Diligence—Competition.—Arrestments were used within sixty days of a sequestration—the arresters refused to loose their arrestments except on the condition of getting their expenses paid by the trustee—the trustee offered to reserve their preference, if they had any, but refused to pay in the mean time, and he obtained a judgment from the Sheriff, decerning for delivery of the goods under the above reservation:—Opinion by a majority of the Court, at passing a bill of suspension on caution, that the arresters were under no obligation to loose their arrestments, and if called on to do so by the trustee, might exact such condition as to expenses as they saw fit.

Nov. 28, 1835.

1st Division.

Lord Balgray.

Bill-Chamber.

B.

WILLIAM ALLAN and SON, being creditors of Andrew Miller Fraser, fruit merchant, for £8, 2s., used arrestments in the hands of Reid and Company, who held some fruit belonging to Fraser. Fraser was sequestrated within sixty days, and Fyfe being appointed trustee, applied to Allan and Son to loose their arrestments, so as to admit of the fruit, which was a perishable article, being sold without delay. Allan and Son replied, that, though the statute struck at their arrestments, and cut down any preference, it did not impose an obligation on them to take any active step whatever in aid of the trustee, and, therefore, if he wished to obtain their consent to a loosing, it must be on condition of paying them the expenses of their diligence. Such expenses were expressly provided by sect. 40 of the Bankrupt Act as in favour of any arrester or poinder when deprived by the statute of the benefit of his diligence. Fyfe stated that he was ready to reserve their preferable claim for expenses, if it should appear that they had such claim, but he insisted on their loosing their arrestments in the mean time and concurring with him in facilitating a sale for the common behoof. And he alleged, in general terms, that other arrestments of the same fund had been used—that it was uncertain whether the fund was sufficient for the expenses of the diligence done against it—that he was not bound to enquire and decide whether the diligence of Allan and Son was good and effectual before getting the fruit disposed of, and that a reservation of their preference was all they could insist for.

As parties could not agree, Fyfe presented an application to the sheriff at Leith, craving him to ordain the arrestees to deliver up the goods to him as trustee on payment of the Government duties and warehouse rent, “reserving always to the arresters their respective rights of preference, if any such exists, or has been acquired by law.” After some procedure the sheriff decerned as craved, and found Allan and Son liable in expenses. The decree being extracted, Allan and Son presented a bill of suspension on caution, which the Lord Ordinary (Balgray) passed, “in respect that the question which has given rise to the dispute between the parties has not been settled by any judgment of the Court.”

be reclaimed.

THE PRESIDENT.—The trustee called upon Allan and Son to take a step for common behoof, by loosing their arrestments, which they were not bound by duty to take. If they were asked to do this, they might accordingly refuse to do it, except on their own terms. The trustee might have gone to the sheriff at once and got a warrant for obtaining possession of the goods. And what he ought to have done. Any difficulty which might have been induced by the arrestments had been swept away by the Bankrupt Act, which provided that no such diligence should give a preference, “but that, in every case, the effects arrested shall be made forthcoming to the trustee.” Had the trustee applied to the Sheriff, he must have got immediate access to the goods and the question, whether Allan and Son had any preferable claim for their arrestments, would have remained to be adjusted under the sequestration. But the trustee chose to take a quite different course, and to request Allan and Son to loose their arrestments. He had no right to compel them to do this, and, if they refused to do it, they might adjust their own condition of having their expenses paid in the first instance.

MR. BALGRAY.—I see no reason for altering my interlocutor. I rather think the statute even goes the length of cutting down the arrestments so effectually as to declare, that the goods do belong to the trustee and the sequestrated thereby entitling the trustee to put forth his hand and take them, along with the rest of the undisputed estate.

MR. MACKENZIE.—I think the trustee committed a mistake in asking Allan and Son to loose their arrestments. So far from the trustee desiring to have the arrestments loosed, I think he should have desired them to be held as standing for the benefit of all concerned. If they were loosed, the subjects arrested would be exposed, perhaps, to hazard of different sorts, whereas the benefit of diligence just accrues to the bankrupt estate, if it be not loosed. Besides, it might raise a question, if a creditor consented to loose his arrestments, whether he did not thereby forfeit the benefit of the provision regarding his expenses. Such expenses are provided to those only “who shall be deprived of the benefit of their respective diligences;” and it seems not to be free from doubt, that a creditor, consenting to loose his diligence, did not place himself out of the reach of these words.

MR. GILLIES was understood to consider the question raised by the bill of sequestration as one which was attended with difficulty; but his Lordship did not make any objection to the passing of the bill.

THE COURT adhered, and passed the bill on caution.

M. and W. SMELLIE—J. JOHNSON—Agents.

No.

Nov. 28,
Allan v.

No. 29.

R. A. OSWALD and OTHERS, Petitioners.—*Keay—Maitland.*JAMES M'WHIR, Respondent.—*D. F. Hope—Ivory.*

Nov. 28, 1835.

Oswald v.
M'Whir.

Process—Appeal—Expenses.—Expenses awarded by a judgment taken to appeal having been paid under a warrant for interim execution, a bond of caution to repeat in the event of a reversal, being granted as usual; and the judgment having been reversed, and the cause remitted, but with express powers to give orders as to all expenses previously awarded—held, that the appellants were not entitled, de plano, to get up the bond of caution that they might operate repetition, but the question reserved to the issue of the cause.

Nov. 28, 1835.

2^d DIVISION.
T.

AN appeal having been taken by the petitioners, Oswald, &c., against the judgment reported ante, XI. 552, the Court granted interim execution, including an order for payment of the expenses awarded to the respondent, M'Whir, on the ordinary bond of caution being granted, to repeat in the event of a reversal. Thereafter (April 13, 1835), the House of Lords pronounced this judgment:—"It is declared by the Lords Spiritual and Temporal, in Parliament assembled, that it is the opinion of this House, that the 'Statement of Facts' in the pleadings in this cause mentioned, as having been submitted to the Court for their judgment thereon, does not furnish a sufficient ground for the judgment of the Court upon the question in this case, and that there ought to be a further trial before a jury upon another issue; and, therefore, it is ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, that the cause be remitted back to the Second Division of the said Court of Session, in order that their Lordships may direct another trial before a jury, upon the following issue, that is to say, "Whether the places in which, during the years 1822, 1824, and 1825, stake-nets, or other fixed machinery, were placed and used for fishing salmon, by the defender, Richard Alexander Oswald, and the other defenders, respectively, or their respective tenants, are within the water of Solway?" And it is further ordered, that the defenders, respectively, in the action in the Court below, be pursuers in the trial of the said issue. And it is further ordered, that the before mentioned "Statement of Facts" is not to be used or founded on by either party, as any evidence or admission of any fact therein alleged: And it is further ordered, that the said Court of Session do, and shall make such orders, and give such directions relative to the costs already paid, or ordered to be paid by any of the parties in this cause, as to such Court shall seem meet; and do further proceed in the said cause in such manner as shall be just and consistent with this judgment."

Oswald, &c. now presented a petition to have the judgment applied, and prayed the Court, inter alia, "to recal the above recited interlocutors, or any order for interim execution—to grant warrant to tl

execution," and, quoad ultra, appointed answers.

The answers given in, M'Whir contended, that the directions at the House of Lords were in exercise of the power conferred by the 18th section of the 48 Geo. III. c. 151, and required the Court to pronounce such order as to expenses already paid, or ordered to be paid, as they in their discretion might deem fit; and that it was not imperative on them to order repetition of expenses paid under the interim execution, which would be the result of granting warrant for delivering up the bond of cautions while on the merits of the claim for expenses they contended, notwithstanding the reversal of the judgment on the joint statement of facts, they were still entitled thereto, or at all events that their obligation to repeat would depend very mainly on the ultimate issue of the

On the other hand, Oswald, &c. maintained that the reversal of the judgment under which alone the expenses were due, necessarily implied that they must be repeated, which, besides, was the express condition upon which alone they were paid; and that although the question of ultimate liability for the expenses in question on either side might lie on the issue of the cause, there was no valid ground for allowing the defendants to retain them when paid under judgments which were now reversed, and when the circumstances in respect of which they were paid were so entirely changed.

GLENLEE.—I am inclined to reserve the question as to expenses to the issue of the cause. In the provision on this subject in the statute, the legis-

- No. 29.** as matter of course; and that it is in our discretion either to order repetition or reserve the question.
- Nov. 28, 1835.
Murray's
Trustees v.
Mowat.
- LORD JUSTICE-CLERK.**—This is not the stage to decide whether defender is to have repetition. I am not prepared to say how expenses shall go, but I think the House of Lords give us this in our discretion.

THE COURT accordingly in hoc statu refused the petition, and reserved the question of expenses till the conclusion of the cause.

A. GOLDIE, W.S.—W. MARTIN, W.S.—Agents.

- No. 30.** MRS KEITH MURRAY'S TRUSTEES, Suspenders.—*Keay—Whigham,*
ROBERT MOWATT and OTHERS, Respondents.—*D. F. Hope—Handyside.*

Property—Possession—Interdict.—Circumstances in which the proprietor of a forest, from the borders of which certain parties were in the use of casting and carrying away peats, having presented a bill of suspension and interdict, the bill was passed, but interdict refused.

- Nov. 28, 1835.
2D DIVISION.
Ld. Medwyn.
T.
- It was found by a judgment of the Court, of date, 5th July, 1817, in certain conjoined actions of declarator, “that the whole of the forest, muir, and common of Cowie, belongs in property to the said Alexander Keith of Dunottar, subject to the rights of servitude, and others, which the other heritors may be able to instruct over the same, and decerned and declared accordingly.”¹

The respondents, Mowat, &c., tenants on the neighbouring estate of Cowie, were in the use of digging and casting peats on the borders of the forest. The trustees of Mrs Keith Murray, Sir Alexander's daughter and representative, presented a bill of suspension and interdict, to have them prohibited “from casting, digging, and taking away turf, sods, or peats, from the said forest of Cowie, until they instruct that they have a right to do so.”

The respondents maintained, that, as the acts complained of were not new acts, there was no ground for an interdict; and that they were entitled to continue in the exercise of the rights of servitude they had hitherto enjoyed, until an opportunity should be afforded of ascertaining the extent of those rights in a competent process.

The Lord Ordinary, who, on the bill being presented, had granted interim interdict, afterwards passed the bill, and recalled the interdict.

The suspenders reclaimed, praying the Court to interdict the respondents, at least “from casting, digging, and taking away turf, sods, or peats, from the Forest of Cowie, belonging in property to the complainers, for the purpose of sale, or for any other purpose than for the use of themselves and their families.”

¹ 5th July, 1817. Affirmed on Appeal, 6th April, 1824.

THE COURT, on the ground that the acts complained of inferred no alteration in the state of possession, adhered to the Lord Ordinary's interlocutor.

DAVIDSONS and SYME, W.S.—PETER CROOKS, W.S.—Agents.

GEORGE YOUNG and TUTOR AD LITEM, Petitioners.—*More.*
EBENEZER WATSON, Respondent.—*Anderson.*

Fee and Liferent—Bankrupt—Clause.—Terms of a marriage-contract which held to import that there was not a fee in the husband, but a mere liferent.

By contract of marriage between George Young and the late Miss D Jean Brown, they assigned and disponed “to each other, and the longest liver of them two in liferent, and the children to be procreated of the marriage in fee, which failing, one-half to the nearest heirs or assignees of the first deceiver, and the other half to the nearest heirs or assignees of the survivor, all and sundry lands,” &c., “and all and sundry goods, gear,” &c., “which may happen to pertain and belong, or be due and addibted to the said parties, or either of them, at the time of the first deceiver's death.”—“And whereas the said Jean Brown has right to a certain share of the means and estate which belonged to the deceased Charles Roger, Esq., which has not hitherto been realized, therefore it is understood, that, when recovered, in whole or in part, the said parties bind and oblige themselves to lend out the same from time to time, on good personal or heritable security, and to take the bonds or other vouchers therefor, payable in terms of the foregoing destination, and so far as respects all sums to be recovered from the estate of the said Charles Roger, as the same shall be instructed by authentic documents under the hands of the said parties or otherwise, the said George Young hereby resigns and renounces his jus mariti, and all other right and pretension competent to him by law, in consequence of such marriage, saving and reserving his interest, in terms of the said destination. But declaring, that no part of the said sum so to be recovered shall be affectable by the debts or deeds of the said George Young, or by the diligence of his creditors, it being understood that the same shall be preserved as a fund for the comfortable subsistence of the parties and their children, if any; and that it shall and may be competent for the said Jean Brown, by herself alone, to grant all receipts, discharges, and acquittances in relation thereto, which will be equally valid and effectual to the receivers, if granted by her with her husband's consent; and, further, it is hereby agreed, that, if necessary, diligence shall pass hereon at the instance of James Brown, brother of the said Jean Brown, for implement of these acts, so far as incumbent on the said George Young.” It was pro-

No. 31.
Dec. 2, 1835.
Young v.
Watson.

vided, that, in case there should be more than one child, "the parties hereby reserve full power to divide and apportion the said heritable and moveable subjects among them as they shall see cause, by a writing under their hand; and, failing such writing, then they appoint the same to fall and belong to the said children equally, share and share alike."

There was one child, George Young, junior, born of the marriage before the death of Mrs Young. Young, senior, became bankrupt, and his estates being sequestrated, a claim was presented for his son to be ranked for £1972, which was alleged to be the amount that had been derived from the succession of Charles Rodger, and spent by the bankrupt. The trustee, Ebenezer Watson, rejected the claim, and George Young, junior, presented a petition and complaint. He was a pupil, and had a tutor ad litem appointed.

Pleaded by the Petitioner—

Though the contract was ill expressed, yet the intention of parties was evident, and should receive effect. The clause of mutual general disposition, near the commencement of the deed, was undoubtedly conceived so as to leave the fee in the husband, with a mere contingent destination of one-half to the heirs of each party, if there were no children. But the special provision regarding the succession of Rodger was meant to be placed on a different footing, otherwise it did not require to be mentioned at all. Therefore, Young, senior, renounced his *jus mariti* in regard to it; his wife's receipts were to be effectual without his consent; and it was declared not affectable for his debts. It was impossible he could be the absolute fiar if these conditions applied to the estate: and although it was declared that the estate, when recovered, was to be lent out on bonds "payable in terms of the foregoing destination," referring to the destination in the general mutual conveyance, these words merely related to the ultimate destination of one half to the children of each party, in the case of there being no children. At all events, it was impossible to give these words the effect of annulling the other anxious provisions above-quoted and, unless they could do so, George Young, senior, had no right of fee.

As to the power reserved to both spouses to distribute the estate among their children, at their discretion, it did not give a right of fee; and the reservation of it was a direct indication that the right of fee was wanting, otherwise no such reserved power would have been required.

Pleaded by the Respondent—

The mutual general disposition at the commencement of the contract confessedly gave the fee of all the property which was included under it to the husband. The estate of Rodger, when recovered, was to be lent out on bonds, taken "payable in terms of the foregoing destination," and thus, had the money even been recovered and lent out in terms of the contract, the fee would have been in the bankrupt. The only difference in regard to that special estate was to give a different interest to the

Young, but, on her death, the right of the bankrupt was free of all limitation whatever. It was true that there were incongruities in the deed; but it was only from the deed itself that the intention of parties could be gathered, and as there was a clear general conveyance of the entire fee to the bankrupt, it could not be defeated by any after provisions, the statement of which involved incongruity.

The reserved power of distributing the estate in any proportions among the children, showed that it was not intended to vest the fee of any part of it in any one of the children.

The Lord Ordinary "found that the trustee has not done wrong in rejecting the claim of the petitioner; therefore, dismissed the complaint, but found no expenses due." *

LORD BALGRAY.—I never saw a deed more completely blundered than this. The writer seems not to have understood the import of his own words. But still, upon looking at it altogether, I think the true intention of the parties is clear enough, and that there is nothing in any part of the deed sufficient to defeat that intention. I decidedly consider that the interlocutor should be altered. It is true that there is first a general and mutual dispositive clause, conceived in such terms as to vest the fee of all the property falling under that clause in the husband, who is now bankrupt. And it is also true, that, in the subsequent clause regarding the special estate to be derived from Rodger's succession, it is provided that it is to be lent out on bonds taken "payable in terms of the foregoing destination." But the clause does not end there. There are succeeding members of the same clause, which, in the most unequivocal terms, qualify the right of the husband in a manner which the Court cannot overlook, and yet, it is only by overlooking them altogether, that it is possible to hold there was a full fee vested in the bankrupt. He expressly renounces his *jus mariti*, and every legal pretension competent to him; and the estate is declared not affectable by his debts or deeds. How is it possible, then, to hold that a proper right of fee was in him? It would be a strange fee if the creditors of the *fiar* could not touch it. But besides this, the

* "NOTE.—The first clause in the deed confessedly vests the fee in the father. Now, though the second clause makes a peculiar provision for the funds to be derived from the wife's uncle, this peculiarity merely enlarges the powers of the wife, during her life, by excluding the *jus mariti* of the husband, and does not change the legal character of the destination quoad the children. On the contrary, even as to this particular fund, this money, by the second clause, is made payable 'in terms of the foresaid destination,' and the husband's interest under that destination is expressly reserved. The case of the husband committing a fraud on the contract, by taking and using the money during his wife's life, in violation of her right, and the child claiming any thing in consequence of this, as in her right, has not occurred; for it is admitted that the husband only obtained the money after her death, and it is now claimed in virtue of the child's own right. There are no words which confer such a *jus crediti* on the child as entitles him to compete with the father's onerous creditors; especially since, even as to the uncle's fund, the father had an absolute power of division among any children he might have.

"The Lord Ordinary has not given expenses, however, because it was not unreasonable in the petitioner to take the opinion of the Court on this rather peculiarly stated deed."

No. 31.
—
2, 1835.
ang v.
son.

deed expressly declares that this same estate is to be an alimentary fund for the husband and wife, and their children. I have no doubt whatever that it was the intention of the parties to give no right of fee in this estate to the bankrupt, but to restrict him to a mere life interest; and I think the clauses of the deed, perplexing as they are, suffice to carry that intention into effect. As to the power of distribution among the children, it does not alter my opinion; and such a power was fully considered, and so viewed, in the case of *M'Kenzie of Redcastle*.

LORD GILLIES.—I think the interlocutor should be altered. The deed is of a very confused description; but, even taking the most unfavourable view for the child of this marriage, George Young, junior, and holding that the first and general dispositive clause gives the fee of the property thereby disposed to the bankrupt—if I am farther to assume that the true effect of the words in the subsequent clause, “payable in terms of the foregoing destination,” imported that the special estate was to be settled, so as to give the full fee to the bankrupt also—the result would be, that the several parts of the deed were directly repugnant to each other, and destructive of each other. They would be absolutely irreconcilable; for it is immediately afterwards declared, most anxiously and explicitly, that the *jus mariti* is excluded as to the special estate; that it shall not be affectable for the husband's debts; and that it shall be a fund for the subsistence of the husband, and wife and children. To say that a sum of money, in which the husband's right and interest was thus qualified and restricted, was nevertheless an estate in which he had a full right of fee, is to state what is a contradiction in terms. In dealing, therefore, with this deed, even if I were obliged to construe the words, “payable in terms of the foregoing destination,” so as to hold that the various provisions of the deed were utterly repugnant to each other, still, as I think the intention of parties is perfectly clear, I should construe a deed like this, so as to give effect to that intention. But I do not feel myself bound to construe these words so as to produce a direct contradiction between the respective clauses of the deed. I think it enough to give them a more limited signification. The mere reference to the destination specified in the first clause, may have had a more restricted purport than absolutely to import an unqualified fee; and I think it a much less violent construction to give these words a more restricted signification, and thereby render the deed consistent with itself, and with the obvious intention of parties, than to adopt an interpretation which defeats that intention, and involves the deed in irreconcilable absurdities.

LORD PRESIDENT.—I am of the same opinion. The intention of parties is sufficiently clear; and I see nothing in the deed to constrain the Court to construe it in a manner which both defeats that intention, and places the several clauses of the deed in absolute and glaring contradiction to each other.

LORD MACKENZIE.—I concur. It seems not to be disputed, that, during the subsistence of the marriage, the right of the husband was burdened with the life interest provided to the wife, to the exclusion of his *jus mariti*. But I do not see any words, in any part of the deed, to change the nature of his right into that of an unlimited fee, on the occurrence of his wife's death. If he was not an unlimited fee from the first, I do not see any thing to make him so afterwards. But, farther, it is equally clear that this estate was declared not affectable by his debts, as that it was declared excluded from the *jus mariti*. But how can it be maintained that he is unlimited fee of an estate which his creditors cannot touch.

And looking at these declarations, together with the provision that the estate should be appropriated to the subsistence of the parents and family, I think there is, in truth and substance, as complete a restriction of the bankrupt's right to a mere liferent, even after the wife's death, as if the technical word "allenary" had been used; and, therefore, I am clearly of opinion that this interlocutor should be altered. The intention of the parties is abundantly clear. The deed contains clauses which are utterly at variance with each other; and when the Court is compelled to construe a contradictory deed, I think it the safest, as well as the truest construction, to give effect to the obvious intention of the parties.

THE COURT altered, and subjected the trustee in expenses.

HORNE and ROSE, W.S.—J. W. MACKENZIE, W.S.—Agents.

ARCHIBALD T. F. FRASER, Pursuer—Sol.-Gen. Cunninghame—Maitland.

THOMAS A. FRASER, Defender.—Keay—Dunbar.

Entail—Ameliorations.—Held, 1. That the subscription of a factor or commissioner, to the annual account of expenditure lodged with the sheriff-clerk, under 10 G. III. c. 51, was sufficient to satisfy the statute. 2. That where a series of operations on the mansion-house and estate went on, uninterruptedly, from 1803 to 1814, there was no need of renewed notice to the heir, as the original notice was sufficient. 3. That the introduction of water into the mansion-house, and the erection of a milk-house and ice-house, were an expenditure such as the statute authorised to be charged against the next heir. 4. That the terms of a certain notice were sufficiently wide to embrace all these. And, 5. That the building, or repairing of a garden wall, was an expenditure chargeable, under the statute, against the next heir.

By 10 Geo. III. c. 51, it is enacted, "that every proprietor of an entailed estate who lays out money in enclosing, planting, or draining, or in erecting farm-houses and offices, or out-buildings for the same, for the improvements of his lands and heritages, shall be a creditor to the succeeding heirs of entail for three-fourth parts of the money laid out in making the said improvements." The proprietor (§ 11) "shall, three months at least before he begins to execute the same, give notice in writing to the heir of entail next entitled to succeed, &c., of such his intention, specifying in such notice the kind of improvement intended, and the farms or parts of the estate upon which the improvements are intended to be made," &c. The proprietor shall also (§ 12), "annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the sheriff or steward-clerk of the county within which the lands or heritages improved are situated, an account of the money expended by him in such improvement, during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported, when payment is to be demanded for."—"Every heir of entail who lays out money in building a house or offices, or in repairing or adding to the mansion-house

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or offices upon his estate, shall be a creditor for three-fourth parts of the money expended by him."

In 1803, the late Honourable Archibald Fraser, heir of entail in possession of Lovat, gave the following notice of intended improvements to the heir of entail next after his own son :—

" 1. I have come to the determination, to new roof the family residence of Beaufort Castle, which has had no roof since the estate came to me in 1782.

" 2. That there being but two spare bedchambers in the whole mansion, I mean to add an attic story at the same time, and (3) also to complete the wings.

" 4. I further mean to complete the fences of the Mains of Beaufort.

" 5. And the wall round the garden, in suitable manner.

" 6. And build a square of offices with accommodation for carriages, horses, implements of husbandry, cattle, and poultry, from time to time," &c.

Archibald Fraser subsequently made an expenditure, which was said to amount to £8885, upon the entailed estate. He carried on, without interruption, a series of operations, consisting partly of the erection of farm offices, partly of repairs on the mansion-house of Beaufort Castle, the construction of a garden wall, the making of dykes, fences, &c.

After his death, Archibald T. Fraser of Abertarff, being in the right of exacting three-fourths of this expenditure, so far as it was covered by the statute, raised an action against T. A. Fraser, now of Lovat, for the amount.

In discussing Lovat's defences, the following questions arose :—

1st. The account applicable to the expenditure for 1804, amounting to £1553, had not been signed by the late Lovat, but by his factor. There were some minor accounts in the same situation. The defender therefore *objected*, that, as the statute required the heir of entail to lodge an account "subscribed by him," and as this was intended to secure to the succeeding heir an assurance under the proprietor's own hand that the expenditure had been made, the statute was not satisfied by the signature of any factor.¹ The pursuer *answered*, that a party might sign any instrument either by himself or his procurator, and the signature was equally his own, to every legal effect. But the question must be held as no longer open, because it had been assumed, or implied, in several decisions, that a signature by a factor was enough; and a very extensive practice throughout the country had both preceded and followed these judgments.²

¹ Sandford on Ent. 220; Elliot, Jan. 22, 1793 (F.C.); Finlayson, Dec. 12, 1821 (ante, I. 226, or 196, New Ed.); Campbell, May 15, 1822 (ante, I. 447, or 383, New Ed.); Craufuird, May 26, 1826 (2 W. and S., 429); Thomson, Dec. 11, 1824 (ante, III. 385, or 272, New Ed.).

² *Chisholm*, Dec. 1, 1820 (F.C.); *Torrance*, Dec. 1, 1820 (F.C.), and May 26, 1826 (2 W. and S. 429).

2d. No renewal of notice had been given by the late Lovat ; but the operations, though of a very diversified nature, had been going on uninterruptedly. The notice was given in 1803, and the operations were continued till 1814. In these circumstances, the defender *objected*, that there should have been a renewal of notice, considering the protracted period ; and that an operation in 1814 could not be held to be covered by a notice in 1803. The pursuer *answered*, that, from the nature of the operations, it must often happen that they could not be completed within a year, or a given number of years. But the statute did not require annual notice to the next heir, nor any periodical notice whatever. It was enough if the operations went on, without any marked interruption, till their close ; and, in truth, there always was a certification of the next heir, by the act of annually lodging the accounts with the sheriff-clerk, as enjoined by the statute.

3d, The late Lovat had introduced water into Beaufort Castle, at an expense of £252. He had also built a milk-house and an ice-house. The defender *objected* that these were not such improvements as fell under the act ; but, besides this, they did not fall within the terms of the notice. The pursuer *answered*, that the introduction of water into a modern mansion-house was just as correctly chargeable against the next heir as any other repair or permanent improvement of it whatever ; that a milk-house and ice-house were suitable adjuncts to the castle ; and that the terms of the notice were sufficiently wide to include them, especially the milk-house and ice-house, which were expressly offices of their kind.

4th, An expense of £268 had been incurred in building a garden wall. The defender *objected* that this was not an improvement within the statute. The pursuer *answered*, that a suitable garden and wall was a proper adjunct to the family mansion, and money expended on it should be chargeable under the statute. The cost of “ enclosing ” was expressly allowed, and that might reach the garden of the mansion-house, just as it would reach a garden if laid off along with farm-house and offices for a tenant. And a claim for a “ garden-house ” had already been sustained, which was a precedent for this claim for the garden wall.

The Lord Ordinary pronounced this interlocutor :—“ First, In respect of the interpretation which the act, 10th Geo. III., cap. 51, has received in this particular from very general practice, recognised in some cases by the Court, Finds that the subscription of the accounts by a factor or commissioner is a sufficient compliance with the clause of the act. Secondly, Finds, That, in the circumstances of this case, in which the course of operations under the notice originally given was uninterruptedly continued for years, a renewal of notice was not necessary. Thirdly, Finds, That the notice so given was sufficient to cover the expense of the introduction of water into the mansion-house of Beaufort Castle, as well as the building of a milk-house and ice-house, and other accommodations of a like

Fourthly, Finds, That the building or repairing of the garden

No. 32. wall was an improvement falling within the provisions of the statute, and therefore to the extent of the above findings repels the defender's objections," &c.*

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 Fraser.

* " **NOTE.**—These accounts include so long a period, are composed of so many different items, and are met by the defender in objections so very detailed and critical, that both parties seemed to be aware at the debate of the impossibility of exhausting them in an interlocutor, and confined themselves, for the present at least, to the ascertainment of certain points affecting large heads of the general expenditure, and it is with this view that the above interlocutor is pronounced.

" The first and most comprehensive objection is, that a great part of the accounts for improvements were not signed by the late Lovat himself, but by his factor. Considering that the law of Scotland recognises the sufficiency of a signature by procuration, that the statute is neither in letter nor spirit absolutely conclusive against such a mode of attestation, that the practice is unquestionably very general, and that in some cases referred to by the pursuer, as those of Chisholm, Blytheswood, &c., the practice, though not the subject of express decision, has been at least recognised by the Court, the Lord Ordinary considers himself bound to refuse effect to the objection.

" 2dly, The statute does not seem to require a renewal or repetition of notice when parties proceed during a course of years in the execution of improvements covered by the notice originally given, and the decision of the House of Lords in the case of Torrance¹ was evidently pronounced on the specialty, that new and separate intermediate notice had been given from year to year, and that, during three years following the last notice, all farther operations had been suspended; in which circumstances it was held that the party was not entitled to go on with the improvements under the notice first given, and without a new intimation to the next heir of entail.

" 3dly, Considering the fair construction which the statute is entitled to receive, the Lord Ordinary thinks that the operations mentioned in the third finding were sufficiently covered by the notice, it being always understood, that they were actually planned and executed in such a way as to form improvements in the ordinary sense of the term.

" 4thly, It appears to the Lord Ordinary that the garden wall is equally protected as an improvement under the statute. He understands that this item, too, has been repeatedly authorized by the Court, though, perhaps, not the subject of express decision. In the case of Torrance, under the head of improvement on the mansion-house, the claim for a 'garden house' was strongly contested, and was ultimately sustained; though it must be admitted, that it does not distinctly appear from the report what the true nature of this improvement was. Upon this point, too, it was a circumstance not to be lost sight of, that while the notice given to the defender, or those acting for him, expressly mentioned the garden wall, and while a protest was taken, on the part of the defender, at the time, against certain heads of the notice, as not forming improvements within the statute, no objection was stated to the article in question.

" Besides these objections, there are a great many others which truly involve questions of fact. Thus, in regard to many of the articles, such as the introduction of water into the house, the building of towers, the ice-house, &c., it is said that they were either in themselves utterly useless, or constructed in such a way as to

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The defender reclaimed.

LORD BALGRAY.—(1.) In regard to the first question raised, I have no doubt that a signature by a factor is quite enough to satisfy the statute. In giving the statutory notice, it is sufficient, if that be done to the heir, or to his known factor or attorney. Now, if a factor can act for the principal in regard to that most important step, I conceive he may equally do so in subscribing the account of expenditure.

(2.) I have as little doubt respecting the objection that the original notice to the heir was never renewed. The annual lodging of the accounts with the Sheriff-Clerk, was, in itself, a continuous notice to the whole familia of the heirs of entail.

(3 and 4.) On considering the true scope and meaning of the statute, which has in view the erection of suitable and convenient residences on entailed estates, and of course their being fitted up with whatever is requisite for the comfort of the heir in possession, I am satisfied that the different repairs or improvements in building a milk-house and ice-house, and bringing water into the castle, and building the garden wall, are fairly chargeable items under the statute. I am for adhering in all points to the interlocutor.

LORD PRESIDENT.—I am of the same opinion.

(1.) If the Court were now to throw out any doubt as to the sufficiency of a factor's signature, it would raise a very serious question indeed for this country. I certainly should not decide against such signature before consulting with all the Judges. But it does not appear to me to be a doubtful point. Indeed in all great estates the signature of the factor is a more satisfactory attestation than that of the proprietor that the money has been actually expended; for the proprietor very often knows little about the matter.

(2.) As to the want of a renewal of notice, I have no doubt that it was in this case unnecessary.

(3 and 4.) As to the other points which have been raised, I approve also of the Lord Ordinary's judgment.

LORD MACKENZIE.—(1.) I think we must sustain the signature by the factor as sufficient. If the point was perfectly new and open, I might think it doubtful. For, although the money is generally expended by and through the factor, and, therefore, the account of the expenditure might reasonably be signed by him also, yet it might have been doubted whether that was the signature which the

become utterly useless during the lifetime of the late proprietor; on the other side these averments are denied. It is clear that these questions can only be extricated either by a remit to a person of skill, or some other competent investigation of the facts. The same remark applies to various other articles, such as the charge for sheds for the workmen employed in the repairs, and for the agent or other person paying the workmen's wages, &c. Although these items are not of course substantially improvements under the statute, still if they were bona fide parts of the expense of executing such improvements, as it is quite possible they might be, if executed by the proprietor himself, instead of by contract, there would be no room for any objection. Accordingly, it is upon the proper mode of extricating all these questions that the Lord Ordinary wishes to hear the farther suggestions of the parties."

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statute exacted, or whether the actual attestation of the proprietor's subscription was not essential. But I cannot view it as an open point. The practice of the country has interpreted the act as requiring only the factor's signature, and this practice has received the sanction of the Court. I think it impossible, therefore, for us to go back upon the question. If the House of Lords should take a different view, we cannot help it ; but certainly we ought not to change of ourselves.

(2.) I am quite satisfied that no renewal of notice was necessary.

(3 and 4.) I have no doubt that the cost of introducing water into Beaufort Castle was an item of that sort which is fairly chargeable under the act. But I am not so sure if the garden wall be so. The milk-house and ice-house are offices of their kind, and are items of a description which may be charged against the next heir.

LORD GILLIES.—(1.) I am not prepared to say that I differ in opinion from the rest of the Court, in regard to signature by a factor. But had this been the first case in which the point was raised, I should have had great doubt as to the sufficiency of such a signature. No doubt, the notice under the act may be given to a factor or attorney ; but, so far from inferring that this special provision should also render the signature of accounts by a factor sufficient, I should incline to draw the opposite conclusion. If I find, in one part of the act, express words to sanction the acting of a factor, in lieu of the proprietor, I am the more inclined to think that a factor is not sanctioned in other cases, to which no such express provision applies. But although I mention the light in which I should have been inclined to regard this question if it was truly a new one ; yet, on considering the practice of the country, and the sanction already given to it by the Court, I rather concur with your Lordships, and would not alter the interlocutor of the Lord Ordinary.

(2.) I have no doubt that the original notice to the next heir was sufficient in this case, though no renewal was made.

(3. and 4.) I look on the garden as an adjunct to the mansion-house. If the introduction of water into the Castle be an item which may be charged against the next heir, as all your Lordships consider it to be, I have no hesitation in thinking that the cost of a garden-wall is as legitimate a charge.

THE COURT adhered.

Æ. MACBEAN, W.S.—J. MORISON, W.S.—Agents.

No. 33.

JAMES MORTIMER and MANDATORY, Advocators.—*More.*

GEORGE NICOL, Respondent.—*M'Neil—Moir.*

Process—Foreign.—Statements on the record of a cause which held sufficient to entitle a party to have an opinion as to the law of England.

c. 2, 1835.

DIVISION.
Lord Jeffrey.
T.

IN a multiplepinding raised before the Sheriff of Aberdeen by the respondent, George Nicol, as executor-dative of the deceased John Nicol, a claim was lodged by the advocator, Mortimer, a party domiciled in London, for an alleged debt, said to have been constituted by an ad-

vance to the deceased, made by a cheque by Mortimer on his bankers in favour of the deceased, "or bearer." Mortimer appealed to the cheque as evidence of the loan.

Answers to this claim were given in by Nicol, who contended, that the cheque afforded no legal evidence that the money thereby advanced was truly in loan.

In his Replies, Mortimer, inter alia, stated as follows:—"The claimant has only one other observation to make, viz. that this question must be decided by the *lex loci contractus* (Tait's Law of Evidence, p. 301). If your Lordship, therefore, shall entertain any doubt that the evidence offered is sufficient for instructing his claim, the claimant will find it necessary to move, that the opinion of English counsel be taken upon the case."

A record was thereafter made up, by condescendence and answers. In the body of the condescendence for Mortimer, there was no averment of English law as a substantive fact, but the plea was in these terms:—"The question here at issue having arisen out of an English transaction, must be determined by the rules of the English law."

The Sheriff found that Mortimer's claim was "not instructed, and no competent proof offered to instruct the same;" and, therefore, repelled it accordingly.

Mortimer thereupon brought an advocacy, in which, besides the question, how far the cause on its merits could properly fall to be determined by the law of England, it was maintained by Nicol, that there truly was no sufficient averment as to the law of England, which, in the Scotch courts, was properly matter of fact, and, therefore, requiring to be stated substantively as an allegation of fact, and not as a plea in law.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: *—"Advocates the cause, alters the interlocutor of the Sheriff com-

* "There is certainly some difficulty as to the sufficiency of the complainer's recorded averment, as to what the rule of the law of England actually is. This, no doubt, is, in this Court, a matter of fact merely, and must be set forth as such on the record; nor can it be received as a sufficient answer to the objection, that the fact is distinctly set forth, though in a wrong part of the record, viz. in the pleas in law. Where this is the case, however (as it seems plainly to be here, see 3d additional plea for complainer), the objection must be allowed to be critical, especially considering how naturally an averment of this particular kind may be mistaken for a plea in law. But the answer which the Lord Ordinary is inclined to sustain is, that the averment is in substance sufficiently made, though in rather an indirect form, in the concluding section of the replies in the Inferior Court, where the complainer, after contending that the case must be governed by the law of England, proceeds to state, that if the evidence offered is not allowed to be sufficient (of course by that law) to instruct his claim, he craves that an opinion of English counsel may be taken. To the Lord Ordinary it appears impossible to doubt that this neces-

No. 33.
 Dec. 2, 1835.
 Fortimer v.
 Nicol.

plained of, and finds that the constitution of the complainer's debt, by an advance of money made in England by a person domiciled in that country, and by a cheque granted on his London bankers by that person, may be proved by such evidence as would be sufficient to constitute such a debt, according to the law of England. And before farther answer, appoints the cause to be enrolled, that the respondent may state whether he admits that the facts set forth on the record would be sufficient to support the claim of the complainer according to the law of England, or requires that law to be put regularly in evidence."

Nicol reclaimed, on the ground of there being no sufficient averment of English law, in as much as the plea could not supply the want of any averment, in fact, in the condescendence; while, as to the statement in the replies, he pleaded, that it was too vague; and, besides, that it was incompetent when condescendence and answers were ordered to supply any omission in them by reference to other pleadings.¹

LORD JUSTICE-CLERK.—The proper facts of the case are distinctly set forth, and I do not think that it is necessary to aver substantively the English law as fact.

LORD GLENLEE.—It is sufficiently stated, that the cause will fall to be regulated by the law of England. The party may not know the law of England, but, *ex parte judicis*, the Court would require the opinion of English counsel if they saw it was necessary to decide the case.

LORD MEDWYN.—I have no doubt that the law of England is with us matter

sarily, and without any stretch of construction, imports an averment and an undertaking to prove that, by the law of England, such evidence is actually sufficient.

"On the merits, the Lord Ordinary conceives that there is a clear distinction between the extinction of obligations and their constitution. As to the former, the *locus solutionis*, where that is clear, will generally give the rule; as to the latter, the *locus contractus*. Now, the question here is as to the constitution of the contract of loan, which undoubtedly took place (if at all) by an advance made in England by a domiciled Englishman. If, in proof of this contract, he had taken a bond in the English form, it would clearly have been sufficient to support his present claim that it was regular according to the *lex loci*, though altogether improbate by the law of Scotland. But if parole proof be equally available as such a bond, by the *lex loci*, it seems equally impossible to reject it. The case of *Glynn*, 8th June, 1830 (8 Shaw, 889), which was founded on by the respondent as adverse to this doctrine, will be found, when carefully considered, truly to support it. For, in so far as regarded any thing but the extinction of the obligation, it was not as the law of the *locus solutionis* that the law of England was preferred, but as the law of the *locus contractus*—that is, of the new and accessory contract of deposition, which was relevantly averred by the defenders to have taken place in London; and as to the constitution and effects of which, therefore, the law of England alone could determine.

¹ Ross, June 15, 1830 (*ante*, VIII. 916).

fact; but it is not of the facts requiring to be stated on record. The proper facts being given are sufficient to show that the cause must be determined by the law of England, and that is enough to warrant the Court to have the English law ascertained.

THE COURT accordingly adhered.

JAMES ROSS, S.S.C.—GORDON and BARRON, W.S.—Agents.

JAMES LISTON, Advocate.—*D. F. Hope.*

MISS ISABELLA GALLOWAY, Respondent.—*Keay—Tawse.*

Possessory Judgment—Servitude—Property.—Held that a party may be entitled to the benefit of a possessory judgment regarding a servitude of fish and entry in a plot of ground, though he held such ground under a bounding charter, making no reference to such servitude, and containing no clause of parts and pertinents.

MISS ISABELLA GALLOWAY, in 1817, obtained from Robert Dow a disposition to a plot of garden-ground in Blairgowrie, which was described as “consisting of forty falls or thereby,” &c., “bounded on the south by the road leading westward,” &c., “on the west by the garden,” &c., “on the north by a dyke lately built, dividing the plot of ground now disposed from the property belonging to James Liston, which dyke is mutual property, and, as such, to be upheld in future by the said James Liston and the said Miss Isabella Galloway; and on the east by the garden-ground,” &c.; “together with all right, title, or interest I have, or can pretend to the property of the said plot of ground or garden above disposed, in time coming,” &c.

There was no conveyance of parts and pertinents, and there was no right of servitude of fish and entry, referred to as existing through any other ground. She was not infeft under her disposition. The property of Liston, adjoining Miss Galloway's ground on the north, was the close or yard attached to an inn belonging to Liston, and it lay between Miss Galloway's ground and the High Street of Blairgowrie. The dyke between the properties was mutual, and had been erected at joint expense, about twenty years ago, and it was so built as to leave a gateway, through which persons could have access from the inn yard to the garden. Liston, considering that his property was not burdened in the titles with any servitude of fish and entry in favour of Miss Galloway, shut up the gateway. Miss Galloway complained to the sheriff, who allowed a proof, when it appeared, that for much more than seven years past, Miss Galloway and her tenants had constantly used the close belonging to Liston, from the street to the garden. Liston attempted to prove
from tolerance, or from the circumstance of the same

No. 34.

ed. 3, 1835.
Liston v.
Galloway.

party having at one time occupied both the close and the garden, but he failed to do so. Independently of this, however, he contended that Miss Galloway held right to her ground by what was strictly a bounding charter; that no length of possession could acquire a right of property beyond that boundary, owing to the total want of title; and that a title of some kind was as necessary to found a possessory judgment at the end of seven years, as it was to found a declarator of property at the end of forty years; and in this case there was the less effect due to any alleged possession, as Miss Galloway's title remained merely personal. There could be no hardship in shutting up the access through the inn yard, as the garden was bounded by a road on the other side, and access could be had from that road.¹ Miss Galloway answered, that a personal right was enough, without infestment; and that, though she could not prescribe a right of property in the face of her title, there was nothing to prevent her acquiring any known right of servitude, especially such as that of ish and entry, which was not at all contradictory to her title; that, unless this was allowed, it must occur wherever a plot of ground was bought, with its boundaries specified, that the purchaser could have no legal access to his ground, unless it happened that one of the boundaries was a public road. The access through the inn yard was the most convenient for her garden; and especially, considering the fact that a doorway had been left in building the mutual wall, it was impossible to invert the state of possession summarily, and without a declarator.²

The sheriff found Miss Galloway entitled to the benefit of a possessory judgment, and interdicted Liston from molesting her in the use of her accustomed access through the inn yard. Liston brought an advocacy, in which the Lord Ordinary ' Found it proved, that, during a period far exceeding seven years, the proprietors and possessors of the garden now belonging to the respondent have constantly used the close belonging to the advocator as an access to the said garden: Found it not proved that the access to the garden in that line arose from tolerance on the part of the proprietors of the close, or from the circumstance of the same parties happening to be, for a considerable time, the possessors of both: Therefore repelled the reasons of advocacy, remitted the case *simpliciter* to the Sheriff of Perthshire, and decerned: and found the respondent entitled to expenses." *

¹ Saunders, &c., Feb. 26, 1830 (ante, VIII., 605). Baird, Nov. 16, 1695 (10623). Hunter, Jan. 26, 1827 (ante, V., 238). Neilson, Dec. 10, 1828 (ante, VII., 182). Bell's Princ., § 2251.

² Knox. May 26, 1827 (ante, V., 714). Thomson, March 4, 1830 (ante, VIII., 630).

* "NOTE.—The Lord Ordinary entertains no doubt on the import of the proof; and, in regard to the respondent's title, it appears to him, that a bounding charter, though it may be conclusive against a claim of property beyond its limits, is not necessarily exclusive of any of the known rights of servitude over adjacent pro-

Liton reclaimed.

LORD BALGRAY.—I think the interlocutor quite right. There is no rule of law, more salutary in itself, or better established, than that which declares that a party who has enjoyed peaceable possession of a right for seven years, is entitled to be protected in it against summary inversion of the state of possession. The respondent was entitled to that protection in the mean time, and that is all which has been found in her favour.

LORD GILLIES and **LORD MACKENZIE** intimated that they were of the same opinion.

LORD PRESIDENT.—I entirely concur; and I own it would appear to me that the judgment in the case of *Saunders*, which has been referred to, would deserve to be reconsidered, if it is opposed in principle to the decision which we are about to pronounce in this case.

THE COURT adhered, and awarded additional expenses.

J. ANDERSON, S.S.C.—**TAWSE** and **BOWAN, W.S.**—Agents.

JAMES WALKER and **GAVIN INGLIS**, Petitioners.—*Rutherford—Russell.*
KELTY'S TRUSTEE, Respondent.—*D. F. Hope.*

Process—Bankrupt.—1. In a petition and complaint against the trustee on a bankrupt estate, competent for the Lord Ordinary, after closing a record, to pronounce judgment himself if he sees cause. 2. Where a complaint was found incompetent, in so far as contrary to a resolution of creditors, which had not been complained of within the thirty days, the Court, in the circumstances, remitted to the Lord Ordinary to sist farther proceedings for a reasonable time, till a reduction or challenge of the resolution should be brought.

In a petition and complaint against the trustee on John Kelty's sequestrated estate, he pleaded in defence, a resolution of creditors passed at a general meeting, on February 6, 1826, and not complained of within the statutory period of thirty days. A record was made up,* and the Lord Ordinary "dismissed the complaint as incompetent, in so far as it interfered with the resolution of the creditors of the 6th of February, 1826, and decerned; and found the petitioners liable in the expenses attending the discussion of this defence." The petitioners reclaimed, and pleaded, 1st, That it was incompetent for the Lord Ordinary to give judgment himself, and that he could merely prepare the cause; and, 2d, that the judgment was, in the circumstances, ill-founded, or at least pre-

judicial, such as that of *ish and entry*, forming the subject of the present discussion, and therefore does, if supported by the requisite proof of possession of such service, afford a sufficient title for a possessory judgment."

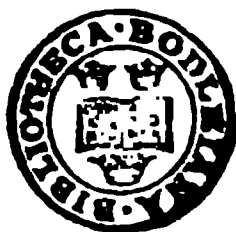
On closing the record, a reservation was inserted, with the sanction of the Court, "that each party should be allowed afterwards to produce such evidence as might be necessary, and are competent otherwise, notwithstanding closed."

No. 35. mature. The trustee answered, that, by the Judicature Act, § 27, and the Act of Sederunt (July 11, 1828), § 92, power was expressly given to the Lord Ordinary to pronounce judgment himself, if he saw cause; and, 2d, that the judgment was well-founded.

Dec. 3, 1835.
M'Ra v.
Pedie.

The Court unanimously held it competent for the Lord Ordinary to pronounce judgment himself; but recalled the interlocutor, and found that the complaint could not be competently insisted in, *hoc statu*, so far as contrary to the resolution of February 6, 1826, reserving to the complainers to bring a reduction or other challenge of the said resolution, on the ground of fraud, deception, or defect of due notice, or any other ground competent in law, and to the respondent all defences, as accords. *Quoad ultra*, their Lordships, in the circumstances, remitted to the Lord Ordinary to sist farther proceedings for a reasonable time, till the said reduction, or other challenge should be brought, and found the complainers liable in the expenses of discussing this defence in the Outer and Inner House.

MACKENZIE and MACFARLANE, W.S.—W. MURRAY, W.S.—Agents.



No. 36.

DUNCAN M'RA, Pursuer.—*D. F. Hope—A. Wood.*
JAMES PEDIE, Defender.—*Keay—Buchanan.*

Agent and Client—Expenses—Auditor's Report.—Where an agent conducted lawsuits which were current for a series of years, and drew at intervals on his client, for payments to account, and it appeared that, though these drafts generally exceeded the amount past due, yet such payment by bills was resorted to for the accommodation of the client,—Held, that the client should be debited with the cost of the stamps and discounts on these bills.

Dec. 3, 1835.
1st Division.
J. Fullerton.
D.

JAMES PEDIE, W.S., was employed by Duncan M'Ra, tacksman of Strathnashalg, to conduct two processes in the Court of Session. The employment commenced in 1818, and continued till 1828. Pedie did not render an account in the one process, till 1827, or in the other, till 1828. When rendered, the amount was, in one process, £103, and in the other £187. At a subsequent taxation, these accounts were respectively reduced to £87 and £141, the whole sum taxed off being thus £62. During the currency of these accounts, Pedie repeatedly drew upon M'Ra, at intervals of one or two years, for sums varying from £20 to £50. The first draft was not made until after the account had been current for about two years. Generally the sum drawn was about the amount actually due according to the untaxed account; but, after taxation, it appeared that the greater part of the drafts exceeded the sum due at each respective period, the excess varying from £4 to £16. The last draft passed on M'Ra was for £105, in 1828; and, after receiving its contents, Pedie was impressed with funds pretty nearly corresponding to the amount of his untaxed account. A farther account of £45 was incurred to him; but, after tax

ing off £62, as already mentioned, there remained a balance due by him to M'Ra, and a dispute arose regarding its amount, to recover which M'Ra raised an action against Pedie. The chief difference between the parties, depended on the question whether Pedie was entitled to debit M'Ra with the stamps and discounts on the drafts which had passed between them. M'Ra contended that, as Pedie passed his drafts before rendering his account, and generally had overdrawn the amount actually due, it must be held that he drew for his own accommodation, and therefore the expense of stamps and discounts should fall on him.

Pedie answered that he was entitled to be impressed by his client with ~~some~~ funds in advance before incurring the outlay consequent on employment. But, in truth, he had not been so to any material extent, as the account was two years current before he drew at all—he only drew at considerable intervals, and after a fresh account had been incurred—the draft would not have placed him in advance at any period at all but for the subsequent taxation; and, even after taxation, he was only placed in advance to a small extent, while a fresh account was at the same time going on. As M'Ra chose to pay by bills in place of remitting ready money, he must pay the stamps and discounts, the accommodation being for his own convenience, and he would have had his account rendered at any time if he had asked it.

A remit was made to the auditor, who considered that the bills had been resorted to for the accommodation of Pedie, and he found that M'Ra could not be debited with the stamps and discounts.

Pedie lodged objections to the auditor's report, and the Lord Ordinary "having heard counsel for the parties, on the defender's objections to the report by the auditor, on the state of the account between the parties, sustained the objections, found the sum reported by the auditor as due by the defender, is £28, 3s. 1d., found the sums objected to by the defender, and hereby sustained, amount to £8, 17s., found him liable to the pursuer in the difference between these two sums, being £19, 3s. 1d., and found the pursuer liable in expenses."*

* *NOTE.*—Had the report of the auditor, in regard to the disputed articles, rested on any rule of practice, the Lord Ordinary would not have been disposed to disturb it. But that is not the case, and the articles are disallowed, on the ground, as he understands, that the bills having been drawn by the agent on the employer before the accounts were given in, and before sums to the full amount were due, must be held to have been granted for the accommodation of the agent. The Lord Ordinary does not consider this circumstance to be conclusive. It is quite common and reasonable for an agent to ask, and a client to lodge, money in advance; and although an agent may not be entitled to draw on his client while his accounts are unsettled, yet, if the client chooses to accept and pay drafts without objection, ~~the agent is not liable for asking or asking for his accounts, the presumption is, that payments~~ *implied, on which supposition, the expense of stamps, &c. on payable against the client.*

No. 36. M'Ra reclaimed.

Dec. 3, 1835. The Court, without calling on the counsel for Pedie, adhered, and
'Lae v. Reid. awarded additional expenses against the claimer.

LORD PRESIDENT.—An agent is entitled to have money impressed into his hands before incurring the outlay, or undertaking the trouble, consequent on employment. There were current law-suits going on for a series of years. The client M'Ra lived in the country. Pedie was entitled to be placed in funds from time to time, and that could only be done by his making remittances in cash, or by accepting the drafts passed on him. The adoption of the latter course I consider to have been truly for his accommodation, and not Pedie's, and he is therefore the person to be debited with the stamps and discounts. Indeed I wish that agents in general insisted more upon being impressed with funds in advance. It would have a wholesome effect in checking rash litigation.

The other Judges concurred.

J. MACDONELL, W.S.—J. PEDIE, W.S.—Agents.

No. 37.

HUMPHREY EWING M'LAE and OTHERS, Pursuers.—*Forsyth.*
JOHN EATON REID, Defender.—*Ivory.*

Process—Production of Writings.—A case submitted by executors to counsel, and opinion thereon sought to be recovered by a diligence at instance of a party interested in the estate, ordered to be produced before answer, to the clerk of Court, to see if it had reference to the proper affairs of the estate, or to the private interests of the executors.

Dec. 3, 1835.

1st DIVISION.
Lord Jeffrey.
R.

In a multiplepinding raised by M'Lae and others, testamentary executors of the deceased John Ewing, and who had also individually an interest under the testament of the deceased, the Lord Ordinary granted a diligence to the defender Reid, one of the parties interested under the settlement, who objected to the management of the executors in their accounting for their intromissions, to recover inter alia a case submitted by the executors for opinion of counsel, and the opinion obtained thereon.

M'Lae, &c. reclaimed, alleging that the case and opinion had reference to the private interests of the executors under the testament, and not to the proper affairs of the estate.

THE COURT, before answer, appointed the case and opinion to be produced to Mr Thomson, clerk of Court, to see if it had reference to the proper management of the estate.

D. FISHER, S.S.C.—J. ADAM, S.S.C.—Agents.

“As these articles form the whole point in dispute, and truly gave rise to the litigation, the Lord Ordinary holds the defender, who has been successful on that point, to be entitled to expenses.”

SIMON FRASER of Ford, Petitioner.—*G. G. Bell.*

Judicial Factor.—A factor loco tutoris to a lunatic authorized, in the peculiar circumstances of the case, to grant charters and other deeds necessary for completing the titles of the lunatic's vassals and heritable creditors.

MR SIMON FRASER had been appointed, in 1814, factor loco tutoris to William Douglas of Garvald, then and now in a state of confirmed lunacy. He presented a petition, setting forth that application had been made to him to grant a precept of clare constat in favour of the heirs-portioners of an heritable creditor on the estate of Garvald, and that it might also be necessary to enter the heirs or singular successors of the lunatic's vassals, in regard to both of which matters he was doubtful as to his powers under the factory, and he prayed the Court for special authority to grant all charters of resignation and confirmation, precepts of clare constat, and other deeds necessary for completing the titles of Mr Douglas's vassals and heritable creditors. It was stated at the bar that the lunatic was eighty-two years of age, and that there were strong reasons of expediency for granting the prayer of the petition. The two heirs next in succession also gave their judicial consent.

The Court, referring to certain observations in the House of Lords in regard to the powers of the Court of Session in such cases,* expressed great doubts as to their powers in the present instance, but were of opinion that the prayer of the petition should be granted in the peculiar circumstances of this case.

Their Lordships, therefore, "in respect of the consent stated at the bar of the two nearest heirs of William Douglas of Garvald, and of the urgency of the case in consequence of the great age of the said William Douglas, and the other peculiar circumstances of the case," authorized the petitioner to grant all charters, &c.

Petitioner's Authorities.—Craigie, June 17, 1758, M. 16361; Busby, February 1, 1823, ante, II. No. 160; Blaikie, February 1, 1827, ante, V. 268; Campbell, January 20, 1829, ante, VII. 296, and especially Pulteney, February 21, 1832, ante, X. 362.

WILLIAM BAILLIE, W.S.—Agent.

* See Bryce v. Graham, 2 W. & S. 513, and 3 W. & S. 323.

No. 39. JOHN BURNET and OTHERS, Suspenders.—*Robertson—J. Anderson.*

Dec. 4, 1835.
Burnet v.
Wallace.

GLASGOW COMMISSIONERS OF POLICE, Respondents.—*D. F. Hope—
Penney.*

JAMES WALLACE, Respondent.—*Rutherford—Russell.*

Public Office—Commissioner of Police.—Opinion by the Court, that, in voting for a general commissioner of police in Glasgow, by depositing a written note or ticket within the box set up to receive the votes, an elector has exercised his right of voting, and cannot at his discretion recal the vote.

Dec. 4, 1835.

1st DIVISION.
d. Corehouse.
B.

IN a contested election for the office of general commissioner of police in one of the wards of the city of Glasgow, John Burnet and James Wallace were competitors. The manner of voting was by putting into a box written notes or tickets bearing the name of the candidate and the subscription of the elector. In consequence of a keen competition, many persons who had, at an early period of the day of election, voted for Burnet, were induced afterwards to give votes recalling these, and voting for Wallace; and the converse practice also took place, though to a less extent. Some of these recal votes, as they were termed, were afterwards recalled by re-recal votes, and a resolution of the Board of Commissioners determined that in scrutinizing the votes any elector might, within the period of election, “ recal and re-recal votes ad infinitum,” the last vote being the only one which was to be computed. After a scrutiny of the votes Wallace was declared elected, and Burnet presented a bill of suspension, in which he was successful. The letters of suspension only came before the Inner-House upon the point of expenses, on which point their Lordships, in the circumstances, adhered to the judgment of the Lord Ordinary, and found Burnet entitled to his expenses against both the commissioners and Wallace. In disposing of this question, Lords Balgray and Mackenzie took occasion incidentally to express a decided opinion against the validity of either a recal or re-recal vote.

LORD MACKENZIE observed, that where a vote was given through fraud or gross error there was a different question, but, apart from these considerations, an elector who had duly deposited his written vote or ticket within the box had effectually exercised his right of voting, and could not at his discretion alter it.

The other Judges were understood to concur in these views.

C. FISHER, S.S.C.—CAMPBELL & MACDOWALL, W.S.—HAMILTON & COOPER, W.S.—Agents.

Mrs ARCHIBALD M'GOWN, Advocate.—Rutherford—Ivory.
Mrs CHARLES M'KINLAY and HUSBAND, and Miss MARY M'GOWN,
Respondents.—D. F. Hope—Wilson.

Executor—Next of Kin.—Where a widow was liferented in the whole of her husband's means and estate, with a power to test on £2000 thereof if she did not marry, but was restricted to an annuity of £100 in the event of re marriage—held that she was not a general disponee to the effect of being preferred to the office of executor in competition with the next of kin, who were to have the fee in the event of their surviving her, failing which event, it was destined away to third parties.

By antenuptial contract between the late Archibald M'Gown and Miss Isabella M'Gown, he bound himself to pay her an annuity of £50 if she survived him. He further bound himself to pay her, on his death, the sum of £150, if there was no child born of the marriage. By post-nuptial contract, M'Gown "disponed and assigned to and in favour of his said spouse, in liferent, for her liferent use only, all and sundry lands, tenements, goods, gear, debts, sums of money, effects, and all other subjects, heritable and moveable, real and personal, which shall belong or be owing to him at his death. But in the event of his said spouse again marrying, the provisions above conceived shall cease, and in place thereof, the sum of £2000 sterling shall be laid out on good heritable security, to yield to her and her spouse an annuity of £100 sterling during her life, after such marriage; and in the event of her not marrying, and for the event of her decease, she shall have a right to dispose and give away to any of her own relations, £2000 sterling of the first party's (M'Gown's) property." "And on the decease of the said Isabella Campbell, and in the event of the said Archibald M'Gown's sisters, Mary and Janet, being in life, the whole of the foresaid property, of every kind, with the exception of the £2000 sterling, as above provided for, shall be equally divided betwixt the said Mary and Janet M'Gowns, and failing either of them by death, the share of the deceased shall belong to the surviving sister and her lawful issue, not subject to the debts or deeds of any husband, or diligence of his creditors; and failing such issue, the property before specified shall be equally divided among the following institutions: The Glasgow Royal Infirmary, Lunatic Asylum, and Deaf and Dumb institutions, as a grant in perpetuity."

On the death of Archibald M'Gown a competition for the office of executor arose between his widow and his surviving sisters, Mrs M'Kinlay and Miss Mary M'Gown. The widow claimed the office as being general disponee, and therefore preferable to the next of kin. It was held that she was only a liferentrix, but the fee was not yet in the next of kin, and even appear in whom the fee might ultimately vest. In consequence it could not be in pendent, there was a fiduciary fee

No. 40. in her, and thus she was truly the general disponee out and out. The sisters claimed the office in respect that their right as next of kin could not be cut off unless their whole interest in the succession was excluded by a general disponee. But the widow did not possess such a character, as she had a mere liferent, defeasible, with a slight exception, in the event of her marrying again, whereas the next of kin, if surviving her, would become fiars of the whole estate, excepting only the £2000, on which the widow might test if she died unmarried.¹*

Dec. 4, 1835.
Johnstone v.
M'Kenzie's
Executors.

The commissary preferred the next of kin, and Mrs M'Gown brought an advocacy.

The Lord Ordinary, "in respect that the advocator is not the general disponee under the settlement of the late Archibald M'Gown; that the said settlement does not exclude the respondents, the next of kin, from the office of executors, and confers on them a material interest in the due administration of the estate, repels the reasons of advocacy, and remits the case simpliciter to the commissary of Renfrew; finds no expenses due to either party, and decerns."

The advocator reclaimed. The Court, without calling on the respondents' counsel, adhered, and awarded additional expenses.

LORD MACKENZIE.—The general rule is that the next of kin have the right to the office. To this rule there is an exception in the case of a general disponee, but I do not consider that the advocator comes within that exception.

The other Judges concurred.

H. MACQUEEN, W.S.—R. KENNEDY, W.S.—Agents,

No. 41.

ANNE JOHNSTONE, Pursuer.—*Rutherford*—*M'Dougall*.
M'KENZIE'S EXECUTORS, Defenders.—*D. F. Hope*—*Moir*.

Obligation—Turpis Causa—Legacy.—Issue allowed to try whether a legacy bequeathed to a female had been left in implement of an illegal agreement, as the consideration of her entering into or continuing a criminal intercourse with the testator.

Dec. 4, 1835.

2D DIVISION.
Johnstone v. Mackenzie
and Moncreiff.
F.

IN 1827, the pursuer, Anne Johnstone, came to live in the family of the late Mr John M'Kenzie in the town of Dingwall. In January, 1829, M'Kenzie died. In his last will certain parties were named as executors, and, amongst other bequests, he made the following:—"And further, I direct my said executors to pay to Anne Johnstone, presently

¹ Crawford, Jan. 10, 1755 (3818), 3. Ersk. 9, 32; July 27, 1737, Kinninmound (3817); Scott, Dec. 24, 1707 (3809).

* Parties were at issue on the fact whether there was much more than £2000 left, and whether there was a probability of children being born to either of the next of kin. Mrs M'Kinlay had no children.

and for some time back residing with me in Dingwall, a yearly annuity of £200 sterling during her life; such annuity to be payable quarterly, and the first payment to commence at the first term of Candlemas, Whitsunday, Lammas, or Martinmas, occurring after my death; recommending hereby to my said executors to make the necessary advances to meet the quarterly payments of this annuity from their private funds, until funds adequate to discharge the same are realized by them from my own proper means and estate."

The executors having refused to give effect to this bequest, Anne Johnstone raised action against them for payment of the annuity. They resisted payment on the ground that the annuity in question had been granted *ob turpem causam*, viz. under an illegal contract founded upon an immoral consideration, being the price of a criminal intercourse between Johnstone and the deceased, and they accordingly set forth in the record the various particulars on which this general defence rested. On the relevancy of the record so made up a debate took place before the Lord Ordinary (Mackenzie), who remitted the case to the Jury roll, with a view to an investigation of the facts. The jury clerks prepared an issue as follows:—"Whether the said annuity was bequeathed to the pursuer, in consequence of a stipulation on her part, or agreement between the parties, as the consideration of her entering into, or continuing, a criminal intercourse with the said John M'Kenzie?"

The cause was again remitted to the Court of Session roll to dispose of an objection to the issue on the point of relevancy, the pursuer maintaining (notwithstanding the Lord Ordinary's judgment on the relevancy of the defence generally), that, even if the defenders should establish the affirmative of the proposition contained in the issue, this would be no defence against the claim for the annuity. Cases having been ordered,

The Pursuer pleaded—

There can be no legal contract where the matter to be given or performed remains, notwithstanding the agreement, entirely at the pleasure of the party by whom the burden has been undertaken; but the granting of a legacy is in this situation, there being no form of law by which it can be compelled; therefore a contract to grant a legacy is a contract without legal meaning, and of which, though proved, the law could take no cognizance.¹ Moreover, the "consideration," of which the issue makes mention, must, if given or received, originate a positive right, and is utterly inconsistent with the nature of legacy, the validity of which depends not on any cause or reason, whether appearing *ex facie* of the testament or not, but on the will alone of the testator, according to the rule of the Twelve Tables, *Uti quisque legâsset super pecuniâ, ita jus esto.*²

¹ *Caj. Opera*, 1 Comment. in lib. xv. Quæst. Pauli, c. 273.

² *Inst.* iii. 9, 31; *Stair*, iii. 3, 24; *Inst.* ii. 20, 21; *Voet ad Dig.* xxxv. 1, 9.

No. 41. Thus the proof of *turpis causa*, in other words, of the affirmative of proposition in the issue, is irrelevant, cognizance of any *causa* whatever in regard to legacies, being out of the question. Admitting that the introduction of a condition contra bonos mores into a deed inter vivos would destroy the obligation, this does not hold in regard to a testament, where such conditions adjoined to legacies are held *pro non scriptis*.¹ But there is no objection to a legacy that it is granted under condition of the future performance of an illegal act, a fortiori is it no objection that it is granted with reference to an illegal agreement actually past. The only cases appearing in the books where *turpis causa* has been pleaded, have no reference to proper contracts or obligations inter vivos; and in these, although the general rule of law is, that obligations ob turpem causam are void, yet the tendency of the practice, both in Scotland and England, has been to relax this rule, and introduce exceptions;² thus a distinction is admitted between bonds given as the price of prostitution and bonds granted subsequent to a criminal connexion.³ Now, the principles applicable to contracts are inapplicable to the case of legacy; and the present is just such a case, upon the pretence of an antecedent covenant that the legacy should be granted; but, allowing that they were, a legacy, from its essential nature and purpose, can have no reference to future intercourse, only to what is past. The import of the language of a will is not to be varied or controlled by extrinsic evidence;⁴ much less can an express provision be obliterated from the deed, as would be the result of the establishment of the present defence. Thus, in an English case, where a legacy was left to a female, expressly as “a mark of friendship,” the character of which friendship was sufficiently demonstrated by a codicil to the will, this provision was apparently considered unobjectionable.⁵ Finally, the *jus dominii* of the legacy must be held to have vested in the legatee by the death of the testator, the trustees being mere depositaries for her behoof. But, if their possession be her possession, the establishment of *turpis causa* will not support a demand for restoration or restitution, the rule of law being, in *turpi causâ melior est conditio possidentis*.

The Executors, in answer, contended—

If a deed, whatever be its nature, though granted, or to take effect

¹ Dig. xxviii. 7, 14.

² *Ross v. Robertson*, June 25, 1642, M. 9470; *Hamilton v. Scott Waring*, May 1816, Fac. Col. Reversed on appeal, but not on the ground of *turpis causa*; *Bell* ii. 169; 1 *Bell*, 299; *Gray v. Matthias*, 1800, 5 *Vesey*, Jun. 286; *Franco v. Bolton*, 3 *Vesey*, Jun. 368; *Nye v. Mosley*, 1826, 6 *Barn. and Cres* (138).

³ *Bell*, ut supra; *Gray*, ut supra; *Franco*, ut supra; *Nye*, ut supra.

⁴ *Powell on Devises*, l. 445, notes; *Evans v. Thomas*, 6 *Term. Rep.* 671; *Oxen v. Chilchester*, 4 *Dow*, 76, 89.

⁵ *Gordon v. Gordon*, l. *Merivale*, 142.

and the promise made, and it will always be a question of fact, whether it was executed in consequence of the promise or agreement, and whether the chance of its execution, which the promise afforded, was or was not the condition under which the pursuer agreed to continue her intercourse with the testator. In the case of *Fischer v. Earl of Argyll*,¹ the point raised in the present question, viz. whether the plea of *causa* could be applied at all to the case of legacies, was fully argued and deliberately considered; the Court allowed a proof before answer, thereby recognised the relevancy of the statements in support of this plea to afford a defence against the claim of the legatee. The distinct duty to grant a legacy is in a more favourable position, as regards the law, than the actual and mere granting of a legacy and communicating the contents of the deed to the pursuer would have been. And, even in the eye of law, an obligation to leave a sum by will gives a very different result to the party in whose favour the obligation is undertaken, than if the testator had merely executed a testament leaving a legacy; in which last case, if he had recalled it after granting, the other would have had no remedy.² The bearing of the decisions and authorities in the law both of England and Scotland is, first, to establish the great leading principle that all deeds which are granted as the price of prostitution, whether commencing or continuing, are null;³ second, to admit only this exception, that, if the deed is granted after the criminal intercourse has ceased, and about a previous promise entered into while the connexion lasted, it will be presumed to be granted not as an incentive to crime, but as a reparation for injury done.⁴ If the pursuer, then, maintains that the exception extends even to those cases where there has been a deed granted after the

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position, for which there seems to be no authority either in the reason of the thing or in the cases referred to.

The Lord Ordinary having reported the cause :—

THE COURT approved of the proposed issue, and remitted the cause for trial.

GEORGE MONRO, S.S.C.—JAMES ARNOTT, W.S.—Agents.

No. 42.

ADAM COUTTS, Pursuer.—*M'Neill—Moir.*

WILLIAM KEITH, Defender.—*Buchanan—R. Robertson.*

Process—Reduction.—A reduction of certain Sheriff-Court interlocutors, process which had not become final, dismissed as incompetent.*

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2D DIVISION.
Ld. Cockburn.
F.

ON the 2d August, 1830, the pursuer, Coutts, presented a petition to the Sheriff, to have the effects of the defender, Keith, who was his tenant in certain premises in Aberdeen, sequestrated. The Sheriff at first granted warrant to sequester, but, after various steps of procedure, rescinded the sequestration; the last interlocutor being of date the 26th November. On the 6th December, Coutts put in a minute of reference, which was dismissed, as not embracing the whole libel, “without prejudice to the pursuer giving in an amended reference before expiry of the days of tract.” On the 4th December, Keith presented a petition to the Sheriff to have his effects restored. The Sheriff granted warrant accordingly on a reclaiming petition by Coutts, alleging that the application was irregular, as no decree in the sequestration had been extracted, and the original action was still in dependence under the reference to oath, he suspended execution of the warrant, and appointed Coutts to give in answer to Keith’s petition. After a variety of procedure, in the course of which answers were given in by Coutts, the Sheriff, on the 8th July, 1831, signed another term for lodging answers.

Coutts then brought a reduction of the Sheriff’s interlocutors in the processes above-mentioned, in which the Lord Ordinary pronounced an interlocutor on the merits, sustaining the defences. On the cause coming into the Inner-House, by reclaiming note on the part of Coutts,

THE COURT, in respect of the tenor of the libel, and state of the processes in the Inferior Court, dismissed the action as incompetent.

GORDON and BARRON, W.S.—JOHN GILMOUR, S.S.C.—Agents.

* In the case of *Holmes v. Tassie*, 19th January, 1828 (*ante* VI., 394), the principle was already advocated by one set of defenders, at the date of the raising of the reduction.

MAGISTRATES OF ANNAN and JAMES LITTLE, Petitioners.—*Rutherford*
—*G. G. Bell—Moncrieff.*

JOHN FARISH, Respondent.—*D. F. Hope—H. J. Robertson.*

D
M
A
F

Proem—Petition and Complaint—Public Officer.—The right to the office of conjunct town-clerk in a burgh being disputed, and a bill of suspension having been passed to try the question, and interdict granted to prohibit the acting clerk from being disturbed in the exercise of his functions; a petition and complaint on the part of the Magistrates, and a party elected by them, to have free access to, and use of, certain burgh books, in the possession of the acting clerk, refused to unnecessary and incompetent, the clerk being willing to discharge the duties of his office, and the question of right being sub judice in the process of suspension.

In 1829, Messrs Foot and Farish, writers in Annan, were appointed conjunct town-clerks of the burgh. On the 11th April, 1834, the Magistrates, who alleged that the appointment was only for five years, made a new election, appointing Foot to be "senior" town-clerk, and one Underwood "junior" town-clerk. Farish protested against this election, the minute not having been as yet signed, on the ground that it was ultra vires of the magistrates to remove him from his office. He followed up his protest by a bill of suspension and interdict. The bill, after setting forth the suspender's appointment, and the proceedings complained of, prayed for an interdict to prevent the Magistrates and Town-Council "from completing or signing the said inchoate minute of the 11th April, from entering the same on the records, from carrying the same in any way into execution, from making any other minute or writing to the same effect, from taking any other steps or measures which may in any way tend to deprive the suspender of his office, or from molesting or troubling the suspender in the lawful possession and discharge of his duty, and exercise of the several functions of town-clerk;" and also to prohibit and discharge Underwood from attending councils and acting as clerk. Interim interdict was granted as craved, and answers having been given in, Lord Moncrieff, Ordinary, passed the bill, and continued the interdict, adding to his interlocutor the note subjoined.*

* * This case is of too much importance to be disposed of summarily in the Bill-Camber. On the same principle on which the complainer is removed, Mr Foot has been removed also: There could be no difference, unless the respondents were to go on allegations of sufficient cause for removal, which would require the bill to be passed of course. If the case should go to the Court at present, it may be proper that they should be informed that the same question has been raised on the removal of the town-clerks of Glasgow, though there has not been an actual removal, and that a bill of suspension has been passed, and other cases very probably arise."

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Farish.

After the proceedings on the 11th April, a dispute arose as to the custody of the Town-Council minute-book, and other documents connected with the office of town-clerk, which Farish retained in his possession, notwithstanding the remonstrances of the magistrates. He also continued to act in the business of the burgh, always expressing his readiness to officiate as usual. Underwood ceased to act within a few days after his appointment.

Foot, who was of advanced age, died on the 1st of October, 1834. On the 9th October, Mr James Little, one of the Town-Council, resigned his office of councillor, and, on the following day, was elected senior town-clerk, in room of Foot. Doubts being entertained of the legality of this election, * Little resigned, and was elected of new, at a meeting of council on the 31st of October. Farish refused to recognise the validity of Little's appointment, or to surrender the books, but still declared himself ready to perform the duties of the office.

The Magistrates of Annan and Little then presented the present petition and complaint, praying, 1st, That the magistrates should be found entitled to free access to the books of the burgh, in the custody of Farish; and, 2dly, That Little should also be found entitled to have access to the books, as senior town-clerk, and successor to Foot, during the dependence of the process of suspension. The complainers, in support of this complaint, alleged, that they had no intention to interfere with the existing interdict, and admitted Farish's right to act, in the meantime, as conjunct town-clerk; but maintained that he had no title to arrogate to himself, against the existing appointment of Little, the rights and privileges of sole clerk. Farish answered, *inter alia*, that the appointment of Little, as senior town-clerk and successor to Mr Foot, was prejudicial to his rights—that the real object of the present application was to force the respondent to give up his status and possession in favour of Little, and that it was a violation of the subsisting interdict.

LORD JUSTICE-CLERK.—I see no reason assigned for interfering in the summary manner proposed by the petitioners. Looking to the terms of the interdict obtained by Farish, I think we must give it a fair construction. It brought, sub judice, the question as to the legal right to the office of town-clerk. Difficulties have occurred in the appointment; but Mr Farish is in possession of the office, and is willing to discharge its duties. Are we, in such a case, to give power summarily to invest the petitioner, Little, with the very right which is the subject of the question to be tried in the suspension now depending? I think not;

* "By section 26 of the Burgh Reform Act, it is enacted, 'That any person elected and accepting the office of councillor, may resign his said office at any time upon giving not less than three weeks notice of such his intention, to the town-clerk or chief or senior magistrate.' And by section 28, it is enacted, that 'no councillor, nor the partner in business of any councillor, shall be capable of holding the office of town-clerk in any such burgh.'"

I have doubts whether he has any interest or title to assume the character of No
ajunct town-clerk.

Lord GLENLEE.—I am of the same opinion. When the question of right to Dec. 3
office is in dispute, a petition and complaint is not a competent way of de- Black
suing it. The interdict protects Farish in his full rights; and the first point is, Booth
Little any character of town-clerk in him at all? I doubt much of that.
The whole proceedings seem to have had the ousting of Farish for their object.
Now, if a job is properly set about, there is no help for it; but I doubt whether,
under the Burgh Reform Act, the magistrates could do as they did, in reference
to Little's resignation of the office of counsellor.

Lord MEADOWBANK.—I concur; and, in respect Mr Farish has, from the
fact, expressed his readiness to act in the business of the burgh, I am for refusing
the prayer of this petition.

Lord MEDWYN.—I would incline to refuse the first prayer of the petition as
unnecessary, and the second as incompetent.

THE COURT accordingly, in respect that Farish had all along declared his
willingness to continue in the regular discharge of his duties as town-clerk,
dismissed the petition as unnecessary on the part of the magistrates and
council, and as incompetent on the part of Little; and found Farish en-
titled to expenses.

WILLIAM STEWART, W.S.—WILLIAM MARTIN, S.S.C.—Agents.

Mrs RACHEL BOOTH OF BLACK, and HUSBAND, Advocators.—D. F. Hope No
—Keay—Munro.

JOHN and LIVINGSTON BOOTH, Respondents.—Ratherford—Moir.

Donatio infiniti mortis—Debitor non presumitur donare.—Circumstances which
are not sufficient to import that certain sums paid by a father to his sons, without
any vouchers, or making any entry to their debit in his books, were donations
on his part, he having funds of theirs in his hands.

THE late Patrick Booth, merchant in Aberdeen, by trust-deed of settle- Dec.
ment, executed in 1783, made the following provision as to the residue 20
of his estate:—"It is my will and appointment, that all my children who Ld.
shall then be alive, shall be entitled to the whole free residue of my whole
moveable and moveable estates, equally, share and share alike, without
preference to the one before the other of them; and in case they be
survived at majority, or be married, at the time of my death, then I ap-
point my trustees to pay their said shares to them, how soon my estates
shall be realized and converted into cash; but, in case it shall happen that
any of my children shall then be major or married, while others of them
shall still be in minority, then and in that event I ordain and appoint the shares
of the children so major, and the expense of whose education
shall be paid, to suffer a defalcation in favour of the younger children,
in the like manner, of which my said trustees shall

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be the sole judges,—my intention being to do strict and impartial justice to all my children, without distinction; and however soon any of my children arrive at majority, or be married, if a daughter, his or her share of the free unliferented residue of my said estate shall then become payable to him or her, subject always to the defalcation above mentioned, in case the cause thereof shall subsist; and providing also, that in case any of my said children shall incline, even before arriving at majority, to set up in any lawful business or occupation by him or herself, with the approbation and consent of my said trustees, then and in that event my said trustees are hereby authorized and empowered to advance to such child any part of his or her share of the free unliferented residue they shall think proper; but such advance shall not interfere with or prejudice the shares of my other children.”

Mr Booth had three sons, John, Alexander, and Livingston. In 1801, on the occasion of Alexander's marriage, he made an allotment of property to each, which he entered in a book, designated by him a “Clatt-book,” and which had this title written on it with his own hand:—“A Clatt-book of Alexander, John, and Livingston Booths' portions, as put by to them in July, 1801, on Alexander being married, who receives all the profits himself that arises from his portion from this time; but J. and L.'s profits that arises from their portions, P. Booth keeps, and must account to them for it, when any settlement takes place that they may want it up. J. and A.'s portions, it's to be observed, is about equal to each of them; but L's is far short, which must be afterwards made up, as will appear in each of their accounts, as stated in this book.”

The property allotted to his sons, consisting chiefly of shares of ships, amounted to £1650 each, increased by a subsequent addition of £224, 4s, being a tenth share of a particular vessel, called the Primrose. The whole funds, however, continued in the possession, and under the management of old Booth, who drew all the profits, made the disbursements, and paid from time to time to his sons such sums of money as they required for their current expenses, they all assisting him in his business. Alexander, on his marriage, ceased to live with his father, who thereafter kept in his books an account with him of the payments made to him on the one hand, and on the other the sums for which he was entitled to be credited, as profits on his allotted share. Alexander died in 1805, leaving three children, of whom the advocator, Mrs Black, is the only survivor; and, till 1807, old Booth continued to keep, as formerly, the account of Alexander's profits, arising from the portion assigned him by the Clatt-book. Thereafter, however, he ceased to keep any separate account, and managed the whole property as a common concern.

John married in 1809, and took up house separate from his father. For several years previous to this, John had been engaged in a clerical business of his own, and he afterwards set up a printing establishment.

and his father kept an account with him for these concerns. With Livingston, who continued to live in family with him, old Booth kept no account whatever.

Subsequent to Alexander's death, the whole estate was managed as before by old Booth, with the assistance of John and Livingston, the only bank account being kept in name of old Booth, and his sons having no individual bank accounts. Booth's business was chiefly that of a ship's husband, but he and his sons were in use to purchase vessels, the venditions to which were taken sometimes jointly, and at times in shares varying in amount. The prices of these vessels were paid by old Booth, who also received the profits and proceeds, the sons, as already mentioned, having no individual bank accounts or separate stocks; but he made no entries debiting or crediting his sons with the payments, on the one hand, or the profits, on the other; his accounts being merely as of the vessels, without reference to the individual interests of himself or his sons, or their accounts with each other. The purchases of these vessels were generally effected by one of the sons, and in the whole correspondence regarding such purchases, there was no appearance of any intention on the part of the father to make to his sons a gift of the shares of the vessels taken to them. On the contrary, its tone and character were entirely those of a correspondence between individuals jointly interested in the management of a common concern for their common behoof, and, at the dates of the several purchases, had a settlement taken place between the father and sons for their shares of the estate in the hands of the father, under the allocation in the clatt-book, there would have been owing them a greater amount than the value of the shares of vessels so taken to them.

In the beginning of 1825, Mr Booth, who was now in extreme old age, but still attending to his business, made two large payments of money to his sons. That to Livingston, amounting to £3000, was made on the 12th February, by a cheque on his (old Booth's) account with the Aberdeen Bank. That to John was made partly by a cheque and partly by a payment in cash, and amounted to £4000. No entry whatever was made by old Booth of these payments in any of his books or accounts; though of dates March 7th and 18th there were entered in his account kept with John for the printing establishment, two payments of £70 and £140 respectively. It did not appear that these sums of £3000 and £4000 were at all required at the time, in the business carried on by the father and sons, and they were immediately invested by John and Livingston respectively on loans; and, had a settlement been then made between the father and sons, there would have still been due to John the sum of £1387, 16s. 2d., while the £4000 paid to John would have exceeded his credit by £1788, 13s. 10d. Old Booth died on the 21st March immediately following these payments, and John and Livingston had *themselves confirmed his executors.* A very considerable time elapsed be

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fore the sons were able to make up a state of accounts as to the property of the deceased; but, in January 1827, such a state was rendered to the advocator, Mrs Black, as representing her father, Alexander. In this state, John and Livingston debited themselves with the two payments of £3000 and £4000, while they did not place to their debit the payments towards the purchases of the vessels above alluded to, taking credit, however, for their proportion of the profits arising on their shares of these vessels, and they brought out a free residue of their father's estate, after accounting for the shares of his three sons under the allocation in the clatt-book, of only £474. To one or two items of inferior amount, contained in this state, objections were taken on the part of Mrs Black, and on her refusing to pass from them, and make a settlement in terms of it, their agent, of date October 2, 1827, addressed to her agent the following letter:—

“ I have now to acquaint you, that Messrs John and Livingston Booth adhere to the accounts between them and their father, rendered some time ago to Mr Blaikie, as agent for the representatives of their late brother, Alexander Booth, and are ready instantly, as they have all along been, to settle these accounts; but as the two sums of £4000 and £3000, stated under date the 1st day of February, 1825, were contained in two bills taken in the names of my clients, delivered to them as a free gift, unconnected with any account, and given credit for solely under the impression that the accounts would be amicably settled; it is to be expressly understood, that, in the event of any action at law being instituted by your clients respecting the said accounts, Messrs J. and L. Booth shall be entitled to withdraw the aforesaid two sums, and plead the case in the same way as if they had not appeared in the accounts.”

In reply to this letter, Mrs Black's agent refused to admit the alleged understanding under which John and Livingston Booth asserted they had given credit for the sums in question, or their right to withdraw them; and no settlement having been ultimately effected, Mrs Black and her husband, in March, 1828, raised an action before the Sheriff of Aberdeen, concluding against John and Livingston Booth, as executors of the deceased, for an accounting, and for payment of her third share of his estate, as representing her father, Alexander Booth, deceased. Thereafter, John and Livingston Booth instituted in the Court of Session an action of declarator, to have it found that, under the deed of settlement of 1783, Mrs Black had no right to the share to which, under it, her father would have been entitled had he survived, ob contingentiam of which process, Mrs Black's action before the Sheriff was advocated to the Court.

In the declarator, the Court pronounced this interlocutor,¹ which

¹ Feb. 8, 1831 (ante, IX. 406).

afterwards affirmed by the House of Lords :¹—" Find that the defender, Mrs Black, is entitled to that share of her grandfather's succession that would have belonged to her deceased father, under the grandfather's deed of settlement referred to, and, to that extent, sustain the defences, and assoilzie the defenders from the conclusions of the action, and decern."

Thereafter, the proceedings in Mrs Black's action, which had been advocated, were resumed, and the main question pleaded was, whether the prices of the shares of the ships taken to John and Livingston Booth, and the two sums of £3000 and £4000 paid them by old Booth immediately before his death, were to be deemed donations, or whether they were to be held as advances of so much of the property belonging to them in the hands of the deceased, in consequence of the assignment in the clatt book, but continued to be retained and managed by him in common with his other funds.

For Mrs Black it was contended, that the settlement, 1783, being unaltered, expressed the will of the deceased to the day of his death, that his children should share his estate equally among them : That, as to the payments in dispute, the general principle, debitor non presumitur donare, clearly applied : That there was nothing to take the case from under that rule : That on the contrary, as to the shares of the vessels, the correspondence clearly evinced that there was no intention to confer a donation ; and, as to the two sums, that the non-appearance of any entries as to them in old Booth's books was of no consequence, as he entered no payments to his sons, nor kept any account with them individually, while the entries of the two payments of later date were in the printing concern account, as to which concern alone he kept any account with his sons : That as the allowing these sums to be gifts would render his estate insolvent, it is impossible to suppose he could have intended this ; and that the insertion of them by John and Livingston Booth to the credit of old Booth, in the account rendered by them to Mrs Black after his death, proved conclusively their own understanding, that no gift was intended ; there not being any pretence for the allegation that this account was rendered as the basis of a compromise, it having, in fact, been rendered before any dispute had arisen.

For John and Livingston Booth, on the other hand, it was pleaded— That the services they had rendered to their father in his business made an additional provision to them most reasonable in itself, and likely to have been given : That the omission to take any vouchers, and the non-insertion in any book or account of the advances or payments in question, evinced that he considered them as gifts, and not as payments in liquidation of his son's claims for their property in his hands : That, in parti-

¹ Aug. 11, 1832 (*Supp.* 31).

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cular, as to the sums of £3000 and £4000, these were made at a very advanced period of life, at a time when no funds were required for the business, and in circumstances in which the payments could only be accounted for on the supposition, that they were donations *intuitu mortis*; and further, that as to John, the sum paid him exceeded what his father owed him, and as to the excess, therefore, the rule *debitor non presumitur*, &c. could not possibly apply; while there was no ground for making any distinction as to the remainder of the sum, or between the case of the two brothers. Then, as to the accounts rendered to Mrs Black after the death of the deceased, that these could not be regarded otherwise than as the proposed basis of an amicable settlement, and could not preclude the parties from founding on what appeared really to have been the true intention of the deceased.

The Lord Ordinary, June 9, pronounced the following interlocutor:—

“ Finds, 1mo, That in estimating the amount of the free succession of the late Patrick Booth (to one-third part of which the pursuers have been found entitled), the different shares of vessels acquired by the defenders subsequent to July, 1801 (with the exception of the *Primrose*), and paid for from funds in the hands of the said Patrick Booth, are not to be held as free gifts or donations by the said Patrick to the said defenders, but that the prices of such shares must be placed to the debit of the defenders in their several accounts with their father's estate: 2do, Finds, That the sum of £3000 paid to the defender, Livingston Booth, on the 12th of February, 1825, by an order on Patrick Booth's account with the Aberdeen Bank, and the sum of £4000 paid to the defender, John Booth, on the 16th of the said month of February, by two orders on Patrick Booth's accounts with the Aberdeen and with the Commercial Banks respectively (and by a small balance paid in cash), are, in the whole circumstances of this case, to be considered as donations made *intuitu mortis* by the said Patrick Booth to the said defenders respectively, and are not to be put to their debit in settling the amount for which they are entitled to claim respectively as creditors on the estate of the said Patrick; and before farther answer, appoints the cause to be enrolled, that parties may suggest what order or decerniture may be necessary to give effect to those findings.” *

* “NOTE.—The Lord Ordinary has much more doubt about the second of the above findings than about the first, there being, in his view of the matter, several features in the case, any one of which seems separately sufficient to exclude the supposition of donation as to the prices of the vessels in question. First, Donation is never to be presumed, especially in the case of a debtor. Second, There is not a single expression in any letter, account, or other written document in process, which indicates any purpose of donation on the one hand, or any sense or consciousness of having received or accepted of a donation on the other. Third, The relative wealth and ability of the parties, for the greater part of the time after the provisions made in 1801, appear to have been such, as to have made such donations as are here

much larger sum owing to them by the attorney in the name of the
than was required to pay the prices of the shares which were then respec-
quired by them; from which the plain and apparently irresistible presump-
that as the father confessedly was to manage those funds for behoof of the
ers, so he did then invest them in those purchases, and meant pro tanto to
ge himself by such investments. Fifth and finally, The whole strain and
f the ample correspondence which took place between the parties, is of itself
ire upon the subject, and not only affords no particle of evidence of donation
It lay with the defenders to establish), but it is such as to be altogether irre-
ble with the supposition that any such thing was intended. That correspond-
a complete record of the whole proceedings in the purchase of some of the
double of the vessels of which shares were assigned to the defenders, these
es being negotiated by one of those defenders in London, with the constant
of his father and brother, who write almost daily from Aberdeen; and
out the whole of this record, from the first inception of a purpose to buy
to the final settlement and adjustment of the shares among the members of
ily, there is not a syllable, on the one side or the other, about the expecta-
a gift, or the intention of making a gift, or the gratitude for a gift bestowed,
must inevitably have been conspicuous in every line of the correspondence,
such thing had actually occurred. It is needless to refer to the letters in proof
the fact being undeniable on the face of them, that the whole three parties
micate, from first to last, exactly in the style of three indifferent persons con-
as for a joint adventure, for the general benefit, and finally arranging their
in it, with a view to their several interests and convenience. Sometimes
ire a joint mandate to a third person to purchase for them, with directions as
extent of their respective shares to be expressed in the vendition, but gene-
be defender Livingston Booth tells the other two that he thinks of making a
as for the common advantage. They help him with their counsel, and give
riows as to the shares in which it should be taken, and the matter is arranged
dingly, in a most quiet and business-like manner, without the slightest expres-
ither of a liberal purpose on the one hand, or a sense of obligation on the other.

No. 44.

The following opinions were delivered

—
 No. 8, 1835,
 Mack v.
 Keith.

On the First Point.

LORD GLENLEE.—The only thing before us on this point is as to the way of stating the articles in the accounting as to what the funds of the father were,

but the fact, that while he does debit them in his books with many small payments and advances, he has no where entered the prices of those shares to their debit in any part of his accounts. The fact may at first appear startling, but its importance and bearing upon the case seems entirely destroyed, when the whole fact is stated, viz. that he nowhere enters the value of these shares, or the accruing profits either upon them, or even on the shares conveyed to them before 1801, as articles of credit in any book or account posterior to 1805; nay, that he has nowhere entered in any general book of accounts the prices paid for his own shares of those vessels, or the profits arising on those shares. The system of book-keeping, indeed, adopted by Patrick Booth, though sufficient for parties having such exuberant confidence in each other, was of a most anomalous and imperfect description. He kept no general cash-book, but merely a series of bank accounts with different banks in Aberdeen, and after 1803, he kept no account whatever of the prices or proceeds of the different shares, held either by himself or his sons the defenders, in the vessels jointly owned by them, except a separate ship-book for each vessel, in which the charges incurred for the ship, and the profits derived from it, are regularly entered, and from which, of course, when compared with the registered venditions, the profit and loss of each owner could be ascertained with sufficient exactness. It appears also that he never, at any time, made a general balance of his books, either as to his own concerns, or those of the defenders, for whom he acted in keeping them, so that there is not, in the whole record of their transactions, any statement of the funds and debts of any of the three parties, or of the way in which their accounts truly stood in relation to each other.

“ The sum of the matter, in short, is, that, subsequent to 1803, Patrick Booth kept his own funds and those of the defenders, all mixed up together, in accounts with various banks in Aberdeen, and drew upon those accounts for such sums as were wanted to pay the prices of vessels bought for the family, and shared among them in such proportions as they mutually agreed upon, neither debiting nor crediting any of the three with advances or profits, as in account with any of the others, but leaving the actual state of their interests, as well as their profit and loss, to appear by the state of the bank accounts on the one hand, and by the registered venditions, and the detailed accounts of the charges and profits on every particular ship, in the separate books kept for each such vessel, on the other. And though this system of book-keeping was, in a certain sense, loose and slovenly, and could not well have been adopted among strangers, or except among persons having the most entire confidence in each other, the Lord Ordinary thinks it does not, when considered in its whole extent, afford the slightest countenance to the notion, that the shares held by the sons were gifts from the father, while the result has shown that it preserved the materials for an ultimate accounting in a very sufficient form.

“ With regard to the payments of £3000 and £4000 made, in the way stated in the interlocutor, by Patrick Booth to the defenders, within a few months of his death, the case is materially different. Those, whatever else they were, certainly were not investments or advances made in the ordinary business of the parties, but the purchases already mentioned. They are payments of large round sums, a

and we have nothing to do with whether Alexander or his daughter get more than, on a fair consideration of the assistance rendered by the three sons, it might be thought reasonable that they should have got. The vessels we have to do with are those in which the father and sons were all proprietors, and the father had the management. There is no case of vessels belonging to the sons alone. The sons claim the profits effeiring to their shares, and how on earth is the party advancing the price for the whole not entitled to set off his advance against their claim for the profits? We cannot confound the presumption of donation and the claim for remuneration. The sons cannot claim profits without deducting all the expenses necessary to show any profits, and of necessity, if we credit them with the profits effeiring to their shares, we must debit them with their shares of the price, and if interest is to be allowed it should be on both sides or neither, and, as to this point, I would adhere to the Lord Ordinary's interlocutor.

gether unlike any others that occur in the whole course of the connexion. They are palpably not made to answer any exigency in the business of the defenders, since the whole £3000 paid to one of them, is immediately afterwards lent out on a bill; and the £4000 to the other seems to be simply handed over to the credit of his own cash-account, and neither the books nor correspondence of any of the parties give the slightest indication of there having been, about that time, any balancing of accounts, or any application either for such a settlement, or for an advance of money. But what seems almost conclusive in favour of this not being a business transaction at all, is, that the sums severally paid over on this occasion bore no proportion whatever to the sums standing at the credit of the defenders respectively, on the supposition that they were to be debited with the prices of the vessels. The £3000 paid to the defender, Livingston Booth, still left at his credit a sum of £1987, 16s. 2d., while the £4000 paid to the defender, John Booth, exceeded his credit by no less than £1788, 13s. 10d.

" Among strangers, the Lord Ordinary is satisfied that those circumstances would not be sufficient to overcome the legal presumption against donation; and accordingly, it is only by taking them in combination with the relationship, habits, and history of the parties, that he has been enabled to come (though not without difficulty) to the conclusion, that in this particular case he is warranted in rejecting that presumption. The defenders were his only surviving children, one of them lived in family with him till his dying day, and both were not only closely connected with him in business, but had, for many years, taken the laborious part of the management on themselves, and shown the most affectionate solicitude for his comfort; above all, he was then in the eighty-eighth year of his age, and, as it proved within a few months of his death, and when in those circumstances, this frugal parent, apparently unasked and unexpectedly, makes over these large sums without receipt, discharge, or acknowledgment, the Lord Ordinary cannot resist the belief that they were meant as donations *intuitu mortis*, and intended mainly to save the expense of a testament, and evade payment of the legacy-duty. It is strong corroboration of this conclusion, that, subsequent to those large payments in February, 1825, which do not appear at all in any of the books of Patrick Booth, there is a comparatively small advance of £70 to John Booth, and another of £14 to Livingston, both in the succeeding month of March, and evidently for purposes of business, which are regularly entered in these books, one in Patrick Booth's own hand-writing, and the other in that of Livingston. It may be added, that, in the view taken by the Lord Ordinary of the other branch of the case, these *mortis causa* donations did not by any means exhaust the property of the father, but left about two funds to be divided among the parties to the present action, of all descriptions."

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LORD MEADOWBANK.—I am clearly of the same opinion. The presumption of law is against the defenders, and the circumstances confirm it.

LORD MEDWYN.—I concur. Looking at the whole conduct of the parties I see nothing to redargue the presumption of law. The only thing is the non-entry in the books of the sums advanced as items to the debit of the sons. But when we see how the books are kept, and that old Booth did not enter the recoveries, or make up any account at all, the effect of the argument is done away. There is no other statement of any force, and the correspondence is certainly against the claim.

LORD JUSTICE-CLERK.—I agree entirely with the opinions delivered. None of the evidence supports the claim of the defenders. We must look, no doubt, at the whole circumstances, and in particular to this, that it was the *enixa voluntas* of the deceased as expressed by his settlement—that the division of his estate among his sons was to be equal, and therefore the defenders must show that he departed from it. There is nothing to show this, and, so far from the correspondence affording evidence in support of the plea, it has a decidedly contrary tendency. This was just a way of investing part of their portions remaining in the father's hands as settled by the clatt-book, and, as there is no proof whatever of a contrary intention, we must apply the common rule of law, that, as the father was debtor at the time of the purchases, he cannot be presumed to have made a donation.

On the Second Point.

LORD JUSTICE-CLERK.—We have now to decide on the last point of the Lord Ordinary's interlocutor, whether the two sums of £3000 and £4000 are to be considered as free gifts made *intuitu mortis*. Considering Mr Booth's settlement in 1783, containing a declaration of his intention to establish complete equality between his three sons, and his fulfilment of that intention in 1801, as evidenced by the entry in the clatt-book, and, looking to the relative situation and whole transactions of the parties, and to the conduct of the defenders themselves, I cannot concur with the Lord Ordinary. These defenders attempted, by their previous action of declarator, to exclude the family of their elder brother from all share in the executry; and what is the nature of their defence against the present action, not attending to the evidence of the settlement in 1801? They say first that the purchases of shipping made for behoof of the whole family were free gifts by Patrick Booth to his sons. On this point we have confirmed the Lord Ordinary's judgment. Now although we have so decided in regard to the shipping transactions, are we to hold that the two large sums taken out of the fortune of old Mr Booth in 1825 were donations *intuitu mortis*? It is to be observed, that, after his death, a state of accounts was carefully prepared, and furnished by the defenders to the pursuer, in which they debited themselves with the two payments in question. There was then no judicial process, but the question was beginning to be agitated as to what was the extent of the inheritance. Afterwards we have this defence adopted as to these payments being free gifts; the first intention to change their ground being indicated in the letter of the 2d October, 1827. Now this state of accounts is different altogether from the case of a proposal made or document brought forward with a view to a compromise, which is not afterwards to be used to the prejudice of the party offering it. It is a voluntary statement prepared when there could be no view to a compromise. Under w

circumstances, then, are we called on to sustain this plea in defence? It is clear that the onus of establishing that those sums were free gifts lies on the defenders, *vis, in opposition to the rule debitor non presumitur donare*, now make this allegation. But where is the evidence in support of it? In February, 1825, these sums are drawn out in the name of the defenders. It is said there are no special entries in Booth's books showing that he intended them as payments to account; but neither is there any entry showing them to be donations, which there was as much reason to expect. It is also a feature in the case, that, after the sums were drawn out, a sum of nearly £2000 was still left at the credit of Livingston Booth in his account with his father, though a sum nearly as large was left at the debit of the other defender. The evidence founded on by the defenders is not such as to constitute those payments donations, in opposition to the presumption of law against donation. They are to be viewed in the same light as any of the other profitable investments made by Patrick Booth for behoof of his sons. On the whole, taking into view the evidence we have of the old man's wish to preserve equality among his sons, and seeing nothing to lead to the belief that he had departed from the purpose indicated in his still existing general settlement, and looking to the other circumstances of the case, I am for altering this part of the interlocutor.

LORD MEADOWBANK.—I am of the same opinion. It is evident that this defence was a second thought, and this is now decidedly proved by the correspondence.

LORD GLENLEE.—I think the evidence on this point of the case raises a presumption *facti* as well as *juris*. It would be hard to foreclose the defenders on the state of accounts which they first gave up, but they must show good cause for their change of ground, and I think they have not done so. Even if they had a compromise in view, they must have been conscious that those payments were a just charge against them. Taking this as an indefinite payment—and this was truly indefinite, as nothing was said at all—it must first be imputed to the payment of the debt due by the defenders. It has been observed that no notice of the payments is entered in Mr Booth's books, but I do not think this of much consequence. The near relationship of the parties rather increases the presumption against the defenders than otherwise.

LORD MEDWYN.—I agree. The question as to these payments in 1825 is more difficult than the other, and the difficulty arises from there being no written documents. If these sums had been intended as donations, how easy would it have been to have made a notandum on the subject. In regard to the defender, Livingston Booth, the maxim *debitor non presumitur donare* applies, but it is not applicable to John Booth. My difficulty is how the largest sum should be paid to the son to whom the father owed least; but this difficulty is not solved by the defenders. It is an important fact, that, in the state of accounts given in at first, these sums were mentioned as having been received in the course of trade. The defenders say that this statement was made with a view to an amicable settlement, but at that time there was no dispute, and it was evidently their own impression that these sums were not donations.* I am also, therefore, for altering.

* *at the bar, offered to prove that in the accounts as originally given, it had not been given for the £4000 and £3000—that this had been*

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Emond v.
Emond.

THE COURT accordingly pronounced the following interlocutor:—"Adhere to the first finding of the interlocutor of 9th June, 1835, and refuse the desire of the reclaiming note for the defenders; alter the second finding of that interlocutor, and find that the sums of £3000 and £4000, therein referred to, are not to be held as donations to the defenders severally, but must be put to their debit in settling the amount for which they are entitled to claim, respectively, as creditors on the estate of their deceased father; adhere to the interlocutor of the 18th June, 1835, and in so far refuse the reclaiming note for the pursuers, and remit to the Lord Ordinary to apply these findings, and proceed farther in the cause as to his Lordship shall seem just, reserving all claims as to expenses."

PATRICK IRVINE, W.S.—H. INGLIS & DONALD, W.S.—Agents.

No. 45.

MARY EMOND, Pursuer.—*D. F. Hope—J. Anderson.*
MARY MAGDALENE MUNRO or EMOND, Defender.—*Keay—Marshall.*

Prisoner—Bill of Health—Magistrate—Burgh —1. Where a prisoner applies for liberation under Act of Sederunt 1671, held that the Magistrates are not bound to cause intimation to be made to the incarcerating creditor before granting the application. 2. Where the oath of a physician, in support of a petition for liberation, was taken down in writing, and preserved by the town-clerk, held not necessary that it should be recorded in the town-books. And Observed, that it might be recorded there at any time.

Dec. 10, 1835.

1ST DIVISION.
Ld. Corehouse.
B.

ON 4th October, 1833, Mary Emond, residing in Selkirk, imprisoned Mrs Mary Magdalene Munro or Emond in the jail of Haddington for a debt of £52. On 31st May, 1834, Mrs Emond presented a petition to the magistrates, setting forth that she was affected by a disease which rendered continued confinement dangerous to her life, and praying to be liberated, and allowed to reside within burgh, on finding caution to return to jail on becoming sufficiently recovered. She produced a certificate by John Burton, M.D., that "her life is endangered by farther confinement." Dr Burton was examined on oath by the magistrates, on 3d June, and confirmed his certificate. He also, of that date, visited Mrs Emond, and made an addition to his deposition, that the prisoner's state of ill health continued the same as at the date of the certificate. The magistrates, on the same day, "having considered the within petition,

done by direction of their agent, Mr Hutcheson, with the view of bringing out some small residue for division; and contrary both to the wish of the defenders and the opinion of another agent whom they consulted at the same time—that Mr Hutcheson, on their objecting, stated that the accounts being rendered with a view to an amicable settlement, their interests could not be affected by giving credit for these sums, and that all this took place months before any objection was stated by the pursuers to the accounts.

and the certificate and deposition of Dr Burton—in respect of said deposition, grant warrant to liberate the petitioner from the tolbooth of Haddington, security being previously found that she shall reside within the burgh, and not remove therefrom, and that she shall return to jail as soon as the state of her health will admit of her doing so with safety;" A bond of caution was found "that the said Mrs Emond shall reside in the house of Mrs Thomson, residing in Haddington, within the burgh of Haddington, and shall not remove from the same, but return to the tolbooth of Haddington as soon as she can do so with safety to her health." Mrs Emond was then enlarged from jail, and removed to Mrs Thomson's house.

No intimation of this application had been directed by the magistrates to be made, either to Mary Emond, the creditor, who resided at Selkirk, or to Alexander Mathew, a writer in Haddington, who had acted as her agent in March preceding, and opposed an application then made by Mrs Emond for aliment under the Act of Grace. On 5th June, the Provost of Haddington addressed a letter to Mathew, stating, "I think it right to inform you, that, after sufficient evidence of the great danger of longer confining Mrs Emond, the magistrates have granted warrant in the usual terms for her liberation," &c.

On the 30th of July Mary Emond raised an action against the Magistrates of Haddington, as having made themselves personally liable for the debt, on account of alleged irregularity in these proceedings.

Parties were at issue whether it was the uniform practice in the burghs to order intimation to the incarcerating creditor before disposing of the application. They were also at issue whether Mrs Emond resided within the house of Mrs Thomson, and whether she walked at large through the town. But it was not averred that she had gone beyond the limits of the burgh.

Pleaded by the Pursuer—

1. By the uniform practice of all burghs, intimation to the incarcerating creditor, or to his known agent, was necessary before granting the prisoner's application. And this was an essential step, to enable the creditor to attend and see that the prisoner's state of health was truly such as to warrant liberation; and that the bond of caution, granted for the prisoner, was duly framed, and signed by sufficient obligants.

2. The Act of Sederunt, 14th June, 1671, declares that liberation shall not be lawful "except only in the case of the party's sickness, and extreme danger of life, the same being always attested upon oath, under the hand of a physician, &c., which testificate shall be recorded in the town-books." In this case the certificate did not attest the danger to life to be "extreme;" and the oath had not been recorded in the town-books. In these violations of the Act of Sederunt, the creditor had a right to sue, and recover the debt from the Magistrates.

No. 45. *Pleaded by the Defender—*

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1. The practice of intimation was denied, and was not proved. There was no authority in the Act of Sederunt for requiring such intimation; and it might often be impossible to make it, as the health of the prisoner might be such as to render instant liberation an imperative duty. It might be common to make intimation, for the greater security of the Magistrates, so that any irregularity in the procedure might be timefully pointed out to them. But, if the procedure was otherwise regular, they incurred no responsibility by omitting to order intimation.

2. The oath and certificate bore that the prisoner's life would be endangered by continued confinement, and that was enough. The principal deposition remained in the custody of the town-clerk, and could still be recorded, if necessary. But it was enough that its tenor had been preserved extant in a written form, so as to show on what grounds the magistrates had proceeded. And, in an action so highly penal, the magistrates were entitled to have their bona fide procedure favourably construed.

The Lord Ordinary "assoilzied the defenders from the conclusions of the action, and decerned; and found the pursuer liable in expenses."*

The pursuer reclaimed. The Court, without calling on the defender's counsel, unanimously adhered.

* "NOTE.—This is a highly penal action, which cannot be supported, unless the provisions of the Act of Sederunt, 1671, relative to bills of health, have been clearly contravened.

"The pursuer pleads, that the petition was not intimated to the incarcerating creditor. But no such intimation is required by the Act of Sederunt, because the prisoner's life being in danger, it may often happen that there is no time for it. The creditor cannot suffer from the want of intimation, because the prisoner is kept within the jurisdiction, ready to be sent again to prison, if there be reason to do so.

"That the prisoner's life, in this case, was in danger by her confinement, is proved by the certificate of the physician, confirmed by his oath; and the original deposition being committed to writing, is preserved among the records of the town, which is equivalent to an entry in the town's books. The provision in the Act of Sederunt on that subject, is evidently meant to prevent liberation on a verbal and unrecorded oath.

"The pursuer does not aver, that the prisoner, when liberated, ever went beyond the limits of the jurisdiction, and in the bond of caution, the house is specified in which she was to reside.

"The proceedings in the process of aliment do not bear on the case at all.

"None of the cases cited by the pursuer are similar in circumstances to the present. Thus, in Fullerton¹ and Kennedy v. the Magistrates of Ayr, the certificate was not upon oath, and the Magistrates, after the prisoner's recovery, allowed him to leave the jurisdiction, and go about the country in the exercise of his profession. On the other hand, the cases of Forbes, Fordyce, and Ritchie,² are precedents, a fortiori, in favour of the defenders here."

¹ 2 Bell, 549, note 2.

² 2 Bell, 550, note 2.

LORD BALGONY.—I think the whole proceedings of the magistrates were consistent with the provisions of the Act of Sederunt. That Act of Sederunt does not require intimation to the creditor at all, or to his known agent.

LORD PRESIDENT.—I am of the same opinion. It is said the deposition of the physician was not recorded in the town-books, in terms of the Act of Sederunt. It may be recorded yet, as it is extant in writing, in the hands of the town-clerk ; and as to the want of intimation to the creditor, that is a proceeding not enjoined by the Act of Sederunt, and it is not necessary in itself. It may be prudent for magistrates to resort to it, because the creditor will then be ready to state the grounds of the application, and to point out any irregularity, if there be any. But, if the magistrates take the risk on themselves of seeing that their procedure is in terms of the Act of Sederunt, they incur no responsibility by merely omitting to direct intimation to be given to the creditor.

LORD GILLIES.—I concur. The Act of Sederunt does not require intimation, and in a highly penal action like this, I see nothing stated to attach any liability to the defenders.

LORD MACKENZIE.—I am entirely of the same opinion.

J. ANDERSON, S.S.C.,—P. CROOKS, W.S.—Agents.

JOHN LILLIE, Suspender.—Cook.

ALEXANDER FINDLATER, Charger.—Sol. Gen. Cunningham.

Stamp—Diligence.—A party holding an assignation to a decree for a debt, which was executed on an ad valorem stamp of 10s., gave a charge to the debtor, who presented a bill of suspension, on caution, in respect that the assignation should have been impressed with a stamp of the value of £1, 15s. : bill passed, and motion refused to delay disposing of it, until the assignation should receive a stamp of £1, 15s.

SIMPSON obtained a sheriff-court decree against John Lillie, for a sum of £35, with certain interest and expenses. He executed an assignation of the decree, in favour of Alexander Findlater, accountant in Edinburgh. The assignation was said to be in consideration of £20, and was written on an ad valorem stamp, of the value of 10s. Findlater gave a charge to Lillie, who offered a bill of suspension, on caution, which the Lord Ordinary refused. Lillie reclaimed, and, for the first time, pleaded that the assignation was written upon an under-stamp, as the assignation of a decree in Scotland was equivalent to the assignation of a judgment-debt in England ; and, as such, it fell under the provision in the schedule appended to the Stamp Act (55, § III., c. 184), voce Conveyance, which affects every conveyance “ not otherwise charged in this schedule, nor expressly exempted from duty,” to be impressed with a stamp¹ of £1, 15s. Lillie alleged that he had not seen the deed of assignation till after the passing of the bill, and that therefore he could not have stated this ground

¹ Warren, Nov. 18, 1823 (2 B. & C., 281—3 D. & R., 494).

No. 46. of suspension sooner. The charger obtained a delay of a few days to consider the objection; and, when the case was resumed, he intimated to the Court, that, in order to save any discussion of this point, he had sent off the deed to have it stamped. This would, in consistency with the case of Robb,¹ validate his right, ab initio, and remove all question. The suspender answered, that if the right of the charger was radically defective when he gave the charge, the bill of suspension should undoubtedly be passed, and the effect of stamping the deed would be tried in the process of suspension.

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ee.

LORD BALGRAY.—I have no doubt that this bill must be passed. A man ought to be in titulo of a debt before he gives a charge for payment. The diligence should be suspended.

LORD PRESIDENT.—Where a party gives a charge to any of the lieges, which may lead directly to his incarceration, the diligence which he uses should be totus, teres atque rotundus. The Court will not otherwise sanction it.

LORD MACKENZIE.—This point was not pleaded to me when I refused the bill. And, undoubtedly, had it been stated to me, and even had the assignation received a new stamp, and been produced to me as a document thereby validated, I should have felt that the Bill-Chamber was not the place to decide on that question. I have no doubt that the bill ought to be passed.

LORD GILLIES concurred, and

THE COURT passed the bill, on caution, in terms of its prayer.

L. M. MACARA, W.S.—W. WALLACE, W.S.—Agents.

No. 47. **THOMAS MANSFIELD** (John Rennie's Trustee), Pursuer.—*D. F. Hope*
—*M'Neill*.

GEORGE RENNIE'S TRUSTEES, Defenders.—*Keay—Walker*.

Debtor and Creditor—Presumption—A party having engaged in extensive cash and bill transactions, in which his father was more or less concerned, and the father having died, and the party subsequently become bankrupt and been sequestrated; Circumstances which held not to infer any claim of debt against the father's estate, on the part of the trustee in the sequestration, on account of these transactions.

Dec. 10, 1835.

2D DIVISION.
Lords Medwyn
and Jeffrey.

F.

THE late George Rennie of Phantassie was an extensive farmer and cattle-dealer, and also, though to a less extent, a grain-merchant. His son, John Rennie, was engaged for many years in an extensive trade, and numerous speculations as a farmer, cattle-dealer, and grain-merchant. John Rennie had many pecuniary transactions carried on by means of bills and bank-accounts, in which his father was more or less concerned.

is, an account-current in name of George Rennie was kept with the Bank of Scotland's branch at Haddington, into which, between 1819 and 1825, John Rennie made payments, partly from cash received by him, partly from the proceeds of discounted bills, to the extent of upwards of £5,000. They were also in the practice of drawing and accepting bills of exchange on each other; John Rennie often retired his father's acceptances, and made payments over and above his own share towards retiring their joint liabilities. No demand was ever made by him in his father's lifetime on account of any balance alleged to be due to him on these transactions. He had no regular books, and kept his accounts in a very confused manner.

In 1817, George Rennie executed a trust-settlement in favour of the children, to which he added codicils in 1820 and 1826. By this settlement he directed a sum of £37,000 to be paid to his children, of which John Rennie was to have £9000. He died in 1828. After his death, John Rennie obtained a lease of the lands of Phantassie from the trustees under the deed of settlement, who received various communications from John Rennie and his agents, in which, as well as in the written tack, it was stated, if not absolutely admitted, that he had no claim of debt against his father. In the spring of 1829 Rennie became bankrupt, and was sequestrated. No mention was made of any such debt being due, either in his examination or in a holograph state of his affairs given up by him to his father's trustees. The trustee in the sequestration, however, raised an action of declarator, count and reckoning, against the trustees under George Rennie's settlement, the summons in which narrated the cash and bill transactions above-mentioned, as showing either a partnership and joint trade to have existed between the father and son, or as constituting a debt due as a ground for count and reckoning against the father's estate; and concluded, alternatively, that it should be found and declared that George and John Rennie were jointly concerned, as partners in a general trade, and, therefore, that George's estate was liable for John's debts, and this being so found, that the defenders should hold count and reckoning, and make payment of £100,000, more or less; or that, in the event of the estate not being found liable to this extent, as on the ground of partnership, the defenders should be ordained to make payment of such sum as should be ascertained on an accounting to be the balance due on the transactions above stated, and also of John Rennie's provision of £9000.

The defenders denied that a partnership had existed, and as to the accounting, under the second conclusion, maintained that it was rested on a statement too vague and general, and was excluded by the real and documentary evidence of the case.

In the course of making up the record, opportunities were afforded to the pursuers of recovering, by diligence, whatever documents might be

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required to support his claim. Several debates took place before the Lord Ordinary as to the relevancy of the facts averred to constitute a partnership. The Lord Ordinary (Medwyn) found that the pursuer had not made such a relevant statement of facts as to support his averment of a partnership, and, the record having been closed, assolized the defenders from the first conclusion of the summons. This judgment was acquiesced in. The cause was then debated upon the other conclusion, and the Lord Ordinary (Jeffrey), before answer, remitted to an accountant to report on the state of accounts, and of debit and credit between George and John Rennie. The defenders reclaimed against this interlocutor, which the Court recalled, and remitted to his Lordship to hear parties on the merits. The Lord Ordinary thereafter pronounced the following interlocutor, adding the note subjoined.*

* "If the first proposition in the interlocutor be right, it is supposed that there can be no doubt as to the last. Since, short of a deliberate discharge or solemn written declaration by John Rennie, that he had no claims whatever as a creditor on his father's estate, no evidence can well be conceived more conclusive than that which is there referred to.

"As to the first proposition, the only real difficulty arises from the circumstance of the record having been made up chiefly with a view to the conclusion as to a partnership between the father and son (which has been since finally abandoned), and the consequent scantiness and vagueness of any allegations applicable to the only remaining point, of the son's being—not a partner—but a creditor. The Lord Ordinary having decided the case without allowing any proof of the specific facts alleged by the pursuer, he is of course entitled now to assume the truth of these allegations. This however, must be understood, not of the general allegation (though scarcely any thing else is to be found on the record), that John Rennie was a creditor of his father to the extent of £30,000 and upwards, but of the particular averments which form the media by which that conclusion is reached. Now these particular averments, as detailed at the debate, and set down in a state of claims handed at the time to the Lord Ordinary, relate to two things—one, the bills of exchange which appear to have been discounted on the joint credit of the father and the son; and the other, the payments which were made into the bank on account of the father; and, without going minutely into particulars, it will be easy for the Lord Ordinary to show that, assuming these particular averments to be true, they lead, at the very most, to nothing more than a presumption or inference, that the son may have been a creditor of the father.

"Take, first, the matter of the bills, on which there seems to be claimed in the condescendence (Art. 14) something more than £20,000, though restricted at the debate to rather less than £13,000.

"The detailed statement, illustrated by the state of claims exhibited to the Lord Ordinary, proceeds on the allegation (also contained in Art. 7 of the Condescendence) that from 1820 to 1828, bills drawn by John Rennie, and accepted by George, were discounted, and retired, to the extent of £61,200. Now, of these it is averred, that £16,894 were retired by John Rennie, though he had received the proceeds to a greater extent than £7454; and upon this statement, it is assumed that he may be still a creditor to the extent of £9439. No intelligible explanation is yet given of the way in which this proportional amount of receipts and payments is to be proved. But holding, as the pursuer is for the present entitled to hold, that it may be proved

“ In respect that the whole evidence proposed for the pursuer, as the same was described, detailed, and explained by him at the debate, would not, even if it stood alone, and unopposed by any other evidence, establish M
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It is quite enough to show how far short the statement falls of positive proof of debt, and to how very doubtful a presumption it amounts, at the best, merely to observe, that, after the most elaborate research by the pursuer (himself a professional accountant) he is obliged to add to the £7454, confessedly paid to John Rennie, a sum of no less than £9614, the application of which, it is admitted, he has not been able to trace. If this, however, was paid to John, as well as the £7454, which is quite as likely as that it was not, then he must have been actually overpaid for the whole £16,894 which he is alleged to have advanced; and, instead of being a creditor of £9439, would, upon these bill transactions, assuming all the facts averred by the pursuer to be proved, be a debtor to the amount of £180.

“ The Lord Ordinary professes himself altogether unable to understand the grounds upon which the pursuer attempts to add a further sum of £3200 to this presumptive balance of £9439, the particular bills on which he professes to raise it, being confessedly included among those upon which the former balance was brought out, and the whole liability of the acceptor under them being necessarily taken into account and exhausted by that balance. It is not pretended that John Rennie retired more of his father's acceptances, including the particular bills here referred to, than to the extent of £16,894, and as it is admitted that he certainly received £7454 of the proceeds, it is impossible that he can in any way be a creditor for more than the £9439 already spoken to, while, as it is admitted that he may actually have received £9614 more, it is plainly matter of mere presumption and inference, that he is actually a creditor at all; and at all events, there seem to be no termini habiles, even for presuming or conjecturing, that he may have been a creditor, as the pursuer now alleges, for £12,644, originally he called it £20,707.

The only other claim is for no less a sum than £18,261, for which it is said the estate of George Rennie is debtor to that of John, in respect of John's having paid over that amount into George's cash account, from funds belonging to himself, in the course of six or seven years. The explanation given at the debate as to the way in which the fact of all these payments having actually been made by John, or with funds belonging to him individually, could be proved, was the most lame and unsatisfactory that was probably ever tendered on such an occasion; and was distinctly proved from documents in process to lead, in many instances, not only to uncertain, but demonstrably to false conclusions. But waving all these irresistible objections, as not, strictly speaking, *hujus loci*, and assuming here also, that the pursuer's averments are completely proved, still the question recurs, do the facts so assumed afford evidence of a debt of £18,261? or do they in this case raise even any presumption that such a debt is due? The payment into George Rennie's account, on which it is admitted (Art. 4 of Condescendence) that John was in the custom of operating, is not, at all events, so strong as a payment made to George Rennie himself. But when one man merely pays money to another, without taking document or obligation of any kind from the payee, does the law hold this evidence of a loan, and an obligation to repay? Or does it not rather presume that the payment was made in consequence of a previous obligation, and that the fact is evidence, therefore, not of the contracting, but of the extinction of a debt? Now there is at the very best, and assuming the pursuer avers to be true, nothing here but a series of payments, made without the least trace of any undertaking or obligation to repay, or even the allegation of any special circumstances, at the time of the payments, from which such an obligation is inferred. On the contrary, these payments are made in the course of a

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positively and directly that the late John Rennie was, at the death of his father, George Rennie, a creditor of his said father for the sums now concluded for, or for any other sums, but would merely raise a presumption

long series of transactions, in which (being father and son), the parties were so closely connected, that the pursuer (after years of investigation) actually came into Court with an allegation of partnership, and both keeping their accounts in so incredibly slovenly and confused a manner, that the pursuer, after the case has depended for three years, cannot even now trace the application of bills (though discounted at a bank) to the extent of £1000, and of course is without a particle of information as to the innumerable great transactions that were concluded, without the intervention of any writing whatever. In such circumstances, to hold that the mere fact of payment made by one of those parties into the cash-account of the other is of itself evidence that the party so paying is creditor for the amount, would, in the Lord Ordinary's apprehension, be altogether extravagant; and, if it afford any presumption at all that he may be such a creditor, he conceives it to be one of the slightest and weakest imaginable.

"It is enough, however, that the facts averred (and assumed) lead but to a presumption of debt, however strong. For the documents relied on by the defenders, are so conclusive against the possibility of any such debt existing, that, unless opposed by complete legal evidence, or regular actionable documents, it seems impossible to deny them effect; and, having decided the case upon this view, the preceding very general and imperfect explanation of the grounds on which he has rested this judgment, is probably all that ought now to be given. The very peculiar character and position of the case, however, seems to require one other observation.

"The abandonment of the original conclusion for a partnership, has not only made the record, in all its parts, inapplicable to the matters now at issue, but has made it difficult, if not impossible, to understand what the pursuer really means to represent as the true nature of the connection between John Rennie and his father. He says, indeed, that it is not that of a partner more or less in advance to the concern, but of a creditor. But in what sense he uses that word, or from what sort of transactions he means to allege that this character arose, the Lord Ordinary has been altogether unable to discover. He says, the father and son, though not partners, were much connected in business transactions, and that the bills and payments in question passed between them, in reference to transactions in which they were so connected. Now, two persons can scarcely be much connected in business transactions, except in one of two ways, either as adverse parties, or parties having adverse interests as buyer and seller—hirer and letter—and so forth, or as joint purchasers or sellers, hirers, &c., that is, connected in a series of joint adventures in which their interests were united, though not necessarily in the same proportions. Now, the Lord Ordinary does not understand it to be insinuated that the connection in this case was in any degree in the first of those characters, and takes it not to be alleged on the part of the pursuer, that George Rennie ever became his son's debtor, as a buyer or taker in hire of articles belonging to the son. It follows, therefore, that the connection must have been of the other description, and if the bills and payments in question passed in the course of that connection, it is plain they must all have passed, in the first instance, for the mutual accommodation of the joint adventurers, and the question, whether any debt is owing by one to the other will depend on the amount of the shares they respectively held in such speculations, and the state of their former advances. But, as to all these, it is admitted upon all hands that it is now impossible to get any information. No books whatever were kept by John Rennie, and nothing but a most imperfect day-book, of

that he was, or might be, such a creditor, and that any presumption to this effect that could be raised upon such evidence is very greatly outweighed, if not absolutely excluded, by the documents in process, under the hand of the said John Rennie and his agents, by the real evidence afforded by his whole conduct and proceedings, for the four or five years that he survived his father, and by the admissions of the pursuer himself in this process, sustains the defences against all the conclusions of the summons relating to John Rennie's alleged claims as a creditor of his said father; and assoilzies the defenders from all those conclusions, and decerns: Finds the defenders entitled to the expenses hitherto incurred, in so far as not already decerned for: Appoints an account thereof to be given in, and remits the same, when lodged, to the auditor, for his taxation, and report. Before answer, as to the conclusions of the libel in regard to John Rennie's provisions under his father's deed of settlement, appoints the cause to be enrolled, that parties may explain what they respectively propose as to that branch of the case."

The pursuer reclaimed.

LORD MEDWYN.—The question is, whether a relevant averment of facts has been made, either to warrant decree, or a remit to an accountant. No proper record has been made up in reference to the second conclusion of the summons; but an amendment of the record was allowed, and ample opportunity afforded for investigation by diligence; so that the pursuer is now in the most favourable situation he could well be.

It is assumed, that the particular averments on which the claim is founded are either proved, or capable of being proved; but they amount merely to presumptions, which again are redargued by other presumptions and by evidence. The absence of books and regular accounts, which is made an excuse for the evidence being defective, is, in reality, the circumstance, on the strength of which the present claim has been raised.

[His Lordship then went into a detail of the cash and bill transactions founded on in the action.]

It appears to me, that the facts averred only afford presumptions, but not strong, that, at the time of his death, George Rennie owed his son £30,000; but, if such had been the case, is it conceivable that John Rennie should never have hinted at the existence of the debt? The terms of his own letter to the

general entries, by George. No accounts, as with each other, were ever kept by either; and there is not only no docquetted account, or statement of balance, at any one period; but scarcely a scrap of business correspondence from one end of their connection to the other. In this utter darkness the pursuers have been groping for the last five years, and with the success that might have been expected. The defenders, however, have the advantage of those conclusive documents, dated after the father's death, to which reference has been already made; and if every thing else is uncertain and conjectural as to their joint proceedings, one thing at least the Lord Ordinary thinks is made clear by those documents, viz. that John Rennie was, in the end, a creditor, though he might have been a debtor to his father's

No. 47. trustees, and those of his agents, and the holograph state of his affairs in the sequestration—all show that he had then no imagination of having any claim as a creditor of his father, beyond the provision £9000. But, without looking to the presumptions on the other side, I see no foundation for the pursuer's demand to have a remit made to an accountant. This matter has already been in the hands of intelligent accountants, with every assistance from diligences, &c. I am therefore, for adhering to the interlocutor, on the ground that no documents or vouchers have been produced, which are evidence of a debt per se, nor any averments made which could found a reasonable presumption of its existence.

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LORD JUSTICE-CLERK.—I concur in the result which Lord Medwyn has arrived at, and on three grounds; first, that the utmost facility has been afforded, for the investigation of this case by diligences and otherwise, and the investigation has, nevertheless, failed; secondly, that there is no written evidence whatever to show that Gorge Rennie died indebted to his son; and, lastly, when John Rennie, after his father's death, carried on trade, and then became bankrupt and was sequestrated; and when he surrendered his goods, and underwent an examination, he on no occasion indicated that there was any claim of this nature against the estate.

LORD GLENLEE.—I am entirely of the same opinion. It has always struck me, that this action is not said to be founded on any thing in the state of his affairs given up by John Rennie under his sequestration, nor on any thing stated by him at the time of the sequestration. It is an action brought by the trustee for his creditors, whose duty it was to make every claim he had any chance of succeeding in; if it had been raised by his heirs or children, I should have considered it an improper sort of claim. As to the payments into George Rennie's account by John Rennie, even an acknowledgment by the bank of payment received from John, as truly for his father, could not have proved a claim at the instance of the payer, unless it was supported by other evidence importing that the money was paid in for a certain purpose. This was settled as far back as 1672. As to the joint bills, the retiring is of no avail, unless there be evidence to show that the money had been paid only by one of the parties. The same observation applies to the case of advances and acceptances, and a mere marking of paid, when the bill is found in the hands of a party, affords a presumption of payment by the proper debtor only, and furnishes no ground of claim, unless supported by other circumstances. The correspondence of the parties would have been such a circumstance, but that is alleged to be wanting. All the presumptions show that the payments were made by George Rennie; and it is of no signification that John, at the same time, discounted private bills of his own. Thus there is a total want of any presumption on the pursuer's side to redargue the presumption of law, that the payments by John Rennie have been made in extinction of obligations. Then you have the real evidence already alluded to which is decisive against this claim on the part of John Rennie's estate. Upon the whole, as there is no fundamental ex facie ground of debt, nor any presumption in favour of the pursuer, but, on the other hand, presumptions of an opposite tendency, I am for adhering to the interlocutor.

LORD MEADOWBANK concurred.

THE COURT accordingly adhered.

THOMAS JOHNSTON, S.S.C.—**WALKER, RICHARDSON, and MELVILLE, W.S.**—Agents.

FLESHERS OF CANONGATE, Pursuers.—*Rutherford—Penney.*
WILLIAM WIGHT and OTHERS, Defenders.—*D. F. Hope—Monro.*

Corporation—Exclusive Privilege—Statute.—1. Held, that the incorporation of fleshers of Canongate, in virtue of a seal of cause obtained from the Lord of Regality of the burgh of Canongate, on which possession had followed, and which had been judicially recognised, were entitled to exclusive corporate privileges, although the Lord of Regality had no express authority in the crown grants to confer such privileges. 2. The last part of the act 1703, c. 7, permitting all persons "to sell and break all sorts of flesh, every day, in the towns and burghs of the kingdom," held to be still in force, but not to extend to the slaughtering of cattle.

In 1128, King David I., by the foundation-charter of the Abbey of Holyrood, made a grant of the burgh of Canongate, and of sundry lands in favour of the church and canons of the Holy Cross, declaring that the burgesses should have liberty of buying and selling in his Majesty's markets, as fully and without hazard or custom, as his Majesty's own burgesses; and that the abbots of the said church and monastery should hold courts and exercise jurisdiction as freely, fully, and honourably, as the Bishop of Saint Andrews and other prelates.

This charter was confirmed by succeeding monarchs, and it was farther declared, that the lands therein specified should be held and possessed as a free regality. After the Reformation, the burgh of Canongate and the other domains of the abbacy passed into the hands of the Bishop of Orkney, who, in 1587, resigned them, in the hands of the crown, in favour of Sir Lewis Bellenden. The subjects in the charter of resignation were declared to be conveyed, "together with the full liberty and privilege of Regality, Chapel, and Chancery, within the whole bounds of the said lands and Barony of Broughton, Abbotscarse, Burgh of the Canongate," &c.

In 1612, the fleshers of Canongate obtained from Sir William Bellenden, successor of Sir Lewis, a charter, or seal of cause, erecting them into a free art and craft, with the exclusive privileges of a corporation, and giving them power "to take under their freedom and liberty the hail freemen of the candlemakers."

The superiority of the Burgh of Canongate subsequently came to be vested in the Magistrates of Edinburgh; and the fleshers of Canongate have, on various occasions, been recognised by the City of Edinburgh, and also by the Court of Session as a craft in possession of corporate privileges under their seal of cause.

In consequence of certain parties, not members of the incorporation, having commenced to slaughter cattle and sell flesh within the burgh, the incorporation of Fleshers and Candlemakers, founding on their seal

No. 48. of cause above mentioned, and alleging continued possession of their corporate rights, as well antecedent as subsequent to the granting of that charter, and of the exclusive privilege of slaughtering cattle and breaking and selling flesh within the burgh, raised action against the parties, concluding—1st, For a decree declaratory of their exclusive privileges; 2d, To interdict the defenders, as unfreemen, from practising the trade of fleshers within the burgh; and, 3d, To subject them in damages for having done so.

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The claim of damages was, however, afterwards passed from.

Defences were put in for four parties, of whom one admitted, and two did not deny having slaughtered cattle within the bounds of the burgh, while the other averred, that he merely retailed the flesh of cattle previously killed.

By these it was pleaded—

1. That the seal of cause founded on proceeded a non habente potestatem, in as much as the royal grants to Sir William Bellenden's predecessors conferred no right to create monopolies within the bounds of the Burgh of Canongate, and a Lord of Regality had in himself no such power; and that, if the charter flowed from an insufficient source, the pursuers could not avail themselves of prescriptive possession.

2. That, by the statute of 1703, in so far as it provides "that it shall be leisome to all persons whatsoever, to sell and break all sorts of fleshs on every lawful day of the week, and that in all the burghs and towns of this kingdom, free of any imposition whatsoever, the petty custom of burgh excepted," was still in observance;¹ and that the word "break" ought to be interpreted "kill," because, if breaking in pieces had been meant, the term *break up* would have been used.

The pursuers, on the other hand, contended, that their right to corporate privileges, as flowing from a Lord of Regality, was unchallengeable;² that the matter was now *res judicata*, having been recognised by the decisions of the Court of Session;³ and that the expression in the statute, "to retail and break," meant "to break into pieces the carcasses of dead cattle and sell them," the object of the statute being to make every day a market day within burgh.*

¹ Dick v. Fleshers of Stirling, Feb. 1, 1827 (ante, V. 268)

² Burgh of Kelso v. Hutchison, 1739, Mor. 1829; Feuars of Kelso v. Duke of Roxburgh, 1755, Mor. 1830; Fleshers of Canongate v. Town of Edinburgh, 1677, Mor. 1824.

³ Fleshers of Canongate v. Magistrates of Edinburgh, July 7, 1809, F.C.; Fleshers of Canongate v. Magistrates of Canongate, June 23, 1826 (ante, IV. 751).

* At the advising, it was observed by Lord Meadowbank, that the proper interpretation of the word *break*, in the passage referred to, was "to sell," of which old meaning there was a trace in the term *broker*—this old sense of *break* having the same analogy to its ordinary meaning as *retail* has to the corresponding French word *retailer*.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined * :—

" Finds that, in virtue of the seal of cause founded on in the record, the course of possession which was followed on it, and the judicial recognitions thereof which have taken place, the pursuers do constitute a legal corporation, entitled to the exclusive exercise of the trade or craft of fleshers, within the bounds limited according to the terms of the said seal of cause, and the general law of the land, but subject to the provisions of the statute 1703, c. 7, in so far as that statute is legally in force : Finds that the summons is sufficient in its terms to entitle the pursuers to a decree of declarator to this effect, and decerns and declares accordingly : Finds that the said statute, 1703, is still in force, and must receive effect in law, in so far as it provides that ' it shall be leisome to all persons whatever to sell and break all sorts of fleshers, on every lawful day of the week, and that in all the towns and burghs in this kingdom, free of any

* " It seems to the Lord Ordinary to be impossible, after the long and clear state of possession by the pursuers and their predecessors, as well as of other corporations in this burgh similarly situated, to look back into the powers of the superior's letters to grant the seal of cause originally. The subsequent acknowledgment of the rights constituted by it must exclude such enquiry, and the judicial recognitions of the title are a good deal too strong to be overcome now. The judgment in the case of the Wrights of Canongate v. Braidwood, on a seal of cause granted in similar terms, on the very same day, which was affirmed in the House of Lords, would alone be conclusive. It is not reported, but was decided in the time of President Blair, who delivered a full judgment on it. But even after there are two judgments in the case of the fleshers, in which the general validity of the title was assumed, and the legal construction and effect of it only brought into question. *Fleshers, &c. of Canongate v. Magistrates of Edinburgh*, July 7, 1809; *Fleshers of Canongate v. Magistrates of Canongate*, June 23, 1826.

" As the defenders have on the record denied the rights thus established, there is therefore ground for the declarator demanded by the summons. But, on the other hand, the Lord Ordinary must hold these corporate rights to be still qualified by the statute 1703, c. 7. For though that act has been considered to be in desuetude in the first part of it, which prohibited fleshers from being graziers, it is not so in the part which is here material. The decision and the opinion of the Court in the case of *Dick v. the Fleshers of Stirling*, Feb. 1, 1827, appear to settle this point. Finding the act to be still in force, the Lord Ordinary is of opinion that all the corporate privileges are not thereby done away; and, in particular, that slaughtering and selling is not within the meaning of the words, ' sell and break all sorts of fleshers.' The judgment in the case of the *Fleshers of Aberdeen v. Williamson, &c.*, June 1, 1825, though only in form on the question of passing a bill, did clearly recognise the distinction.

" The pursuers being right in their declarator, but wrong in the extent in which they maintain their privileges, the Lord Ordinary thinks that no expenses are due to either party.

" The sum for damages was given up at the Bar, the petitory claim being in fine, for all persons desiring to exercise the trade.
" *in the record against the sufficiency of the summons.*"

No. 48. imposition whatsoever, the petty customs of burgh excepted : ' Therefore, finds that the right and title of the pursuers above declared is qualified and limited by the said enactment : Finds that the general right and liberty declared by the statute does not extend to the act of slaughtering cattle within burgh, or within the bounds of the privileges of the corporation in this case : Finds it admitted on the record, that the defender, William Wight, has slaughtered cattle within the said bounds ; and not denied, that the defenders, Robert Wight and John Anderson, have done the same ; and, therefore, finds that these defenders have invaded and violated the privileges of the corporation—not being freemen thereof—and prohibits and interdicts them from doing so in time coming : Finds it not admitted by the defender, John Sommerville, that he has slaughtered cattle within the said bounds, but in respect that he has concurred with the other defenders in the general defence—denying the legal existence and privileges of the corporation, and that no damages are asked from any of the defenders : Finds it unnecessary more particularly to distinguish his case from that of the other defenders : Therefore, on the whole, finds, decerns, and interdicts in terms of the libel, but to the effect only, and under the qualification and restriction above specially expressed. But, in the circumstances of the case, finds no expenses due."

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Both parties reclaimed,—the pursuers, on the points of damages and expenses ; the defenders, on the merits.

LORD JUSTICE-CLERK.—After the various judgments in which this corporation has been recognised, it is now too late to raise a question as to its legal existence and rights. In regard to the act of 1703, we found, in the case of *Dick v. the Fleshers of Stirling*, that the last part of it, which is that here referred to, was not in desuetude. The object of the act was to make a provision for the subsistence of the inhabitants, which is one of the most important things for the legislature to consider ; and its meaning was, that every person, whether in the neighbourhood or coming from a distance, might bring in dead animals to be cut up and sold within burgh.

LORD MEDWYN.—I agree. Sir William Bellenden had the same right to grant this seal of cause as the magistrates of a royal burgh would have had, acting as the commissioners of the Crown.

LORDS GLENLEE and MEADOWBANK concurred.

THE COURT accordingly adhered on the merits, but found the defenders liable in expenses.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—JAMES BURNES, S.S.C.—Agents.

JOHN CHARLES, Petitioner.—*Monro.*

Bankrupt—Sequestration.—In a petition for discharge, under section 61 of the bankrupt statute, it is requisite that an actual concurrence be produced from the statutory proportion of creditors, and mere neutrality by a creditor is not enough; and there is no difference between the case where a bank is the neutral creditor, and that where a private individual is so.

In a petition by Charles, a bankrupt, for his discharge, under section 61 of the statute, it appeared that he did not possess the requisite concurrence, unless a banking company was computed as concurring. Charles stated, that the bank was willing that he should be discharged, and merely refrained from giving a positive assent to it, judicially, under the sequestration, because they held other parties bound, along with him, for their debt, and it might affect the liability of these parties, if the bank were express consenters to his discharge. And he alleged it to be the practice of the First Division of the Court to compute a bank as a concurring creditor, unless it appeared and made opposition; because it was the universal practice of banks to refrain from giving a positive assent judicially lest they should thereby injure their recourse against co-obligants.

The Court intimated, that there must be an actual concurrence and consent by the statutory proportion of the creditors. It was not enough that they refrained from opposing, and no distinction could be drawn between the concurrence required from a bank, and that required from any other creditor.

Their Lordships, therefore, superseded the petition, in order that the bankrupt might obtain a positive concurrence, without which the prayer of the petition could not be granted.

J. COMBE, W.S.—Agent.

ALEXANDER ROBERTSON, Suspender.—*D. F. Hope—Neaves.*

WILLIAM GAMACK, Charger.—*Rutherford—Thomson.*

Bill of Exchange—Proof.—Circumstances in which held proved that a letter, containing notice of the dishonour of a bill, and addressed to the drawer thereof, was duly put into the post-office, and, accordingly, that recourse was preserved against him.

ALEXANDER ROBERTSON, in Meiklemill of Esselmont, expedite letters mentioning of a charge on a bill for £95, dated 8th September, 1832, by him, at four months, upon Gilbert and John Heron. T

No. 50. ground of suspension was an allegation, that no due notice of the dishonour of the bill had been given to him, and a proof of this fact was allowed.

c. 12, 1835.
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Gamack.

The bill had been discounted with William Gamack, agent for the Commercial Bank at Peterhead, the party who gave the charge. Robertson lived in the country, and not at any post town; but Ellon was the nearest post town to his residence.

Gamack adduced the evidence of Bisset, his clerk, who had special charge of giving notice of the dishonour of bills, and who deponed, that it was his regular practice to send notice to all the parties when a bill was dishonoured, by letters, through the post, addressed to their nearest post-town; that he copied these notices into the bank letter-book, and then put them into the post-office himself; and that, at the time of despatching them, a marking to that effect was made on the bill to which the notice related.

The bill in question fell due 8th–11th January, 1833, and it bore a marking in Bisset's handwriting to this effect:—"Intⁿ. given 12th Jan'y, 1833;" and there was the copy of a letter of intimation to Robertson, of the same date, in Bisset's handwriting, regularly entered in the bank letter-book.

Bisset, who was examined in 1834, deponed, that he "had no particular recollection of having written or sent that individual notification, but from the marking on the bill, and from the entry in the letter-book, combined with the uniformity of his practice, he has no doubt whatever that such an intimation was put into the post-office by him, and the contents of such an intimation were in terms of the copy letter in the letter-book, by filling up the blanks in a printed form used for such purposes. Interrogated, depones, That it was his invariable practice to put the party's post-town on the back of the letter; and he has no doubt whatever that he did so in this case." "That he has no doubt that the letter to the suspender was put into the post-office by him of the date it bears." "Interrogated, Whether he has any special recollection of the letter to the suspender, or of any thing connected with the writing, addressing, or despatching it? depones, That he has not, because there were so many such intimations."

It appeared by an excerpt from the Peterhead postmaster's book, that he had entered only one letter as going from thence to Ellon, between the 11th and 16th of January, 1833; but that letter went on the 13th, which was the day on which Bisset's letter would have gone, if put into the post-office on the 12th, unless at a very early hour.

Robertson endeavoured to take off the force of this evidence, by attempting to prove, that the letter which went to Ellon on the 13th January was addressed to one Kirkton, and that Bisset, therefore, could not have put his letter of the 12th into the post-office; and there was no other proof of notice of dishonour within the requisite period. He attempted to prove that the charger had been irregular in his course

in giving notice of dishonour in other cases. But he failed to , with any degree of certainty, that the letter of the 13th of was one addressed to Kirkton.

se circumstances, the charger pleaded, 1st, That he had produced evidence of which the case admitted, to prove that notice had been put into the post-office of Peterhead on the 12th, and sent on the 13th; but, 2d, It was enough if he proved notice to have into the post-office, as he thereby preserved recourse, whether e ever reached Ellon or not: and, unless it was to be held that f of putting the letter into the post-office was complete in this re was no case in which the holder of a bill could be safe, as s no stronger evidence to be adduced than the marking on the e copy of the letter of intimation from the letter-book,—and the he clerk intrusted with that duty, who deponed, both as to his practice, and as to his having no doubt that he had put the letter ion into the post-office.

Lord Ordinary “found it proved, that due notice of the dishonour ll was given by the charger; and, therefore, repelled the reasons nsion; found the letters orderly proceeded, and decerned; and found the charger entitled to expenses.”

tson reclaimed.

PRESIDENT.—I am satisfied that the interlocutor is well founded. Un- was something of an unusual kind to attract the special attention of ie bank-clerk, to any individual notice, it was quite unlikely that he e any particular recollection in regard to it, especially when examined e interval of time. But he depones as to the regular practice in copy- notices into the letter-book, the marking on the bill, the despatching tion, and putting the notice into the post-office himself. The copy from -book was produced, and the bill bore a marking of intimation. On ese, Bisset, in reference to his own practice, swore he had no doubt that e was put into the post-office at Peterhead on the 12th of January, and end to the case. The bank-agent, the charger, has adduced all the rch the case is susceptible, that the letter was duly put into the post- and I hold the proof of it to be complete. But that is enough to preserve urse of the bank-agent against the suspender. Whether that letter ever him or not, the charger is protected in his right of recourse if he put the ly into the post-office. And, farther, I do not see any thing in the case ff the effect of the presumption that the letter reached the suspender, s that it was duly put into the post-office for him.

BALGRAY.—I concur. The bank-agent has adduced all the proof n be adduced in the nature of things, and in the ordinary course of busi- direct proof from the special recollection of a clerk, that he put a particu- into the post-office at a long interval before, cannot be expected where he dily duty of putting similar letters to other parties into the post-office, here was nothing of a remarkable kind to fix the particular letter in

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No. 50. his memory. I have no doubt that the charger has led proof sufficient to preserve his recourse.

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LORD MACKENZIE.—I am of the same opinion. It is true that I do not think the proof, that the letter was put into the post-office, is of a kind to produce certainty. Such proof could not be expected, and accordingly, such proof is not adduced. And, since the proof is necessarily of this inferior kind, I think it was open for the suspender to prove, if he could with certainty, that only one letter for Ellon was sent from the Peterhead post-office, and that such letter was addressed to Kirkton. Had he done this, it would have remained a question of presumption whether, on the one hand, from the practice of the bank-clerk, supported by the letter-book and the marking on the bill, it was more probable that he had duly put the letter into the Peterhead post-office on the 12th, but that it had not been duly forwarded to Ellon; or whether, on the other hand, it was more probable, from the regularity of the post-office, that every letter put into the post for Ellon had been duly forwarded, and accordingly, that no letter to the suspender had ever been put into the post-office. That would have been a question of presumptive evidence, as to which I am not prepared to say what my opinion would have been. But the facts of the case do not raise such a question. The suspender has failed to prove, with any thing like certainty, that the letter sent to Ellon on the 13th was addressed to Kirkton; and I do not feel satisfied, from any thing in this proof, that, had any party been waiting when the mail arrived at Ellon, and had opened the bag, he would not have found in it this very letter from the charger, giving the notice of dishonour. In these circumstances, I have no hesitation in holding that the reasons of suspension cannot be sustained.

LORD GILLIES.—I am quite satisfied that the interlocutor is right; and I hold that the bank has fully proved that notice was duly put into the post-office, because the whole proof has been adduced which the nature of the case allows, and it suffices to produce complete conviction on my mind. If such a proof as this could be viewed as of an inferior or doubtful kind, no bank could ever prove that notice was duly put into the post-office, unless in those comparatively rare instances where the clerk who put in the letter had his attention expressly called to it from some unusual circumstance, and retained a positive recollection as to it in particular. I hold it clearly proved that notice was put into the post-office, and the attempt to take off the effect of it appears to me to have failed.

THE COURT adhered, and awarded additional expenses against the suspender.

H. INGLIS and DONALD, W.S.—J. SHEPHERD, W.S.—Agents.

NEIL CAMPBELL M'LAREN, Suspender.—*A. M'Neill.*

ROBERT FINLAY, Charger.—*Russell.*

Sheriff's Small Debt Act.—Bill of suspension of a decree under the sheriff's small debt act, for a sum libelled as "per account," passed on the allegation, that no account was actually served, and that the citation (which the statute required should be in a particular form) did not bear that it was served, although this was duly set forth in the execution.

THE charger, Finlay, raised an action before the Sheriff of Lanarkshire, under the Small Debt Act, concluding against M'Laren, the suspender, for a sum of £3, 7s. 5d., set forth in the summons as "per account." The execution bore, that a full copy of the summons, with a copy of the account pursued for, was served on M'Laren, who made compearance, but stated no objection to the service. The Sheriff having decerned against him, he presented a bill of suspension, without caution or consignation, on the allegation—1. That no copy of the account was actually served on him; and, 2. That the citation did not bear that it was so served, as required by the schedule of citation given in the statute, and he produced a copy citation without any notice of an account.

In answer, Finlay contended, 1. That the execution being regular, and setting forth that a copy of the summons was served, it could not competently be redargued in a suspension; and, 2. That the provision as to this matter being for the benefit of the defender, he might wave it, and had done so in this case, by not stating the objection before the sheriff, whereby he was now barred from insisting on it.

The Lord Ordinary refused the bill, with expenses, adding the subjoined note.*

M'Laren reclaimed.

LORD MEDWYN.—In the case of Wallace I was in the minority, but this case is different. Here there is no averment that the account was actually served on the party. I am for passing the bill.

LORD MEADOWBANK—I should be sorry if we were ever again to unsettle the point decided in the case of Wallace.¹

* "The Lord Ordinary is of opinion that the bill is incompetent. The suspender tries to create a competency by saying, that the fact of the account having been served upon him is not set forth in what he avers was the copy of citation served upon him. But the execution of citation bears that a copy of the account was served upon him, on which conclusive circumstance this case differs from that of Brown, 14th February, 1833. There being no ex facie irregularity, it is needless to discuss the merits of the sheriff's decree in reference to the previous application. Even though there was a doubt of the incompetency (the Lord Ordinary thinks there is none), the suspender could scarcely expect to get the bill passed without caution and consignation."

¹ Wallace v. Hume, July 3, 1835 (ante, XIII. 1034).

No. 51. LORD MEDWYN.—The two cases are totally distinct.

Dec. 12, 1835
 Tod's Trustees
 v. Burns.
 —
 Mackenzie v.
 Lord Dundas.

LORD JUSTICE-CLERK.—I am for passing the bill on the principles on which we decided the cases of Brown¹ and Wallace. Where we have a statute, the provisions of which are contrary to the common law, pointing out a certain mode of procedure, I shall hold myself bound to follow implicitly the provisions of the statute.

LORD GLENLEE concurred.

THE COURT remitted to pass the bill without caution or consignation.

C. F. DAVIDSON, W.S.—C. FISHER, S.S.C.—Agents.

No. 52.

TOD'S TRUSTEES, Pursuers.—*More.*

DAVID BURNS and OTHERS, Defenders.—*Sol.-Gen. Cunningham.*

Process—Reduction.—A summons, containing alternatively declaratory and reductive conclusions, the latter, in the event of failing in the other, not proper for the reduction roll, but must be taken up in the ordinary action roll.

Dec. 12, 1835. A SUMMONS contained alternatively, declaratory and reductive conclusions. The statement of the reductive conclusions commenced as follows :—" Or, otherwise, and in case it shall not be so found and declared by our said Lords, then and in that case, the interim decree" &c. should be reduced and set aside. No writings were called for to be produced.

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The summons having been enrolled in the reduction roll, the junior Lord Ordinary reported it to the Court, as to whether he could take up the action, on the grounds, 1. That the reductive conclusions were contingent on the declaratory, so that, if the pursuer were successful in the declarator, the process of reduction would fall; 2. That this did not seem to be a proper reduction, nothing being called for to be produced.

THE COURT, considering the action to be primarily declaratory, and on the grounds stated by the Lord Ordinary, held, that the summons must go to the Ordinary Action Roll.

JAMES ROSS, S.S.C.—WILLIAM DOUGLAS, W.S.—Agents.

No. 53.

J. A. S. MACKENZIE of Seaforth, Pursuer.—*Keay—Sandford.*

LORD DUNDAS, Defender.—*Rutherford—H. Bruce.*

Proving of the Tenor—Casus Amissionis.—In a proving of the tenor of a personal bond, where there was sufficient evidence of the bond not being, de facto, a retired instrument—Held, that it was not necessary to state and prove a special casus amissionis.

¹ 16th February, 1838, ante, XI., 407.

THIS was an action for proving the tenor of a bond for £8250, granted by Sir Lawrence Dundas of Kerse, and Thomas Dundas, his son, in the year 1772, in favour of Thomas Earl of Dundonald, grandfather of the present Earl.

The tenor of the bond was set forth in the summons, with the exception of the testing clause. It provided, *inter alia*, that the granters should have deduction and allowance out of the principal sum and interest, of an annuity of £530, which they became bound to pay to Catherine, Countess Dowager of Dundonald, during her life; and that, at her death, the balance should be burdened with payment of £700 of principal to Lady Mary Cochrane, her daughter. The sum then remaining due was payable to the Earl of Dundonald during his life, and after his decease, it was to be burdened with an annual rent of £133, payable to Jane, Countess of Dundonald, his wife, in case of her surviving.

The action was insisted in by the pursuer Mackenzie, as assignee under a progress from the Earl of Dundonald, and he referred, in support of it, to the following adminicles:—1. Extract discharge by Lord Dundonald, in 1775, for the sum of £1000 paid to account, stating, in *gremio*, the general nature of the original bond, and the fact of this payment being marked upon the bond. 2. Assignment, in 1776, by Lord Dundonald to Arthur Cuthbert, of £7250, as the balance of the principal due on the bond. In this deed the bond was narrated at length, but without the testing clause. 3. Discharge, in 1779, by Lady Mary Cochrane for the sum of £700, paid to her on the death of Countess Catherine. 4. Proceedings in a process of multiplepoinding, raised in 1779 by the debtors in the bond, to ascertain what parties had right to its contents. In these proceedings, the bond was founded on and admitted by the parties, though the original was never produced; and, by the final interlocutor, a balance of £5000 was found due to Cuthbert, burdened with the payment of Countess Jane's annuity. 5. Receipts by Countess Jane for the payment of her annuity. 6. Assignment by Cuthbert to Admiral Keith Stewart (whom the pursuer represents), of the balance of £2660, due under the bond in 1787. There was no special *casus amissionis* set forth in the summons, the statement as to this matter being as follows:—
 "The principal bond having remained in the hands of the Earl of Dundonald until his death, according to the terms of his deed of assignment, came into the possession of his widow, the said Jane Countess of Dundonald, the *liferentrix* of the balance, or of his son Archibald Earl of Dundonald. The affairs of the said Archibald Earl of Dundonald fell into the utmost embarrassment and confusion, and he spent the last years of his life in England—the whole of his property in this country having been taken possession of and sold by his creditors. Both the saids Archibald and Jane, Earls of Dundonald, and the said Jane Countess of Dundonald, employed various agents, into whose hands their papers came at various times; and in the course of these changes, the said bond

No. 53. has fallen by, and is lost, and cannot now be found, though the strict search has been made for the same.”

12, 1835. The defender, Lord Dundas, representative of the granters of the bond admitted that a bond of the same description as that libelled had once existed, but alleged, though without offering evidence thereof, that the debts had been all paid over to Cuthbert and others having right, and that the bond must have been cancelled and discharged; and he maintained in point of law, that, as the bond was a retireable document, a special casus amissionis required to be stated and proved; that the tenor of the complete bond was not libelled, inasmuch as the testing clause, on which the obligatory character of the deed depended, was not set forth; that the pursuer ought to have stated that he was in a condition to show that the bond did exist, it was not cut off by prescription.

The pursuer answered, that, in the circumstances of the case, and of the nature of the adminicles, a special casus did not require to be stated, that it was not necessary to bring evidence of the testing clause,¹ and especially as, in practice, the tenor of a deed was usually proved from a scroll, into which this clause did not enter.

LORD GLENLEE.—I am quite clear there is no ground for the plea, that sufficient casus amissionis has not been libelled. It is, in many cases, sufficient to show, that the deed was in such circumstances as it might have been lost.

Lord Dundas himself has put an end to the defence that this bond was a retired document. The contents of the bond were settled in the multiplepoinding in which Cuthbert was preferred on his assignation to the bond, under reservation of certain payments. Lord Dundas states, that the whole balance found due in the multiplepoinding was paid. If he could show these payments, he would not be subject to the tenor of the bond being made up. I do not see how he can found his defence on payments not proved to have been made by himself. He cannot plead, therefore, that this is a retired instrument.

LORD MEDWYN.—The only point is as to the casus amissionis. But the difficulty of there being no special casus libelled, although the document is retired, is obviated by the judicial proceedings founded on. Considering the circumstances of the process of multiplepoinding, I doubt much whether it was necessary to prove the tenor of the bond, and whether a declarator would not have been sufficient. The proceedings in the multiplepoinding show clearly how the deed stands. The existence of the bond is admitted by the defender.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly repelled the defence as to the casus amissionis and sustained the adminicles.

ROBERT RUTHERFORD, W.S.—KER and DICKSON, W.S.—Agents.

¹ Erskine, IV. 1, 57.

sum in the policy, which was refused, and the claim submitted to arbitration; the arbitrators found that the property was not over-insured, and that the company was liable; the company then brought a reduction of the submission and decretal, in which, having obtained leave at an advanced stage of the proceedings and their summons, they averred, as additional grounds of reduction, 1. That the action was raised they had discovered that the insurance was fraudulently effected with the intention of having the property destroyed by fire and obtaining an amount sum from the insurance office; 2. That the property was actually destroyed by the defender by fire—Held, that the first averment was relevant to set aside the submission and decretal, and that the pursuers were not precluded, by the finding of the arbitrators having found the sum in the policy not to be excessive, from raising an issue on the first as well as on the second averment.

On the 8th October, 1831, the defender, Hunter, effected an insurance with the Hercules Insurance Company on certain mill machinery and materials in Glasgow to the extent of £1450. One of the conditions of the policy was as follows:—"In case any difference shall arise upon the award made on the office, such difference shall be submitted to arbitrators mutually chosen, whose award, or that of their umpire, shall be final; in no case shall the company be obliged to take the risk of the sale of damaged goods on themselves. The arbitrators or valuers shall fix the original value, and the value after the fire, and this company shall or make good the difference between these two sums, either by repairs or restitution, or by payment in cash, at their option." About a fortnight after the insurance was effected the property was destroyed by fire, and a claim was made by Hunter for the full sum insured. This claim the company refused to admit, alleging, inter alia, that the goods destroyed were not of the value put on them. The matter

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No. 54. in and revised, the company obtained leave to amend their summons, and in addition to their former reasons of reduction, stated, first, That “the said submission was entered into in the belief that the said insurance had been effected for the bona fide purpose of protecting the defender’s property from fire, and that the fire which had occurred was an accidental innocent one, so far as he was concerned; but the pursuers have recently discovered that they were deceived in this respect, and from facts which have come to light, they are enabled to aver, that the insurance of the mill machinery in question was the result of a deliberate fraud on the part of the defender Hunter, with the view of having the machinery consumed by fire, and obtaining an exorbitant and excessive sum for the same from the insurance office,—the true value of the said machinery, though insured at £1450 sterling, not having exceeded £350;” and, second, That “the pursuers have also recently discovered that this fraudulent scheme was carried into effect, in so far as within a few days after the insurance was effected, and on or about Saturday the 22d of October, 1835, the mill and machinery were wilfully set fire to and burnt by the defender Hunter, or by William Montgomery, then tenant or occupant of the said mill, or by some other person to the pursuers unknown, acting in concert with the defender Hunter, and under his orders, by leaving a lighted candle in the garret of the mill among a quantity of shavings or waste, at the time when the mill was being shut, or in some other way to the pursuers unknown. On a charge of this kind, the defender Hunter, and William Montgomery, were lately apprehended and fully committed for trial at the instance of the public prosecutor, though they have since been set at liberty. By all which the said decree-arbitral is null and void, as well as the said submission, and not binding upon the pursuers.”

These averments were in substance repeated in the condescendence. Hunter denied the allegations of fraud and wilful burning, but admitted that the matter had been taken up by the public prosecutor, and pleaded that a formal decree-arbitral could not be reduced at the instance of any one of the parties, unless on the ground of corruption, bribery, or falsehood alleged against the arbiters, and that the pursuers were not entitled to let into a proof on the allegation of fraud, which was open to them before the arbiters, but of which they did not avail themselves.

The record having been closed, the Lord Ordinary issued the following interlocutor, with the note subjoined: *—“Finds, that it is competent

* “The Lord Ordinary purposely couples the remit with a finding, because of the circumstances of the case, he thinks that the defender has a fair claim to have the opinion of the Court in the remit, if he wishes it.

“After the submission was gone into, and disposed of by a decree, the pursuers brought the decree under reduction, on certain legal grounds, and then, after the case had gone a certain length, they got leave, by interlocutor of Lord Moncreiff, to give in an amendment, which charges the defender with the fire-raising. It

to enquire, under this record, into the fact of the fire having been wilfully raised by the defender, and that it is proper that this fact, which, if established, goes to destroy the whole submission, should be determined before deciding whether the decree under that submission be effectual; therefore remits the case to the Jury roll."

The parties then went before the Jury clerks, who prepared an issue as to the second of the pursuers' averments above mentioned, viz. "Whether the defender destroyed the said machinery, or caused the same to be destroyed as aforesaid, for the purpose of defrauding the pursuers of the said sum insured as aforesaid?"

This issue was subsequently approved of by the Lord Ordinary as the issue for trying the cause. The Insurance Company then moved the Court, that, with reference to their averment, "that the insurance in question was the result of a deliberate fraud on the part of Hunter, with the view of having the machinery consumed by fire, and obtaining an exorbitant and excessive sum for the same from the insurance office," the following additional issue should be allowed:—"Whether the said insurance was effected by the defender, upon a fraudulent over valuation of the said machinery, with the intention of destroying the same by fire, or for the purpose of defrauding the pursuers of the sum insured, in the event of the said machinery being so destroyed."

Hunter opposed this motion, on the ground that enquiry on this head was excluded by the decret-arbitral, the value of the subjects insured having thereby been determined not to have been excessive.

LORD MEADOWBANK.—The fact that the property was not over insured was ascertained in the submission; but I have no doubt, if the insurance was made with a fraudulent intention—and this was unknown to the parties when they entered into the submission—that this additional issue should be allowed.

LORD MONCREIFF.*—I am of the same opinion. The summons as amended contains two substantive averments on the matter of fraud, first, That recently, and since the submission was entered into, the pursuers have discovered that the

maintained by the pursuer, the Lord Ordinary thinks justly, that if this charge be supported, it goes altogether to destroy the agreement to refer, and that therefore this fact must be first disposed of.

* But the defender urges that the pursuers have no right to be let into any proof on the subject, because it was open to them before the arbiter, and they did not call themselves of it, and that they only try to get into it now, by averring res noviter, &c., but without either condescending on it or proving it. The Lord Ordinary is not satisfied that the plea of competent and omitted before the arbiters is applicable here. But, at any rate, res noviter, &c. is sufficiently condescended on in view of its being proved, if this shall be necessary; and in adjusting the issues, may be given on that point, subject always to approval."

In consequence of the declinature of two of the Judges, and the number being less than a quorum, Lord Moncreiff was called in, agreeably to the
of the 2 Will. IV. c. 5.

No. 54. insurance was fraudulently made with the view of having the property destroyed by fire, and obtaining an exorbitant sum from the Insurance Company; secondly, That the property was in fact wilfully destroyed by fire by the defender. of these averments are substantively repeated in the condescendence, and separate pleas founded on them. The issue allowed by the Lord Ordinary was the second only. But is not the first averment per se relevant? This is so disputed as against the insurance, but it is said to be excluded by the decree arbitral, in as much as the value of the property is thereby determined to be excessive. Now the ground of reduction of the submission is, we submit, in the belief that the insurance was effected bona fide, though the value claimed was extravagant, but we have now discovered that the insurance was made with the intention to destroy by fire. This is the essence of the reason of reduction, and the over valuation is merely stated to show the motive. If the insurance was made with the intention to burn, whatever the motive may have been, is that relevant to annul it and to bar the right to recover under the policy? The rule is, that every concealment of what would influence the mind of the insurer is relevant to vitiate the policy. But would not the knowledge of this avowed intention have had influence with this insurance company? Would any man insure if this intention were disclosed? This objection strikes at the root of the insurance as a bona fide contract, for you could never suppose that the insurance could have been effected under the idea that the party insured meant to destroy the property. If, then, this ground of reduction be relevant to void the policy, it is relevant to set aside the submission entered into in ignorance of the actual state of the fact, and also the decree following on it. It goes to the root of the policy, and says there was no contract; but if there was no contract of insurance, the contract of submission falls with it, and also the decret-arbitral.

LORD GLENLEE concurred.

THE COURT accordingly allowed the issue proposed, omitting the parts printed above in italics.

G. & W. NAPIER, W.S.—JAMES WRIGHT, W.S.—Agents.

No. 55. MISS MARY J. L. LOCKHART M'DONALD and OTHERS, Pursuers, *D. F. Hope—H. J. Robertson.*

SIR NORMAN M'DONALD LOCKHART, Defender.—*M'Neill—Neill*

Entail—10 Geo. III. c. 51.—Two contiguous estates were destined to the series of heirs under strict entails, dated respectively 1693 and 1777; the first contained the same conditions, and the second was declared to be subsidiary first; an heir in possession expended a large sum in repairing the mansion which stood upon one of the estates exclusively—Held, in a question between the executors and the next heir, under 10 Geo. III. c. 51., that the rents of both estates were to be taken into account in estimating the amount of improvement money which the heir could be subjected to.

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Ed. Fullerton.
D.

THE late Sir Charles M'Donald Lockhart was heir of entail in possession of the estates of Lee and Cartland. The estate of Lee was en

in 1693, by Cromwell Lockhart. The estate of Cartland was entailed in 1777, by Mrs Porterfield or Lockhart, who disposed it in favour of the same heirs as those in the Lee entail, and under the same conditions. It was provided in this entail, as in that of Lee, that the husbands of heirs-female should bear "the name and arms of Lockhart, and title of Lee, and that they shall continue, and not desist, from using the same thereafter:" and, likewise, "that all the heirs-male and female succeeding to the said lands, by virtue thereof, shall assume, use, and carry the surname and arms of Lockhart of Lee." It was also provided, that, if an heir was created a peer, the benefit of the entail should cease, and the next substitute should take up the succession; "but always with and under the express condition, declaration, and quality, that the said irritancy, in case of creation, or succeeding to any title of dignity, shall have no other nor stronger effect than the same clause is entitled to in the entail of the estate of Lee, executed by Cromwell Lockhart of Lee, of date the 2d day of February, 1693; and shall in no event be so constructed as to occasion a separation between the said estate and lands hereby disposed, it being my intention that the two estates shall go together; and, therefore, that the clause of irritancy in this entail, respecting such creation or succession, shall be understood in the precise same sense, and have the same effect with the clause relative thereto in the said former entail."

The lands of Lee and Cartland were adjacent to, and interspersed with each other. Since 1777, the heirs of entail bore the single title of Lockhart of Lee, in respect of the lands in both entails, and always occupied the mansion-house which stood upon the lands of Lee, contained in Cromwell Lockhart's entail.

In 1820, Sir Charles gave notice, under 10 Geo. III., c. 51, that he intended to execute certain considerable and expensive improvements upon the house of Lee. After making the repairs, he obtained a decree, finding that the sums expended on the mansion-house and offices of Lee was £10,938, of which £8203, was chargeable against the next heir in the estate of Lee, restrictable to two years' free rent of the said estate. At his death, the free rents of Lee and Cartland amounted in two years to £3098, but of this sum, £739 arose from the rents of Cartland; and, when Miss M'Donald Lockhart and Others, the executors of Sir Charles, claimed £3098 from the next heir, Sir Norman M'Donald Lockhart, he alleged, that the rents of Cartland, which was an estate held under a distinct entail, could not be taken into account, as the mansion-house was built exclusively on the land contained in the older entail of Lee-proper, and the rents of that estate alone were to be regarded. The executors of Sir Charles raised an action to obtain payment, and pleaded that the lands in both entails were destined to the same series of heirs, and under the same conditions; the object of both was to support the family of Lee, and the heir in possession was to bear no other title than that of Lockhart of Lee; the lands themselves lay naturally adjacent, and even intermixed

No. 55.
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15, 1835.
Donald v.
Lockhart.

and one mansion-house had always been inhabited by the heir of entail in both estates. It was necessary that such mansion-house should be corresponding to the estates to which it belonged, and these were, in substance, equally Cartland and Lee, though the site of the house was exclusively upon Lee. The defender had succeeded both to the estates of Lee and Cartland, and in a question with him alone, the statute, receiving a fair and liberal interpretation, ought to be construed as allowing the whole rents of both estates to be computed as liable to the pursuers. That sum fell very far short of the actual expenditure of Sir Charles, and his expenditure on the house had necessarily been on a scale referable to the rents of both estates.

The defender pleaded, that this was strictly a question of power under the statute. The fact of the estates being adjacent, was accidental and irrelevant, as they were still held under distinct entails; and there was no authority under the statute for subjecting the rents of one entailed estate, for an improvement not made on itself, but made on another. This principle became more evident, though not more certain, in its application, where the destination in each entail was to a different series of heirs. But even in this case, the succession might split, from various causes, as, for instance, if the entail of Cartland should be separately contravened, the succession to it would be propelled to the next substitute, who would hold it, during the lifetime of the contravener, separately from the estate of Lee, which might remain unforfeited. It was therefore impossible to allow the rents of the one estate to be affected for improvements made exclusively upon the other.

The Lord Ordinary found “ that the only point raised in the present record is the amount of the sum which shall be held to form two years’ rent of the entailed estate of Lee, and which, in consequence of the improvements on the mansion-house of that estate by the late Sir Charles Lockhart, the pursuers, his daughters, are entitled, in virtue of the 10th Geo, III., to recover from the defender, the heir now in possession ; that in this question, and with reference to the terms of the statute, the lands originally entailed by Cromwell Lockhart in 1693, and those entailed in 1777 by Mrs Mary Porterfield or Lockhart, on the same series of heirs, and under the same restriction and limitations, and which confessedly lie adjacent to, and are interspersed with the former, must be held, in sound construction, to form the entailed estate of Lee ; and therefore, and in respect that the sum of three thousand and ninety-eight pounds, nine shillings and eightpence sterling, is admitted to be the amount of two years’ free rent of the said entailed estate,—Repelled the defences, and decerned against the defender for payment of the foresaid sum of three thousand and ninety-eight pounds, nine shillings and eightpence sterling, and found the defender also liable in expenses.”

The defender reclaimed.

BALGRAY.—I think the interlocutor is right. I do not see in what case there should be a permanent separation of the two estates; and viewing them as held by the same heirs, and adjacent to each other, I think the rents of both should be computed in reference to the repairs on the mansion-house, which has been inhabited by the heir in possession of both estates. The object of the entail was one and the same, the preservation of the family of Lockhart of all the provisions of both entails had that end in view.

PRESIDENT.—I am of the same opinion. These lands were adjacent to each other. They were destined, under the same conditions, to the same series of heirs; and in repairing the mansion-house of the heir, I conceive that, whether a site had been chosen on Lee or Cartland, the rents of both should be taken into account, in estimating the claim of the heir of the late heir.

GILLIES.—I think the interlocutor is right. In substance, this is much the same as a case, not uncommon, of several distinct estates being included in one deed of entail. The Wemyss entail, for example, contains the estates of Wemyss, Elcho, and Elcho. And, in many of the larger entailed estates of Scotland, the estate is made up of lands which have been entailed from time to time by successive proprietors. I cannot hold that, in such cases where a mansion-house is built, the rents of that estate containing the site of the house, which can be taken into account; and I view this as substantially a case of one entailed estate to the same order of heirs. Had the estates been destined to different orders of heirs, the question would have been essentially different.

MACKENZIE —I consider the question to be attended with difficulty, but I am inclined to adhere to the interlocutor of the Lord Ordinary. I consider, on the one hand, that the adventitious circumstance of the contiguity of the estates is quite irrelevant; and, on the other hand, that wherever lands are included in one entail, it is immaterial how distant they may be from each other in natural position; the rents of the whole must be taken into account.

I hold it also immaterial that the estate on which the house stands is larger than the other of the two; for it is the same question, in principle, as if the house, for the sake of a good site, had been built on the smaller estate, and a claim was made against the rents of the larger one. I am sensible, therefore, that the decision of the case is not free of difficulty, as I think it cannot rest on mere authorities, but involves a general principle; and, as it is clear that the two estates might be separated for at least one generation, at any time, when a claim was made against one entail only was incurred, it would rather seem to me that this is the same question as where a permanent separation might occur.

Soon as the forfeited estate was taken up by the next substitute, the question might arise as to the first year's rents under his possession, whether they were payable for a claim like the present. But, notwithstanding these doubts which have occurred to me, I rather think, that, according to a fair and liberal interpretation of the statute, the interlocutor of the Lord Ordinary was well justified in subjecting the succeeding heir.

COURT accordingly adhered, but found no additional expenses due.

No. 56.

Dec. 15, 1835.
Campbell v.
Grahame.

JOHN CAMPBELL, Pursuer.—*M^cNeill—Hamilton.*
MRS JANE GRAHAME OF GARDINER and OTHERS, Defenders.—*Sol.- Gen.*
Cunninghame.
Et e contra.

Dec. 15, 1835.

1st DIVISION.
Ld. Fullerton.

Expenses.—This was an action resulting, in its later stages, in a question of expenses. The Lord Ordinary found neither party entitled to expenses, and both parties reclaimed. The Court altered, and found Campbell liable in expenses, subject, however, to a special report by the auditor, regarding the cost of certain branches of the proceedings in which he had been successful.

J CAMPBELL, W.S.—W. DICKS W.S.—Agents.

No. 57.

MAGISTRATES AND COUNCIL OF BRECHIN, Pursuers.—*D. F. Hope—*
G. G. Bell.

GUTHRIE, MARTIN, AND COMPANY, and JOHN OGILVY, Defenders.—
Rutherford—Currie.

Proving of the Tenor—Writ.—Circumstances in which the Court decerned in a proving of the tenor of a minute or act of thirlage by the town council of Brechin in 1637 relative to the mills of the burgh.

Dec. 15, 1835.

1st DIVISION.
D.

JOHN OGILVY, tacksman of the mills of Brechin, raised an action against Guthrie, Martin, and Company, distillers in Brechin, concluding for payment of certain mill dues, in respect of the defenders being thirled to the mills of Brechin under an act and minute of thirlage by the town council of Brechin on 15th May, 1637. The defenders denied the existence of the act of thirlage, and the process was sisted until a proving of the tenor should be brought. The magistrates and council then brought a proving of the tenor, and called John Ogilvy, and Guthrie, Martin, and Company, as defenders. No appearance was made for Ogilvy. The magistrates adduced as adminicles, first, A copy of the said act of thirlage made in 1744, which had been found in the repositories of one Low, who was treasurer of the burgh in the year 1744, and had been dean of guild afterwards; and, second, Another copy of the same act of thirlage, apparently much more antiquated in its orthography, which was extant in the charter-chest of the family of Panmure, and in that part of it containing papers relative to their Brechin estate. Some members of the Panmure family had anciently been connected with the council of the burgh. This copy differed from the first in some details, none of which was important in itself except the date, which in the Panmure copy was 1636, whereas in Low's copy the date was 1637. It was 1

last copy which was selected by the pursuers as that in terms of which their decree of proving was asked. The pursuers also produced an extract from the records of the craft of hammermen of Brechin in 1580, narrating that the town council had appointed the meikle mill to be roused, and the whole malt made within the malt barns of the town to be thirled to the said mill.

In regard to the *casus amissionis*, it was proved, from the records of the town books, that in 1745 the rebels had been in possession of the town; and it was handed down traditionally from several prior town clerks, that many of the town papers and records had then been burnt or destroyed, as the rebels had made a guard-room of the town-house. It also appeared that some of the papers had been lost on the occasion of building a new town-house about forty or fifty years ago, and removing the papers to it.

The Court unanimously decerned in the proving as libelled.¹

Dean of Faculty.—As the other process was sisted until this process should be brought, the defenders ought to be subjected in expenses.

LORD MACKENZIE.—The pursuers were obliged to bring this action in order to make up their own title. It is impossible to subject the other party in the expense of this step.

G. BINNY, W.S.—J. IMRIE.—Agents.

JAMES INGLIS, Pursuer.—*J. Anderson.*

ALEXANDER GLEN, Defender.—*Sol.-Gen. Cunninghame.*

Jury Trial—Notice.—Action dismissed, in respect of no notice of trial having been given by the pursuer, within a year after the final adjustment of the issues, no reasonable cause having been assigned for the delay.

INGLIS pursued an action of reduction against Glen, in which Issues were finally prepared and signed by the Lord Ordinary (Jeffrey), on the 19th November, 1834.

By Act of Sederunt, 29th November, 1825, § 47, it is enacted, that “if the pursuer, or the party appointed to stand as pursuer, before the Jury Court, shall not proceed to trial within twelve months after issues have been finally prepared; or if, after having given or received notice of trial, the pursuer does not appear at the trial and proceed with his evidence, unless reasonable cause for such delay, or for his failing to appear, is shown to the satisfaction of the Jury Court, it shall be competent to apply to the Jury Court to remit the case back to the court from whence it came, and that such court shall hold the party as confessed, and proceed thereon, as in other cases in which parties are held as confessed.”

A year and five days having elapsed from the date of the final prepara-

No. 58. tion of the issues, and no notice of trial having been given by the pursuer, the defender moved the Court to hold the pursuer as confessed, and dismiss the action.

15, 1835.
Mackie v.
Watson.

The pursuer answered, that there was reasonable cause for delay, as the parties had been engaged in a communing concerning an extrajudicial arrangement, although this communing had been broken off in February, 1835; that the provision of the Act of Sederunt was not imperative, and gave a discretion to the Court in applying the certification, by making it "competent" for the defender to move for it; that, if the defender had seriously wished the pursuer to proceed, he had the power of himself fixing a day for trial within ten days of the issues being engrossed. The pursuer farther stated at the bar, that he was ready to give notice of trial for as early a day as the Court should think fit.

THE COURT, on the ground that there had been, on the whole, no reasonable cause for the delay that had occurred, granted the motion.

JOHN LIVINGSTON, W.S.—GREIG and MORTON, W.S.—Agents.

THOMAS MACKIE, Suspender.—*A. McNeill.*

No. 59.

WILLIAM WATSON, Charger.—*McNeill.*

Payment—Presumption—Suspension.—A charge was given for payment of the contents of a bond, no demand having been made upon it for twenty-nine years, and certain other circumstances concurring to throw suspicion on the existence of the debt,—the Court remitted to pass a bill of suspension on juratory caution, although there were no receipts for payments, and the bond remained in the hands of the charger.

15, 1835. In 1806, the suspender, Mackie, had made a purchase of heritable property, and had been accommodated by the charger, Watson, who then and afterwards acted as his agent, with advances towards payment of the price. The bond in question was for £70, and contained a disposition to certain of the subjects in security. These subjects were sold in 1807, with concurrence of Watson, who alleged, however, that no part of the debt was then cancelled, and that he continued to rely on the personal obligation in the bond, and he now gave Mackie a charge for payment. Mackie presented a bill of suspension, averring that the debt was discharged, although he could produce no written vouchers thereof; and he maintained, that post tantum temporis payment was to be presumed, especially when the sale of the subjects conveyed in the bond was taken into consideration, and that this presumption was confirmed by Watson having made no demand for a period of twenty-nine years.

DIVISION.
Chamber.
Cockburn.
T.

Watson answered, that the bond being in his possession undischarged, and not met by vouchers of payment, was evidence of the existence of the debt which could not be redargued by any presumption drawn from lapse of time short of the years of the negative prescription,

Neither caution nor consignation was offered by the suspender.
The Lord Ordinary refused the bill, adding the note subjoined.*
The suspender reclaimed.

The Court, considering the case to be one which required investigation, remitted to pass the bill on juratory caution.

CHARLES FISHER, S.S.C.—E. and A. M'MILLAN, W.S.—Agents.

FLESHERS OF EDINBURGH, Suspenders.—*Sol. Gen. Cunninghame—More.*
JOHN TURNBULL (Collector of Annuity-Tax), Charger.—*D. F. Hope—Inglis.*

Annuity-Tax—Burgh.—1. Suspension of imposition of annuity tax, by stentmasters competent. 2. Circumstances in which Court refused to pass a bill of suspension of a charge for payment thereof.

By the statute 1661, authorizing the levying of the annuity-tax for the stipends of the ministers of Edinburgh,¹ it is provided that the annuity of six per cent “shall be imposed upon and paid by the inhabitants, tenants, and occupiers of the several dwellinghouses, chambers, booths, cellars, and all other houses, high and laigh, within the said town, without exemption or exception of any house, of whatsoever holding or nature the same may be, or of any person or persons of whatsoever degree or quality or place, upon pretence of any privilege or pretext whatsoever: And that the quota of the said annuity payable by the inhabitants of the said houses shall be according and effeiring to the maills of the houses occupied and inhabited by them, at the proportion of six merks for each hundred merks of maill, so that the inhabitants and occupiers of houses, of which the maill extends to one hundred merks, shall be liable, beside and by and attour the maill pertaining and payable to the heritors and others having right, to pay yearly to the collectors of the said annuity six merks, and according as the maills of the houses occupied by the several inhabitants of the said burgh shall be less or more than a hundred merks, their respective quota of the said annuity to be less or more proportionally.”

And, by another provision, “it is always declared, that the said imposition, being only payable by the inhabitants and occupiers of the said tenements, chambers, booths, cellars, and other house, shall not affect the ground; and that the heritors and others having right to the said houses shall not be liable to the same, unless they actually inhabit, occupy, and dwell in the same themselves.”

* * The absence of receipts for payments by the suspender, and the bond remaining in the hands of the charger, are sufficient presumptive evidence that it has not been discharged by payment; and neither caution nor consignation is offered.”

¹ See edition of the Statutes, VIII., p. 244.

No. 60.

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 15, 1835.
 Fleshers of
 Edinburgh v.
 Bull.

The Incorporation of Fleshers of Edinburgh were charged, under the above statute, by the tax-collector, for payment of arrears of annuity-tax, due from the year 1828, for premises occupied by them, viz., the shambles at the North Loch, and certain stalls in the Upper Flesh Market. The Fleshers presented a bill of suspension, on the ground that they did not occupy or possess any part of these premises, which, they alleged, were generally let to their tenants, though occasionally unoccupied; and therefore that they were not liable under the statute.

The charger answered, that the present application was incompetent, as being an appeal from the judgment of the stentmasters; and, on the merits, averred, that the suspenders occupied the shambles as proprietors, and the Upper Market stalls as tenants of the city of Edinburgh.

The Lord Ordinary reported the case, adding the subjoined note.*

At the advising, the Court expressed themselves clearly of opinion that this proceeding was competent; so that the chief point in dispute was the state of the fact. The following were, in substance, the admissions which either appeared *ex facie* of the bill and answers, or were elicited at the bar:—

The corporation were proprietors of the shambles or slaughter-houses, and individual members used these premises in the exercise of their trade. The corporation allowed unfreemen fleshers also to use them occasionally, for short and uncertain periods, on payment of a small custom or “box-penny,” which the corporation alleged to be rent. The Upper Market stalls were stated by the charger, and this statement was not expressly denied to be in the occupation of the corporation, as tenants of the city of Edinburgh, paying a yearly rent.

Previous to 1828, the corporation had regularly paid annuity-tax for the same premises on account of which they were now charged; and no change was alleged to have occurred in the state of occupancy. The assessment for poor’s rate is laid upon the same description of persons as those by whom the annuity-tax is payable, and is collected according to the same valuation by the stentmasters; but it appeared that while the corporation refused to pay annuity-tax, they had continued to pay the poor’s rate.

LORD JUSTICE-CLERK.—This is an important question to the law of the country. Although the statements of the parties differ considerably, there are certain points which are clearly made out. The assessment applies both to the shambles and to the stalls in the Upper Market. Now, the shambles are the general slaughtering place for the town of Edinburgh; there is no averment that the suspenders have abandoned them; so we must hold that the corporation, with its individual members, are in occupation of these shambles. As to the averment of the booths being let to unfreemen, I cannot regard it; the corporation

* “The Lord Ordinary reports this case, because despatch is expedient, and in consideration of the subject to which it relates. The important question is, the competency of such applications.”

much more by what they charge for the use of the booths, but that will be the occupation. As to the stalls in the market, it is averred, and there is no satisfactory denial, that the suspenders are the actual tenants of these stalls under the city of Edinburgh. Is the annuity tax to be withheld, and the suspenders to be deprived of their subsistence, on such grounds as the suspenders have? We cannot allow them to change their ground in this way. They admit that they paid this tax previous to 1828, and now they take up a new opinion on the subject, and resist payment, although there be no good reason why the tax should not continue. I am for refusing the bill; and if these complainants think they have a right to exemption from this tax, let them proceed to establish it by an action of declarator.

MR GLENLEE.—I entirely agree. It is plain from the complainants' own statement, that when they made the payments previous to 1828, they must have been in the same situation as they are now, and this is just an attempt to intercept the course of payment of this tax.

MR MEADOWBANK.—I am of the same opinion. This is an alimentary provision for the clergy, which these complainants have been paying without opposition, and they now wish to invert the course of payment.

MR MEDWYN.—I do not materially differ, and have no doubt as to the competency of the suspension. But the suspenders say, we are not in a proper situation to have payment demanded of us,—we are not occupants. I should wish the bill passed, on condition of their continuing to pay in the interim. I should like to see the facts of the case reduced to a more proper shape.

THE COURT refused the bill, without prejudice to any competent action which the Incorporation may be advised to bring.

E. and A. McMillan, W.S.—HARRY INGLIS, W.S., Agents.

JOHN DRYSDALE, Advocate.—*Monteith.*

CHARLES KENNEDY, Respondent.—*Rutherford—Monro.*

Competition—Landlord's Hypothec—Deathbed Expenses—Process.—A landlord had to have his tenant's effects sequestrated for payment of the rent; after the writ to sequester was served, the tenant died; the effects having been sold, the landlord made an order for payment of the proceeds to the landlord, previous to which, however, the medical attendant of the deceased had lodged a claim for the deathbed expenses; the sheriff, without recalling the order, preferred the surgeon's claim to the landlord's—Held, in an advocacy, 1. That the surgeon's claim for the deathbed expenses was preferable to the landlord's under his hypothec. 2. That in such a case the duration of the period of deathbed was not limited to the sixty days after death. 3. That the circumstance of the landlord having raised sequestration after the tenant's death was of no consequence as in a question with the medical attendant. 4. That the decree of preference in favour of the surgeon was good, although the order for payment to the landlord had not been recalled.

The late James Clark rented a house in Edinburgh from the advocate, Dec. 15, 1820, in view to obtain payment of his rent, applied, in Dec. 15, 1820, for *Clark's effects sequestrated.* The sheriff, on the 1st.

No.

Dec. 15
Drysdale
Kennedy

No.

No. 61. 14th August, pronounced the usual interlocutor of sequestration, and the warrant to sequester was served accordingly. On the 4th September Clark died; and thereafter, intimation being made to his nearest of kin, warrant was granted to sell, and the effects were sold. On the 10th October, Charles Kennedy, surgeon, lodged a claim in the process of sequestration for deathbed expenses incurred by the deceased, and claimed to be ranked *primo loco*. Without this claim having been disposed of, the sheriff, on the 17th October, pronounced an interlocutor ordering payment of the proceeds of the sale to the landlord Drysdale. This interlocutor was not reclaimed against, and was never recalled. On the 18th October, Drysdale gave in answers to Kennedy's claim, and, after some procedure, the sheriff preferred Kennedy to Drysdale, allowing the latter, however, to receive, in the first place, the expenses incurred in the sequestration and sale, and modifying the amount of the surgeon's claim.

Drysdale thereupon brought an advocacy, and pleaded—

1. The landlord's claim under his hypothec is as much a privileged debt as the surgeon's claim for his account of medicines and attendance, and *privilegiatus contra privilegiatum non utitur privilegio*; even assuming the surgeon's right of preference, it would be insufficient to support his claim for the expense of attendance during a period antecedent to the sixty days previous to death, when Clark must be presumed not to have been on deathbed.

2. Clark's effects having been attached before his death for payment of the year's rent by a sequestration at the landlord's instance, there is no room for the surgeon's plea of preference; the surgeon's claim not having been lodged until after the decree of the 17th October was pronounced, it was incompetent for the sheriff to prefer him to the landlord.

Kennedy, on the other hand, contended—

1. The expense of a surgeon's attendance and of medicines during the mortal sickness of a party is a privileged debt on his estate, and preferable to the landlord's hypothec.¹ The duration of the mortal sickness covered by the privilege is not limited to any precise period.²

2. The execution of the warrant to sequester could operate no transfer of the property from the tenant, or confer on the landlord a higher grade of preference, so as to defeat the surgeon's claim, which did not require nor admit of the adoption of judicial measures in security;³ and the circumstances of the inferior court procedure could have no legal effect in giving the landlord any preference beyond what he might otherwise have.⁴

¹ Rowan v. Bar, 1742 (11852); Peter v. Munro, 1749 (ibid); Lawson v. Maxwell, February 12, 1784 (4473).

² See Lawson, ut supra.

³ Robertson v. Jardine, July 6, 1802 (7801).

⁴ Rowan, ut supra.

" This case is not free from difficulty. But the Lord Ordinary, after carefully ~~stating~~ all the points, and examining the adjudged cases, thinks that the claim ~~is~~ ~~independant~~, as modified by the sheriff's interlocutor, is a just claim of pre-~~sum~~, and that there is not any incompetency in the form of the proceeding.

2. There is some appearance of difficulty in the form of the procedure, in so ~~as~~ the interlocutor of the sheriff, of 17th October, 1832, was not reclaimed ~~at~~, and was never recalled. It was a mistake to pronounce that interlocutor ~~not~~ first disposing of the respondent's claim, which had been lodged on the October. But, (1.) No objection to the form of the subsequent proceedings ~~taken~~ in the inferior court. And, (2.) The Lord Ordinary is inclined to think from the peculiar nature of the process, it was not essential that that interlo-
cutor should be recalled. The fund was still in manibus curiæ, and the respondent's ~~claim~~, if just, was properly a burden on the advocator's right as the landlord seques-
trating. It rather appears, indeed, from the report of the case, Rowan v. Barr, June 742, Kilkerran, p. 138, Mor. 11852, that the creditor funerarius was found ~~led~~ to reclaim the money from the landlord sequestrating, even after it had actually paid to him. At the same time the Lord Ordinary doubts whether it ~~is~~ ~~of~~ of any avail to the respondent, though his objection was sustained. Some ~~an~~ extensive form of doing justice must be found; and, as the respondent did ~~not~~ take the point in the inferior court, he could not be relieved of expenses. In ~~the~~ the point is not even stated in this record, the 6th plea for the advocator being ~~not~~ ~~led~~ to a different question, in which he has mistaken the facts.

3. The Lord Ordinary thinks, that according to the decisions, though none of them ~~exactly~~ exactly the same with this, the medical attendant has a preference for the death-
charges. By Peter v. Monro, July 26, 1749, the surgeon was preferred pari-
~~bus~~ with the creditor funerarius; and by Rowan v. Barr, June 29, 1742, the creditor ~~funerarius~~ ~~was~~ was preferred to the landlord.

4. Some doubt was founded on the fact, that the sequestration was raised in the ~~line~~ ~~line~~ of the deceased. But it was merely raised, no warrant of sequestration ~~had~~ had been given, and before the order for payment was pronounced, the respon-

No. 62,

Dec. 15, 1835.

Duke of
Hamilton v.
Mather.

THE DUKE OF HAMILTON, Pursuer.—*Sol.-Gen. Cunninghame—Jardine*
JOHN MATHER, Defender.—*D. F. Hope—Patterson.*
JOHN URQUHART, Defender.—*Cowan.*

Superior and Vassal—Prestations—Teinds—Expenses.—1. Certain feu-du kain and carriage services, being payable out of lands held in feu, together with certain teind-duties, payable by the investiture to the superior, or, at his option, to the minister of the parish, which teind-duties were within the scope of stipend allocated upon the lands in successive localities; and no settler having taken place with the superior for several years,—Held, in an action at instance for payment of the value of the arrears of these prestations, (1.) That the superior was entitled, either to delivery of the kain in kind, or to the market value thereof in the several years; (2.) That the carriages not having been required to be performed in each year, he was not entitled to demand any estimated value thereof, retrospectively; and (3.) That the payments of stipend by the vassal in the different decrees of locality, must be considered as payments of the teind-duties in question, by consent of the superior, in terms of the investiture. 2. A pleader whose interest was only indirect, having been allowed to assist himself as a defender and having unnecessarily given in separate pleadings, contrary to the expressed opinion of the Lord Ordinary, found liable in the expense of making up the standard record, while the other defender was found entitled to expenses.

Dec. 15, 1835.

2^d DIVISION.
Moncreiff.
T.

THE lands of Meikle Earnock were held feu of the Duke of Hamilton by one Strang, for payment of certain feu and teind duties, kain and carriage services, the teind duties being declared payable to the Duke, heirs, and successors, or at their option, to the minister of the parish of Hamilton, in which the lands lay. In 1763, Strang disposed a part of these lands, which was acquired by the defender Urquhart by purchase. By the investiture, Urquhart was taken bound for payment not merely of the feu and teind duties appertaining to the parcel of lands acquired by him, but of the duties appertaining to the whole lands of Meikle Earnock, with a right of relief.

The last settlement between the superior and the vassal in the principal lands of Meikle Earnock, for the feu-duties, kain and carriages, was in 1799. The stipend allocated in successive localities to the minister of Hamilton on the lands in question exceeded the amount of the teind-duties, and had been regularly paid by Strang's successors. About the year 1830, the defender, Mather, having succeeded to the lands originally retained by Strang, the Duke raised action against him concluding, first, for payment of the amount in money of the feu-duties, kain and carriages, due out of these lands, from Martinmas, 1830; secondly, for the amount of teind-duties due out of the same lands, from the year 1799.

Mather, admitting that he was liable for the feu-duties, and that the kain and carriages had not been paid, maintained, in defence, that the Duke was not entitled to have the kain converted to a money rate,

Duke and his predecessors, were not now due or payable to his
1

Duke answered, in regard to the teind-duties, that this was not a
as in an allocation of teinds; that as Mather was localled upon
and only in proportion with the other heritors having heritable
to their teinds, and as his teind-duties have not been exhausted in
at place, he must make payment of these teind-duties to the Duke
relief.¹

as the record was in course of being made up, Urquhart applied to
ed as a defender in the action, on the ground that, according to the
f his titles, he was liable to the superior in the reddendo of the
lands of Meikle Earnock, and had therefore an interest in the
to be pronounced. The Lord Ordinary found him entitled to
, and give in defences for his interest; but his Lordship observed
te, that "he cannot see any use for double pleadings, as every
material may be put into one set." Urquhart thereafter sisted him-
ed although his defence against the action was necessarily the same
stance as Mather's, he gave in not only separate defences, but a
condescence and revised condescence.

Lord Ordinary pronounced the following interlocutor, adding the
abjoined.* "Finds that the pursuer is entitled to decree against

Mac v. Baikie, 19th February, 1793 (F.C.); *Lord Dundas v. Belfour and*
17th November, 1802 (F.C.); *Locality of Bothwell*, 8th July, 1808.

No. 62.

Dec. 15, 1835.
Duke of
Hamilton v.
Mather.

the defender Mather, for the sums of feu-duty concluded for in the summons, amounting, for all the years libelled, to the sum of , and decerns for the same accordingly, under deduction of the sum of £5, 7s. 6d., admitted by the pursuer to have been overpaid in 1821: Finds, that the pursuer is entitled either to delivery of the kain stipulated by the charters, in kind, or to the market value thereof in the several years: Finds, that the carriages not having been required to be performed in each year, in the manner specified in the charters, the pursuer is not entitled to demand any estimated value thereof retrospectively: Finds, that the allocation of the teinds of the defender's lands as stipend to the minister must be considered as an allocation made by the pursuer and his predecessor, as titulars of the teind-duties payable forth of the said lands, to themselves as titulars and superiors in the first instance, such teind-duties being by law primarily liable to such allocation: Finds, therefore, that the payment of stipend made by the defender under the decrees of locality must be considered as payments of the said teind-duties by consent of the pursuer, in terms of the charters: Sustains the defences as to

to the minister. The feu gives a right to the teinds to the heritor valeat quantum, and the implication is, that the feu-duty is the full value of that right. Therefore, on the strictest principle, the titular must exhaust that teind-duty as the proper teind drawn by himself, before he can require his feuar to pay any thing more from the land as teind to the minister. It is true that the result is not the same in the case of a proper sale of teinds under the statutes. The titular is not required to allocate the interest or value of the price. This is explained by the authorities to proceed on the difference between a forced sale at an under value by the statutes, and a voluntary sale or feu, where the full value is presumed to be taken. But, at any rate, the anomaly, if any, is in the latter case. The correct principle is in the decisions in the other case—that of a feu of the teinds at what is presumed to be the full annual value.

“ The decisions, however, are quite conclusive of the point, and it is unnecessary to assign further reasons for the judgment.

“ Perhaps the present Lord Ordinary does not fully understand the grounds on which Lord Mackenzie found Mr Urquhart entitled to appear in the process. Mr Urquhart's titles certainly make him liable to the superior for the entire feu and teind-duties stipulated with Strang, with a right of relief only against Strang's heirs. But the summons has no relation to Urquhart, being certainly confined to the proper proportions due by Strang's heirs for the lands retained by them, after the constitution of Coventry's right; and though the judgment to be pronounced under it might affect Mr Urquhart in principle, yet as a judgment it could never touch his rights. However, it is *res judicata* that he had a right to appear. But though it be so, most clear it is, that the making up of a separate record was a most unnecessary and oppressive proceeding. It is clear too, from Lord Mackenzie's note, that in admitting Mr Urquhart as a party, he deprecated the idea of separate pleadings, and never thought of any thing more than Mr Urquhart appearing to attend to his interest, by concurring in Mr Mather's pleadings where he thought it necessary. The Lord Ordinary thinks it his indispensable duty to discourage such multiplication of unnecessary pleadings.”

and directly affecting his interest : Finds, in conformity to the Note and Mackenzie in pronouncing the foresaid interlocutor of 5th March, that it was altogether unnecessary for the said John Urquhart to make separate pleadings, in addition to those of the said John Mather, insist on a separate record being made up for his case, on which, the summons, no judgment could possibly be pronounced : Therefore Finds the said John Urquhart entitled to the expense of entering appearance by his minute, and of maintaining his interest at the bar, as intimated by the said final interlocutor of Lord Mackenzie ; but Finds the said John Urquhart liable to the pursuer in the expense of making up a separate record on his own account, in opposition to the expression of opinion to the contrary by Lord Mackenzie, and for no use or purpose."

The Duke reclaimed on the merits, in reference to the teind-duties.

Urquhart reclaimed on the point of expenses.

THE JUSTICE-CLERK.—I think the interlocutor right, and that the case of the Duke has been properly applied. Had I been Ordinary, I should not have ordered Urquhart to make up a record for himself.

THE GLENLEE.—It is plain that Mather was entitled to come to the Duke's house—You, as titular, might have localled for yourself on these teind-duties ; but have not done so, and must allow me a deduction corresponding to the payment I have made for the stipend.

THE MEADOWBANK and MEDWYN concurred.

No. 63.

WILLIAM GIBSON and MANDATORY, Pursuers.—*Rutherford—Miller.*Dec. 16, 1835.
Gibson v.
Stewart.DUNCAN STEWART, Defender.—*D. F. Hope—Sol.-Gen. Cunningham—Marshall.*

Pactum Illicitum—Partnership.—1. The partner in an illegal adventure, being sued by a co-partner for his share of the loss which had arisen on the adventure, was absolved on the plea of *pactum illicitum*: he afterwards made a claim for remuneration on account of services performed for behoof of the adventure, claim disallowed. 2. The captors of a confiscated vessel having allowed one of the partners in the vessel to retain a certain portion of the proceeds of the sale of the vessel, for his own behoof—Held, that his co-partner had no right to call him to account in relation to these sums.

Dec. 16, 1835: SEQUEL of the case reported ante, VI. 733, IX. 525, and XI. 683, which see. The questions remaining under the remit to the 1st Division Lord Ordinary were of a special nature. Gibson and Stewart were partners in the slave-ship, *Washington*. After her seizure, proceedings were instituted for behoof of the partners, in order to recover her; and a favourable decree having been obtained in the Vice-Amiralty Court at Barbadoes, and the ship being there sold, Stewart received a certain portion of the proceeds arising from the sale, payment of expenses incurred by him, &c. The decree of that Court was afterwards reversed, on appeal, and the proceeds of the confiscated vessel became the property of the captors, who, on settling for the amount, did not claim repetition of the sums previously received by Stewart, but allowed them to him.

Gibson now claimed repetition of these sums from Stewart, who, inter alia, maintained, that the money so paid to him was the money of the captors, and not of Gibson, and that whatever question the captors might have raised with him, Gibson had no right to it whatever.

The Lord Ordinary adopted this view, and explained the grounds on which he held it in the note subjoined.

On the other hand, Stewart claimed a large sum in name of remuneration for his services in endeavouring to recover the vessel after her seizure.

The Lord Ordinary and the Court considered that, as the vessel had been engaged in an illegal adventure, and Stewart, though a partner, had refused to indemnify Gibson for his share of the loss, maintaining successfully that no action could arise against him out of what was called *pactum illicitum*; so also, Stewart could have no claim against Gibson.

of remuneration for services performed in relation to the illegal adventure.*

LORD GILLIES.—Stewart was himself a partner in the illegal adventure. Whatever claim might have arisen to a third party for services in attempting

* " NOTE.—On the first point, viz. the defender's claim for remuneration on account of his attendance and services in the West Indies during the proceedings which terminated in the condemnation of the vessel, the Lord Ordinary thinks that, in the circumstances of this case, it is inadmissible. It is a claim on equitable grounds advanced by the defender, who was not only the master of the vessel, but a partner in the adventure; and had the accounting for the ultimate loss proceeded agreeably to the principle assumed in the summons, the claim might perhaps have formed a very reasonable article in that accounting on the side of the defender. But the defender has pleaded the condemnation of the vessel, and the illegality of the contract ascertained by that condemnation, in bar of all accounting or claim against him as partner, for any share of the loss, and that plea has been sustained by the Court. Having taken the benefit of such a plea, he is not, in the opinion of the Lord Ordinary, entitled to make any demand on the score of services performed in relation to the adventure, and before it was terminated by the condemnation of the vessel.

* Secondly, The Lord Ordinary can see no ground for the pursuer's claim, in relation to the articles of the account forming the only remaining point in this discussion. These are certain items which were included in that account—an account paid to the defender, first, by the bills drawn by him on Dixon, and afterwards paid to him a second time by Hyndman, and taken credit for by Hyndman, on settling with the captors for the proceeds of the vessel. By the former interlocutor of the Court, the pursuer has recovered the full amount of that account from the defender, of which he had received a double payment; and what the pursuer now demands, is another repayment of certain articles which, he says, ought not to have been allowed to the defender at all, in either account.

* The parties differ as to the principle of the judgment of the Court, and if the Lord Ordinary had considered that the present question depended on any particular view of the Court in pronouncing it, he would again have reported the case. But this course appears to him to be unnecessary, as, in any view which can be taken, the pursuer's claim is untenable. By the decision already pronounced, he is completely indemnified; and such being the case, and even taking his own view of the judgment, as proceeding on the ground that Hyndman, in claiming the amount from the captors, acted as his agent, it is impossible to see why he should claim the articles now in dispute from the defender, or how it can be relevantly stated, that those articles ought not to have entered into the account at all. The case is now precisely the same as if there had been no previous payment to the defender by Dixon's bills, and as if Hyndman, viewing him as the pursuer's agent, had paid those items to the defender, and then taken and got credit for them, in accounting with the captors. Now, had that been done, it would seem a most extraordinary proposition to maintain, that the pursuer was entitled to recover from the defender the amount of those very charges, which he, or his agent, had got credit for from the captors, on the single ground, that, whether justly or not, they had been actually paid to the defender."

No. 63. to retrieve the vessel from confiscation, I think, in the circumstances such claim of remuneration can arise to a partner.

sc. 16, 1835.

The other Judges concurred.

Marquis of
Abercorn v.
Grieve.

J. MACKENZIE, S.S.C.—J. T. MURRAY, W.S.—Agents.

No. 64. THE MARQUIS OF ABERCORN and COMMISSIONER, Pursuer.
D. F. Hope—Marshall.

JOHN GRIEVE (Scott's Trustee), Defender.—*Forsyth—Py*

Superior and Vassal—Trustee.—A party having acquired right to certain subjects, which he held under separate feudal titles, conveyed the perty by one disposition for behoof of creditors, to a trustee, who took drew the rents, and exercised other acts of possession—Held, that the adopted the feu, and was personally bound, in a question with the sup plement the obligations contained in the feu charters.

sc. 16, 1835. In 1805, Mr James Scott obtained from the Marquis of A lots of ground on the estate of Duddingstone, each consist
by DIVISION. eighth of an acre. In accordance with a provision in the D
d. Moncreiff. entail, six feu-charters were granted by the superior, corre
T. these divisions, one in favour of Scott, and five in favour of o

who afterwards respectively conveyed their rights to him. Scott acquired right to other five eighths of an acre on the I estate in the same way. He was duly infeft on all the el entered into possession of the subjects comprehended in th a villa called Hawthornbrae, by which name the whole sisting of the eleven lots, was generally known as one poss of the charters contained a provision, that the feuar and assignees should be bound to build a house, or houses, therein contained, within two years from the term of entr for payment of the feu-duty; but this provision was not in

Some years afterwards, Scott granted a bond to one M sum of £1200, over the feus above mentioned. In 18 having become embarrassed, he conveyed, by one deed these feus in trust, for behoof of his creditors, to the d who accepted of the disposition, and took infeftment therein contained. Grieve entered into possession of t poned, and drew the rents. In 1832, the daughter and Morrison, the heritable creditor (who had died previous executed against Grieve and the tenants a summons of mails a before the sheriff, for the rents of the villa and part of the groun were occupied by a tenant. This action was resisted by Griev allegation, that his intromission with the rents as trustee had bee rized by Morrison, and the defence was sustained by the sheriff.

he shew, he had unquestionably adopted the feu, and could not
re; that any objection which might be raised to his infeftment
a consequence; and that the obligation incurred by him was not
by the proceedings of the heritable creditor.

re maintained in defence, 1. That the heritable creditor ought to
en called for his interest. 2. That he (Grieve) was a mere
or mandatary employed to realize funds and pay debts, and had
ed for them, or was ready to account, to the heritable creditor;
ecording to feudal forms, he was the vassal of Scott, and might
ce, and had renounced the feu; and that Scott was the party
interested. 3. That his infeftment was invalid as in a question
be superior, seisin not having been taken separately on each of the
subjects, which were not united in virtue of any clause of union.^a
at the case of Mitchell's Trustees v. Pearson,^b was an authority, a
d, against the pursuer's plea of adoption. And, 5. That the heri-
creditor having come forward to assume the possession and manage-
of the subjects, Grieve was no longer concerned or connected with
A even as trustee.

and Abercorn did not insist for immediate implement of the provision
building, to which the second conclusion of the summons applied. As
the first conclusion, the Lord Ordinary pronounced the following inter-
dict, adding the subjoined note:—"Finds it admitted that James
the defender's author and constituent, stood infeft on the eleven feu-

No. 63. to retrieve the vessel from confiscation, I think, in the circumstances, that no such claim of remuneration can arise to a partner.

—
c. 16, 1835.

Marquis of
Abercorn v.
Leve.

The other Judges concurred.

J. MACKENZIE, S.S.C.—J. T. MURRAY, W.S.—Agents.

No. 64. THE MARQUIS OF ABERCORN and COMMISSIONER, Pursuers.—

D. F. Hope—Marshall.

JOHN GRIEVE (Scott's Trustee), Defender.—*Forsyth—Pyper.*

Superior and Vassal—Trustee.—A party having acquired right to certain heritable subjects, which he held under separate feudal titles, conveyed the whole property by one disposition for behoof of creditors, to a trustee, who took infeftment, drew the rents, and exercised other acts of possession—Held, that the trustee had adopted the feu, and was personally bound, in a question with the superior, to implement the obligations contained in the feu charters.

c. 16, 1835.

DIVISION.

d. Moncreiff.

T.

IN 1805, Mr James Scott obtained from the Marquis of Abercorn six lots of ground on the estate of Duddingstone, each consisting of one eighth of an acre. In accordance with a provision in the Duddingstone entail, six feu-charters were granted by the superior, corresponding to these divisions, one in favour of Scott, and five in favour of other parties who afterwards respectively conveyed their rights to him. In 1806 Scott acquired right to other five eighths of an acre on the Duddingstone estate in the same way. He was duly infeft on all the eleven charters, entered into possession of the subjects comprehended in them, and built a villa called Hawthornbrae, by which name the whole ground, consisting of the eleven lots, was generally known as one possession. Each of the charters contained a provision, that the feuar and his heirs and assignees should be bound to build a house, or houses, on the ground therein contained, within two years from the term of entry, as a security for payment of the feu-duty; but this provision was not implemented.

Some years afterwards, Scott granted a bond to one Morrison for the sum of £1200, over the feus above mentioned. In 1830, his affairs having become embarrassed, he conveyed, by one deed, the whole of these feus in trust, for behoof of his creditors, to the defender Grieve, who accepted of the disposition, and took infeftment in the precepts therein contained. Grieve entered into possession of the subjects disposed, and drew the rents. In 1832, the daughter and representative of Morrison, the heritable creditor (who had died previously in that year) executed against Grieve and the tenants a summons of mails and duties before the sheriff, for the rents of the villa and part of the ground, which were occupied by a tenant. This action was resisted by Grieve, on the allegation, that his intromission with the rents as trustee had been authorized by Morrison, and the defence was sustained by the sheriff.

In these circumstances, the Marquis of Abercorn, founding on the feu-charters and on the trust-conveyance by Scott, and the subsequent possession had by Grieve as trustee, raised action, concluding against him personally for payment of arrears of the feu-duties, and for implement of the provision as to building contained in the charters. His Lordship maintained, that the only question was, *quo animo*, did the trustee enter into possession of the subjects? that having taken infeftment on the disposition, and drawn the rents, and appeared as a party in the action before the sheriff, he had unquestionably adopted the feu, and could not now refute;¹ that any objection which might be raised to his infeftment was of no consequence; and that the obligation incurred by him was not affected by the proceedings of the heritable creditor.

Grieve maintained in defence, 1. That the heritable creditor ought to have been called for his interest. 2. That he (Grieve) was a mere trustee or mandatary employed to realize funds and pay debts, and had accounted for them, or was ready to account, to the heritable creditor; that, according to feudal forms, he was the vassal of Scott, and might renounce, and had renounced the feu; and that Scott was the party legally interested. 3. That his infeftment was invalid as in a question with the superior, seisin not having been taken separately on each of the feudal subjects, which were not united in virtue of any clause of union.² 4. That the case of *Mitchell's Trustees v. Pearson*,³ was an authority, *a fortiori*, against the pursuer's plea of adoption. And, 5. That the heritable creditor having come forward to assume the possession and management of the subjects, Grieve was no longer concerned or connected with them, even as trustee.

Lord Abercorn did not insist for immediate implement of the provision as to building, to which the second conclusion of the summons applied. As to the first conclusion, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note: *—"Finds it admitted that James Scott, the defender's author and constituent, stood infeft on the eleven feu-

¹ *Hunter v. Boog*, Dec. 16, 1834 (ante, XIII. 205); *Kirkland v. Gibson*, May 17, 1831 (ante, IX. 596).

² *Erskine*, II. 3, 44 and 45; *Bank of Scotland v. Ramsay*, 1729 (Mor. 16404).

³ January 23, 1834 (ante, XII. 322).

* "The Lord Ordinary must now assume it to be fixed law, that a party who holds a subject in feu by feu-charter cannot refute the feu invito domino; December 16, 1834, *Hunter v. Boog*. Scott, therefore, could not throw back any part of the feus in question on the superior.

"The Lord Ordinary farther holds it to be a well-settled general rule of law, that where a bankrupt has an interest in any prospective contract, the creditors may be called upon either to undertake his part, or to abandon the contract, having his estate exposed to a claim of damages; Bell, 2, 413. If, therefore, the defender had merely accepted of a general disposition from Scott, the pursuer might have called on him either to undertake the burdens and obligations in the feu-charters, or to

No. 64. charters recited in the summons : Finds it admitted, under the 11th article of the condescendence, that the said James Scott was in full possession of all the lots of ground comprehended in the said charters ; and that the additional ground acquired under the five latest charters was possessed as an addition to the villa previously formed by the name of Hawthornbrae, and, ‘ along with the ground previously feued, was thenceforth known by that name : ’ Finds that the disposition executed by the said James Scott in favour of the present defender did clearly comprehend the whole grounds so possessed, as well those conveyed by the last five charters as those conveyed by the six first charters, with reference to the descriptions therein contained : Finds it admitted that the defender accepted of the said disposition, took infeftment on the precept therein expressed, and entered into possession of all the subjects comprehended therein : Finds that by such acceptance, infeftment, and possession, the said defender for himself,

Dec. 16, 1835.
Marquis of
Abercorn v.
Erleve.

abandon the subjects of them ; and if he had declared his resolution to adopt the contracts involved in these charters, and had taken and held for a length of time possession of the subjects of them, it seems inevitably to follow that he could not afterwards have refused to implement the obligations imposed by them.

“ But where, instead of a general disposition, the defender has accepted of a special disposition, which, by the description of the subjects, with reference to the two plans, by Paterson as to the first six feus, and by Leslie as to the subsequent five feus, and as admitted on the record, did certainly comprehend all the eleven parcels, and has taken infeftment on that disposition, and during a long period exercised all acts of possession, the Lord Ordinary must be of opinion that he effectually made his choice, and cannot now throw any part of the feus back on the superior. The cases decided in regard to leases settle the general principle as to the effect of a trustee for creditors taking up the real property of the bankrupt, involving onerous obligations to third parties ; Cuthill v. Jeffrey, Nov. 21, 1818, &c. But the case of Kirkland and Sharpe v. Gibson, May 17, 1831, is directly in point as to feu-rights ; and the Lord Ordinary must consider the case of Mitchell’s Trustees against Pearson, &c. Jan. 23, 1834, as having been decided on its special circumstances, and not at all as intended to alter or depart from the principle held in the case of Kirkland.

“ It farther appears very clear to the Lord Ordinary that it is nothing at all to the purpose in such a question to say, that, in strict feudal correctness, the defender’s case might be liable to objections in the form of it. The question is, whether he intended to take up the whole rights in the bankrupt, and did take full possession on the title by infeftment, which he deemed sufficient ? For any other purpose, if the title was defective, he could have got it perfected at any time.

“ If the defences are not good, the Lord Ordinary sees no other course but to give decree in terms of the libel, with a full reservation of the defender’s relief. If he has funds of the trust, no matter whether derived from this property or not, they must be answerable. If he has not funds, or has parted with what he had, every creditor acceding must, according to the Lord Ordinary’s present opinion, be liable in relief ; and in general he can see no cause for doubting that he will make his relief effectual. But at any rate he thinks that the right of the superior cannot be prejudiced by any question of that kind.

“ There is no question of interest involved, the summons only concluding for interest from the date of citation.”

and the creditors for whom he acts, must be held to have fully adopted, as the assignee of the said James Scott, the feu-contracts established by the said charters in the person of the said James Scott, with all their benefits and burdens; and finds that it is irrelevant, in this question with the superior, to enquire how far the infeftment so taken was in all respects feudally effectual or complete, or not: Finds that the said defender having so adopted the contracts of feu under which the said James Scott possessed the property in question, is bound to give implement of the conditions and obligations thereof, so far as concluded for in this action, and is not entitled now to refute or reject any part of the subjects of feu included therein, against the will of the superior: Finds it expressly stated on the record by the defender, that the heritable creditor, Mr Morrison, did fully accede to the trust, and homologate the defender's management; and that it has been found by the sheriff that the party now in his right is not entitled to interfere with the trustee's right, or to disturb his management: Finds that no defence to the present action can arise from the existence of such heritable security: Therefore repels the defences, and decerns in terms of the libel; reserving to the defender his relief, not only against all the funds of the trust that may be in his possession, but also against all the creditors acceding to the trust, and the said James Scott, and to them their defences as accords; but finds no expenses due."

Grieve reclaimed, praying the Court to "recal the interlocutor reclaimed against, and to assoilzie the defender from the whole conclusions of the action, with expenses: or at least to find that the said John Grieve is not liable beyond the extent of his intromissions with the subjects libelled on, as trustee foresaid; to assoilzie him quoad ultra, and find him entitled to expenses."

LORD JUSTICE-CLERK.—I have no doubt in this case of the soundness of the Lord Ordinary's interlocutor. We have nothing to do with the objection which has been made to the infeftment. Mr Grieve, as Scott's private trustee, confessedly accepted the feu, and took all the rights in his own person. He entered into possession, drew the rents, and tried to sell the property. In all the cases referred to, the Court have looked narrowly to the fact, *quo animo* the party possessed. This was looked to particularly in the case of Mitchell's trustees, where the trustee did nothing which could imply possession as vassal, and, indeed, abandoned the feu. In the present case, there can be no question as to the animus. What is stated by Grieve as having taken place between him and Morrison in the action before the Sheriff, is foreign to the point. It may be very good evidence of possession on the part of Grieve, but nothing farther.

LORD MEADOWBANK.—I am clearly of the same opinion.

LORD GLENLEK.—We can decide only as to what appears on the record, which shows clearly that the Lord Ordinary is right. We have nothing to do with the validity of the infeftment. I do not say what might be the effect of a resignation *ad remanentiam* in the hands of Scott, but, as the case stands, Grieve having

No. 64. accepted and entered into possession as trustee for the creditors of Scott, is liable in all that might have been demanded of Scott himself. The personal obligation lies on him just as it did on Scott, and, in reference to the superior, he stands in the same situation, and is liable to account to the superior for the arrears of duty, just as Scott would have been. I was struck with the second defence, if there had been any thing in the record showing it to be well founded, it would have required attention.

Dec. 16, 1835.
with v.
Mitchell.

LORD MEDWYN.—I agree. This case does not carry farther the principle of former cases.¹ It is admitted that Grieve took infeftment, drew the rents, and although the infeftment should not be good against a third party, it is sufficiently indicative of Grieve's intention to adopt the feu. He cannot get quit of this by saying, that he did not mean to adopt it. Under the personal obligation even without infeftment, the acts of possession would have been enough. That this was a private trust, and not a sequestration, is more unfavourable for Grieve. He voluntarily undertook the office, and received the mandate from Scott. That there is a distinction, it makes the case stronger against him. I think there might be some qualification in the interlocutor, as to the time during which the pursuer may agree to wave his right to insist on the fulfilment of the obligation to build.

THE COURT accordingly refused the Note, and remitted to the Lord Clerk Register to receive a minute as to the obligation to build.

J. and C. NAIRNE, W.S.—ANDREW GRIEVE, W.S.—Agents.

No. 65. **DONALD SMITH** (for the Western Bank of Scotland), Complainer
Robertson—W. Bell.

WILLIAM MITCHELL, Respondent.—*Penney.*

Administration of Justice—Expenses.—A party, pending an action at his instance, having printed in the form of a pamphlet a memorial and queries previously submitted by him to counsel, and calculated to produce an impression prejudicial to his opponents, and several copies having got into circulation, though not by direction or authority, found liable in the expenses of a petition and complaint, and have the circulation interdicted and the copies delivered up.

Dec. 16, 1835.

D Division.
d. Cockburn.
T.

THE respondent, Mitchell, having been dismissed from his situation as manager of the Western Bank of Scotland, raised an action against the Directors concluding to be reinstated, and for damages. Shortly thereafter, the manager who had been elected in Mitchell's place, presented, on behalf of the Bank, a petition and complaint, alleging that Mitchell had printed, in the form of a pamphlet, a memorial and queries submitted to counsel before raising the action, which they averred to be partial, calculated to produce an impression unfavourable to them, and which they further averred he was extensively circulating extrajudicially, and pray for an interdict, and to have the copies delivered up and destroyed.

¹ See, however, dicta of Court in *Kirkland v. Cadell*, Feb. 21, 1834 (*ante*, 472).

In answer, Mitchell stated that he had had the memorial printed for the more convenient use of the counsel and others engaged in the cause ; that the printer had thrown off a large impression without orders, and that no copies had been circulated by him. He offered no opposition to an interim interlocutor, ordering the copies in his possession to be delivered up, and interdicting him and all others in his employment from circulating them. The Bank, however, required a record to be made up, and this was accordingly done.

Thereafter, certain examinations took place before the Sheriff of Larkshire, under a remit to see the interlocutor of the Court carried into effect; and from these it appeared that the printing was ordered by Mitchell, who corrected the proof sheets ; that 302 copies were thrown off, although there was no proof of this number having been ordered by Mitchell, and that several of these copies had gone into the hands of different individuals before they were sent from the printing-office, while there was no evidence of any having been circulated by Mitchell himself. The copies extant in his hands, 283 in number, were delivered up, and placed under seal, and the only question truly in issue between the parties came to be that of expenses.

On this point Mitchell contended, that having submitted at once to an interlocutor by which the Bank had truly attained their object, so that it was unnecessary to make up a record, while no circulation had been traced to him, he ought not to be visited with the penalty of expenses.

To this it was answered, that the printing of the memorial and queries in the shape of a pamphlet plainly evinced an intention to circulate extrajudicially, and that circulation having de facto taken place, through the fault of Mitchell in so having it printed, he ought to be found liable in expenses, it not being disputed that the tenor of the memorial was such as to be prejudicial to the Bank, and to create an impression favourable to Mitchell.

The Lord Ordinary reported the cause on cases.

LORD JUSTICE-CLERK.—There is no direct proof of circulation by Mitchell, but there has been an order given to print this document, and no means taken to prevent the circulation. So he has indirectly circulated, and I would subject him to expenses.

LORD MEDWYN.—I agree ; and it is an additional consideration with me in awarding expenses, that this party states his sole object in printing these pamphlets was to have printed copies for the counsel and others engaged in the cause ; and, none of the persons among whom these papers were distributed, could have been witnesses in the cause.

LORDS GLENLEE and MEADOWBANK concurred.

THE COURT ordained the pamphlets which had been sealed up to be burned, and found Smith entitled to expenses.

No. 66.

ALEXANDER FRASER, Pursuer.—*Rutherford—Shaw.*

17, 1835. JOHN RANKIN and OTHERS (Fraser's Trustees), Defenders.—*Christie*
—*M'Neill,*

ser v.
Rankin.

Marriage Contract—Clause—Fee and Liferent.—Terms of an antenuptial contract, under which the Court found that a child of the marriage had right to a proportional share of £1000, therein provided, and to his legitim.

17, 1835. In 1771, the late John Fraser, tanner in Edinburgh, entered into antenuptial contract with the late Margaret Bowie. Fraser was possessed of a sum of £500, together with the liferent of £2000, of which the was held by trustees for behoof of his children. The chief fund which Margaret Bowie was possessed was a sum of £500. By contract, Fraser bound himself, in contemplation of the marriage a tocher of £500, to employ, on good security, “the sum of £500 sterli money of his own proper means and effects, with the sum of £500 mon foresaid, being the tocher underwritten, extending in hail to the s of £1000 sterling, to and in favours of himself and the said Marga Bowie, his future spouse, and longest liver of them two in conjunct and liferent, for the said Margaret Bowie, her liferent use allenarly, a to the children to be procreate betwixt him and her in fee; and how the said sum of £1000 money foresaid, or any part thereof, shall happ to be uplifted, the said John Fraser binds and obliges himself to empl and secure the same of new again in the terms above specified.” Fra also bound himself to pay £50 per annum, or the interest of £1000, his wife, if she survived him. “And sicklike the said John Fra hereby dispones and assigns to the said Margaret Bowie, his futr spouse, under the conditions and provisions after mentioned, in case s survive him, all goods, gear, debts, sums of money, both heritable a moveable, household plenishing, heirship moveables included, and oth whatsoever, pertaining and belonging to him, or that shall happen be resting to him at the time of his decease, or that shall fall under l executry. And in case his said future spouse shall survive him, hereby nominates and appoints her his sole executrix and univen legatrix.” It was then provided, that, if there were children subsistin she should be bound to educate them, “providing the said John Fra has left her sufficient funds for that purpose, over and above her s jointure of £50 sterling yearly.” If not so provided, she was empow ed to apply to the trustees for advances out of the trust-fund held l them for the children. It was then declared, “that the aforesaid sum £1000 sterling, or whatever the said John Fraser shall die possessed c shall be divided among the said children, in such proportions, and whatever time, the said Margaret Bowie shall think proper. And it further provided and declared, that, in case the said John Fraser sh

to survive his said spouse, and that there be a child or children of the marriage at the time, and that he marry a second wife, said sum of £1000 shall not be affectable with the debts or deeds said John Fraser, but shall wholly belong to the children of this marriage; and he hereby binds and obliges himself to lay out the interest of the aforesaid sum upon their maintenance and education. In like manner; it is also provided, that, in case the said Margaret Bowie shall survive her future husband, and shall marry again, in that event her jointure of £50 sterling, provided by this contract, is hereby reduced to the sum of £25 sterling yearly, &c." If the wife married again, she was to have no power of administering or dividing the estate left by her husband; but, if there were no children, she was to have a power of bequeathing that estate to certain persons, including some of her own name. "For which causes, and on the other part, the said Margaret hereby disposes and assigns to the said John Fraser, her future husband, the foresaid sum of £500 sterling of tocher provided to her, and the sole interest due thereon; and in case the said John Fraser, her husband, shall happen to survive her, she hereby assigns and disposes to him, under the conditions above mentioned, all debts, goods, heritable and moveable, and others, of whatever nature or kind, and that shall be resting and belonging to her at the time of her death, or that shall fall under her executry, with her paraphernalia included; and, in that event, she hereby nominates her said future husband her sole executor and universal legator."

There was no clause limiting the claims of the children nascituri for legitim.

Two sons and a daughter were born of the marriage. Mrs Fraser died long before her husband, who lived till 1827, and who never married again.

He left from £12,000 to £15,000, chiefly of moveable estate. In the period, at least as early as 1800, an unhappy quarrel had arisen between John Fraser and his children, especially his eldest son Alexander, and which continued to be actuated by sentiments of the strongest animosity between them as Alexander during the rest of his life.

In the year 1806, Fraser obtained from all his children a discharge of their claims under the marriage-contract, and also of their legitim. In consideration of this discharge he paid a sum of £1500 among them, subject to certain deductions. He succeeded in obtaining this discharge only by deceiving his children as to the real amount of his property, and the value of their claims which they surrendered.

Before his death he conveyed his whole estate, on the narrative of the discharge, to trustees, so as to disinherit Alexander Fraser entirely. His son was dead before this time. Alexander then raised a reduction of this settlement, and of the discharge, alleging that his father had been afflicted by monomania towards him, and had been actuated by that infirmity in disinheriting him; and that, even if his father was

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Dec. 17,
Fraser v.
Rankin.

No. 66. free of this malady, yet he had impetrated the discharge of 1806 by fraud so that it ought to be set aside, and the pursuer reponed against it, to the effect of drawing his full claim of legitim, and the share of the estate due to him under the marriage contract.

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The trustees lodged defences, and issues were prepared to try—1st Whether the son's discharge was impetrated by fraud? And, 2d Whether the father's settlement was executed under the influence of monomania?

The jury found for the pursuer on the first issue, but for the defender on the second; and the Court applied the verdict, and reduced the discharge, but assoilzied from the reasons of reduction of the settlement.¹

After this stage of the cause, it remained to be determined what were the rights of the pursuer under the marriage contract. It was admitted by the defenders, that he, as one of two surviving children, was entitled to one-fourth of the free moveable estate extant at the death of his father in name of legitim.

Pleaded by Pursuer—

1. It was the intention of the parties, that the surviving spouse, whether husband or wife, should have right to the whole estate left by the predeceaser, and also to the whole estate possessed by the survivor but in trust for behoof of the children; subject, however, to the power of the husband to restrict the children's provision to £1000, in the event of his being survivor, and entering into a second marriage. According to this view of the contract, the pursuer was entitled to one half of all the estate which his father possessed.²

2. The settlement proceeded on the narrative of the previous discharge of the legitim, &c., and as the discharge was reduced, the settlement should also be set aside. Otherwise, a deed was truly made for the deceased which he had never made for himself, and non constat that he would have executed any settlement at all, unless he had relied on the discharge being effectual.³

Pleaded for the Defenders—

1. The intention of the parties was to leave the surviving husband the free administration of his estate, and the absolute power over it, except in the event of his entering into a second marriage, when he was bound to secure £1000 to the children of the first marriage, and apply the interest of it for their maintenance. It was never intended to tie up his hands

¹ Nov. 7, 1834, ante, XIII., 703.

² Campbell, Dec. 16, 1757 (2991); Lundie, Feb. 24, 1672, 1 Supp. p. 764; Boyce, July 12, 1701 (5049); Hunter, July 12, 1710, 4 Supp. 805; Thomson, Feb. 18, 1744 (6142); Crawford, Dec. 24, 1746 (2274); M'Kinnon, Feb. 24, 1763 (2278); Riddell, Nov. 28, 1781 (6457); 3 Ersk. 8, 38.

³ Kerr, Jan. 28, 1747; (12987); M'Neill, Jan. 27, 1826 (ante, IV. 393, or 396, 2nd edition.)

and sustained in other respects. The present case was on the same footing.

and Ordinary reported the cases.

SALGRAY.—I have formed a clear opinion in this case. The pursuer's claim of the marriage-contract is quite unwarrantable. He was only entitled to a proportional share of the £1000 over and above the legitim.

PRESIDENT.—I am of the same opinion.

MACKENZIE.—I entirely concur. I think it would have been an extra-contract had the pursuer's construction of it been well-founded. It would have had the effect of giving to the children a right as against their father over the acquisita and the acquirenda, up to the day of his death, in the absence of there being no second marriage. The pursuer seems to support his case on this argument, that had the wife been survivor, her power over the legit would have been limited to a mere life-rent, with a power of division among her children, and there was meant to be a reciprocity in the contract between the husband and wife.

But even if the words of the contract had made room for letting in the husband's argument, it would not be a case of reciprocity. The acquisitions even if made after the marriage was dissolved, were free from any such restriction. Besides this, it is a very different thing to give a surviving wife a mere life-rent and nothing more, and to impose such a limitation on a husband, especially when the legit is extended to all acquisitions after the date of the dissolution of the marriage. I am not for holding that any such provision as that existed in this contract.

the questions of detail, respecting the sums already paid to the pursuer, should be remitted to the Lord Ordinary.

GILLIES.—I am of the same opinion. Apart from the provisions re-

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Dec. 17, 1835.
Fairbairn v.
A and B.

JOHN FAIRBAIRN, Pursuer.—*Neaves*.A and B, Defenders.—*Sol.-Gen. Cunninghame—W. Bell*.

Expenses.—Where a debtor, by improperly alleging himself to be a creditor, and making demands as such against his creditor, forced the creditor to raise an action against him, and occasioned unnecessary expense by improper pleading, the Court subjected him in the pursuer's expenses, notwithstanding that the summons contained an extravagant and groundless conclusion for damages, of which their Lordships disapproved.

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First Division.
L. Fullerton.
B.

FAIRBAIRN, a bankrupt, was discharged under a composition contract. Some time afterwards, A and B, who had been creditors, and also agent in the sequestration, demanded a balance of account as still due to them amounting to £26, and intimated to Fairbairn's composition-cautioners that they had raised, and were about to execute, a summons against them for the amount. At the date of this letter, A and B, who had received various payments, were owing, on a just balance of accounts, eleven shillings and eleven pence to Fairbairn, in place of being his creditors. The cautioners raised an action of relief against Fairbairn, and used arrestments on the dependence. Fairbairn then raised an action of count and reckoning and damages against A and B, concluding for £30, less if more, as the balance of account due to him, and for £1000 of damages in name of solatium, &c. He used inhibition and arrestment on the dependence. In the course of making up a record, the defenders occasioned unnecessary trouble, by denying a payment of £15 to account, while there was evidence of such payment in their own letter books.

On its appearing that the balance truly due to Fairbairn was only eleven shillings and eleven pence, the Lord Ordinary decerned for payment of that amount, and of the dues of extract, but found no expenses due to either party. The interlocutor contained no finding as to damages, as Fairbairn apparently had not pressed this claim.

Both parties reclaimed.

THE COURT altered, and found Fairbairn entitled to expenses. The Judges intimated a strong disapproval of Fairbairn's conclusion for damages; but, considering that he had been driven to raise the action by the previous threat of the defenders to prosecute his cautioners, and also that the defenders had occasioned improper expense in their mode of pleading, their Lordships thought the defenders should be subjected in expenses.

R. RUTHERFORD, W.S.—P. CAMPBELL, S.S.C.—*Agents*.

ALEXANDER WYLLIE, Petitioner.—*Dunlop.*

Bankruptcy—Process.—The Bankrupt Act, § 72, permits a trustee to apply for discharge, “ provided always, that, before making any such application, he shall send a full state of his accounts, &c. and shall call a meeting of the creditors,” —Held, that a petition, being presented before such meeting was held, was irregular; that it was not validated by the circumstance, that a meeting had been held before the petition was finally reported to the Court; and that a new, or supplementary petition, was necessary.

ALEXANDER WYLLIE, trustee on the sequestrated estate of Watson Dec. 1. Allan, presented a petition to the Court for his exoneration, and for 1st D. C. revocation of his bond of caution. It is provided by the Bankrupt Act, 1, that, “ before making any such application, the trustee shall make a full state of his accounts, &c. and shall call a meeting of the creditors,” &c., on a certain specified advertisement, intimating the purpose of meeting. No such meeting had been held prior to the presentment of the petition; but, during the subsequent procedure, such a meeting was called and held, and this took place before the clerk of Court reported on the application. On these circumstances being brought under the consideration of the Court, their Lordships were of opinion, that the petition had been unwarrantably presented, as the statute did not sanction its being presented until after the meeting of creditors; that the meeting, subsequent to the presentment of the petition, could not cure this defect; that a new petition was necessary.

THE COURT therefore “ appointed the petitioner to put in a new, or supplementary petition, the present one having preceded the statutory meeting of creditors.”

J. G. BARR, S.S.C.—Agent.

No. 69.

CHRISTOPHER KERR, Pursuer.—*D. F. Hope—Ivory.*

17, 1835. HUGH BREMNER, W.S., and GREIG'S REPRESENTATIVES, Defenders.—
Rutherford—Pyper.

Cautioner—Passive Title—Process—Expenses.—A party became cautioner for a factor loco tutoris, and died some years before the conclusion of the factor's management, leaving children in pupillarity, and naming tutors, who on his death appointed one of their number to act for them; the factor had given up no inventory, and failed to render his accounts—Held, in an action raised after his death for a balance due on the factory accounts, against the cautioner's representatives, 1. That the cautioner's surviving child, in so far as lucratus by his father's succession, was liable for the balance due at his death, and that the tutor, who had intromitted for behoof of the children, was subsidarie liable. 2. In the account of charge and discharge of the factor's intromissions, in which termly payments were received by him, and termly disbursements made for specific purposes, a prior arrear not extinguished by payments for these specific purposes subsequently made. 3. (*Note*) A clerical mistake in an interlocutor, which has been signed by the presiding judge, may be corrected on a petition being presented, but not on a motion at the bar. 4. Expenses not having been moved for, when judgment on the merits was pronounced, the Court refused, as incompetent, a petition subsequently presented, to have the point of expenses disposed of.

17, 1835. IN 1795, the late James Bremner was appointed, under the Act of Sederunt, 1730, factor loco tutoris to Mrs Maxwell, a lunatic, and her brother, Hugh Bremner, became cautioner for him, the terms of the obligation being as follows:—"Therefore witt ye me, the said James Bremner, as principal, and the said Hugh Bremner, accountant in Edinburgh, as cautioner, surety and full debtor with and for me, to be bound and obliged, likeas we do hereby bind and oblige us, jointly and severally, our heirs, executors, and successors whomsoever, that I, the said James Bremner, shall do exact diligence in performing my duty as factor loco tutoris foresaid; and that in conformity to, and in terms of the said Lords their Acts of Sederunt thereanent, in all points."

Thereafter, James Bremner, entered into the management of Mrs Maxwell's estate, particularly of an annuity of £180. He lodged no inventory, and rendered no annual accounts of his intromissions. The annuity was payable to Mrs Maxwell, out of certain lands, at Whitsunday and Martinmas; Bremner received the termly payments, from which, during each term, he made disbursements on account of board and furnishings for behoof of Mrs Maxwell.

In 1804, Hugh Bremner, the cautioner, died, leaving a widow and four children in pupillarity. He had executed a deed, naming certain parties tutors and curators to his children, who, upon his death, accepted the office, and appointed one of their number, the late Alexander Greig, accountant, to be their factor. Greig accordingly intromitted with an

realized the property of the deceased, but he gave up no inventory, nor were the children confirmed as executors. Three of the children died, the defender, Hugh Bremner, being the survivor and successor *lucratus* to his father.

In 1826 James Bremner died, and, in the following year, Mr Christopher Kerr was appointed curator bonis to Mrs Maxwell. He immediately brought an action of count and reckoning and damages against the representatives of James Bremner, as having intromitted with and not accounted for Mrs Maxwell's estate. In this action interim decree was pronounced for £3941, but there being no funds belonging to the estate of the deceased from which to meet this sum, it became necessary to have recourse on the cautioner, and the present action, proceeding on the ~~same~~ media, and founding on the bond of caution above mentioned, was accordingly raised against Hugh Bremner, the only surviving child, and Mrs Bremner, the widow of the cautioner, as his representatives, concluding for an accounting and for damages.

Mrs Bremner pleaded in defence that she did not represent her husband, and was not liable for his obligations. Hugh Bremner pleaded, as a preliminary defence, that Grace Sanderson, daughter of one of his deceased sisters, ought to have been called, and that he himself, never having been served heir to his father, and not having been confirmed executor, nor otherwise representing him on any passive title, was not liable; and on the merits he maintained—

1. That the cautionary obligation libelled on, while it imposed on the cautioner's heirs and successors the duty of seeing that the factor should do exact diligence, inferred no liability on them to account for the sums which he might recover.

2. That the cautionary obligation was prescribed.

3. That Mrs Maxwell's next of kin, for whose behoof the action was carried on, were bound to have attended to the mode in which the factor conducted himself, and to have intimated to those acting for the cautioner's children that the factor was neglecting his duty, and that they still held the children bound under their cautionary obligation.

4. That at all events the claim could only extend to sums which became due by the factor during the lifetime of the cautioner, and could not exceed the amount by which the defender benefited by his father's estate.

5. That the only title on which the defender could possibly represent his father was vitious intromission, but as he had no active intromission, and was in pupillarity and minority when the intromissions of his tutors and curators took place, he was incapable of incurring this passive representation.

A supplementary action was then raised against Grace Sanderson, and ~~being~~ the factor appointed by Hugh Bremner's tutors and curators, who ~~pleaded~~, the one non-representation, and the other, that, having acted in

No. 69. bona fide, and not being a vitious intromitter, nor otherwise representin
 the deceased, he was not liable in the sum claimed. The actions havin
 been conjoined, and a record made up, the Lord Ordinary assoilzie
 Sanderson, and, quoad ultra, reported the cause on cases.

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At the first advising (6th July, 1835), the Court repelled the ple
 founded on the form of the bond of caution, and remitted to an a
 countant to report as to the sum due by James Bremner at the deat
 of his brother, and the amount of payments subsequently made b
 him.*

On the first point, the accountant reported the sum due to be £1038.
 on the second, he stated the amount of payments made by the factor sul
 sequent to Hugh Bremner's death to be £1928.

The cause having come to be advised on this report, the defenders
 pleaded—

1. Admitting the liability of the cautioner's estate for the debt due
 his death by the factor, the defender Bremner cannot be liable as a vitio
 intromitter for the debt subsequently contracted—he received paymen
 out of his father's funds from his tutors and curators and their fact
 while in minority, and no fault is imputable to him—no fraud was
 be presumed, and his title was colourable, which would free him fro
 this passive title. The case of Erskine,¹ where a cautionary obligati
 was held to extend against the cautioner's representatives, does not tou
 the present case, where the children were not confirmed and there is
 proper representation.

2. If then Bremner is only liable for the factor's debt as at th
 cautioner's death, being £1038, the question arises how all the subseque
 payments by the factor for behoof of Mrs Maxwell, amounting to £192
 are to be imputed? This is to be viewed as the case of an account-on
 rent, the factor's accounts and vouchers of charge and discharge being
 reality a continuous account, and the principle adopted in the cases
 Devaines² and Houston's Executors³ is to be applied. The old
 articles of the charge against the factor are to be held as wiped off by th
 oldest articles of the discharge, and thus the balance due by the factor

* LORD GLENLEE observed—There can be no doubt that a cautioner's heirs a
 successors, if majors, are liable as for a debt of their own, and as if they had giv
 a new bond of caution. But is an infant to be treated in the same way? Maj
 are presumed to have agreed to become cautioners, but such presumption can
 apply to an infant. However, as to the debt due at Mr Hugh Bremner's deat
 although his son cannot be liable as a vitious intromitter, he must be liable
 what he got from the estate of the deceased. The other Judges concurred.

† Mr Greig having died in the interim, his representatives were sisted in his ste
 as defenders.

¹ Dec. 22, 1739, Mor. 9002.

² 1 Merivale, 608 (Clayton's case).

³ 3 W. & S. 392.

the death of the cautioner will be more than extinguished by his subsequent payments.

The pursuer, on the other hand, contended—

1. All objections to the form of the cautionary obligation having been repelled, the defender Bremner, as heir and successor to his father, is liable for the factor's debt in terms of the bond, his tutors and curators having allowed the obligation to subsist against him after the cautioner's death.¹ Decree is not asked against him for more than he received from his father's succession which he intromitted with through his tutors and curators. It is admitted that the obligation extended against the cautioner's estate, and if the defender has been benefited by that estate, his liability cannot be affected by there having been no confirmation or *aditio hæreditatis*. But if he be answerable generally for the factor's debt, so far as *lucratus*, no distinction can be drawn between the debt contracted previous and that contracted subsequent to the death of the cautioner. The obligation extended over the whole period of the factor's management, and the defender, not having withdrawn from the obligation, continued to be responsible. In regard to the other defenders, they are liable subsidiarie, inasmuch as Mr Greig intromitted with Hugh Bremner's estate without a legal title, and paid over the funds to the children before the debts were discharged.²

2. The cases of *Devaines* and *Houston's Executors* have no affinity to the present, for here there are no indefinite receipts or indefinite payments into a general fund or account. The factor received Mrs Maxwell's annuity in half yearly sums, to be applied to her maintenance. Each payment by him was specially appropriated, and so cannot be made to extinguish a former balance existing against him.

LORD GLENLEE.—It cannot be said that the defender, Hugh Bremner, has incurred a universal passive representation to his father, so as to subject him for the arrears incurred by James Bremner, after his father's death. But, at the same time, it is quite as plain, that in so far as he has received funds which were in bonis of his father, he must be liable,—not, however, as a vitious intromitter, though Mr Greig, from not having confirmed and not having made up a title by inventories, may have been one. This was not a vitious intromission, rendering the children liable. Had an inventory been given up and the children confirmed executors, it might be a question as to whether they could be restored; but certainly they are bound to repeat what they got, even as legatees would have been bound. Another matter has been unexpectedly brought before us, as to the application of the payments by James Bremner, out of the fund in question, after his brother's death. But I cannot comprehend how the payments to Mrs Maxwell can be made available to extinguish James Bremner's debt, as on the footing of *Devaines's* case. What, in reason or justice, would have been the proper ap-

¹ *Ereikne, ut supra.*

² *Ross v. Bruce, 1685, Mor. 3858.*

No. 69. portionment of the payments at the time? The case of Devaines was different, and there the rule seemed to be properly applied. Had Mr Bremner rendered his accounts in terms of his appointment, and the cautioner's family stated after his death that they gave up their obligation, they could not have availed themselves of James Bremner's future intromissions on account of Mrs Maxwell to extinguish the balance due at their father's death. Here the annual expenditure was defrayed out of the annual receipts.

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LORD MEADOWBANK.—I entirely concur, on the first point, with Lord Glenlee. There is no ground for holding this party to be a vitious intromitter; but, in so far as he has been lucratus, he must repay what he has got. I had considerable difficulty as to the other point, but at present I concur with Lord Glenlee in the result, that the payments after the cautioner's death cannot be imputed, without taking the receipts also into account.

LORD MEDWYN.—This is a case of hardship on both sides; for we must look to the object of the factory, and keep in view that the tutors might have announced that they would no longer be bound for the cautionary obligation of Mr Hugh Bremner. The heirs of a cautioner for an office may withdraw, on their ancestor's death. Lord Glenlee holds, that Hugh Bremner was not obliged to intimate his withdrawing. But he had tutors and curators, and so we must hold the minor here to be in a more unfavourable situation than if he had had none. I cannot well see the ground of distinction, why he should not be considered his father's representative. I cannot see how he can shake himself free from the representation. Vitious intromission does not properly apply to a case of this kind. On the other point, as to the application of Devaines's case, I agree with Lord Glenlee that to hold it to apply to the payments of James Bremner for behoof of Mrs Maxwell, would be inconsistent with the ordinary principles of justice. In that case, the opinion of Sir William Grant was applied solely to a cash-account in a bank, and it is so stated in the rubric of the report. I do not dispute the application of the principle there adopted to a bank-account; but the present case is totally distinct. Looking to the whole case, even if I had thought that the defender Hugh Bremner's liability ceased after his father's death, I could not have agreed in his view as to the application of the cases of Devaines and Houston's Executors.

LORD JUSTICE-CLERK.—It has not been made out to my satisfaction that the defender has incurred that liability under the bond of cautionry, which would have attached to him had he been major, and at the same time had not withdrawn from the obligation. But I must hold him liable for the balance due on the factor's account, as it stood at his father's death. In regard to this other point, I am of opinion that the principle of the cases of Devaines and Houston's executors does not apply. In the present case there was no account-current, as in a bank. The factor was bound to have rendered his accounts annually, and they should have been regularly docqueted, but none were ever rendered. Here the factor was annually receiving sums for behoof of the lunatic; and, except one year, there was always a greater sum received than what was expended by him. The balance, however, must be taken as at the death of Hugh Bremner.

THE COURT pronounced the following interlocutor:—"Find the defenders liable, conjunctly and severally, to the pursuers for the amount of the admitted balance of £1033, 14s., 9d., due by the factor, James Bremner,

WILLIAM MITCHELL, Respondent.—*Neaves*.

Judicial Factor—Trust—Testament—Circumstances in which the Court appointed a judicial factor upon an estate contained in a trust-settlement, the trustees by the deceased being equally divided as to the administration of the estate, a trustee who was named factor by the deceased, consenting to the judicial appointment.

In late Mrs Carmichael, by a trust-settlement, appointed Alexander Thomson, merchant in Edinburgh, James Robertson, late merchant in Glasgow, William Mitchell, teller in the Commercial Bank of Scotland, and Alexander Adie, optician in Edinburgh, and the acceptor, or survivor of them, her trustees. Power was given to assume new trustees to act with those named, or after their decease; and three were declared sufficient. The trustees were also appointed executors, and they were tutors and curators over the trust-estate, in regard to the pupil and relations of the testatrix, who were or might become beneficiaries of the trust. A trust-management of considerable duration was contemplated, and William Mitchell was appointed "to be factor under the trust." It was declared that the trustees and executors "either in these terms, or as tutors and curators, as after-mentioned, shall not be liable to one another, nor for omissions, nor to do diligence, nor for persons to whom they may lend the proceeds of my said estate, nor for their factor, more than that he was habit and repute solvent at the time of lending the money, but that each trustee shall only be liable for his own actual misdoings alienably."

Dec. 19, 1883.

1st. Division
D.

No. 70. Mrs Carmichael died in July, 1828; the above-named parties acc
 ed, and Mitchell managed the estate as factor. In 1835 a petition
 a. 19, 1835. presented by Thomson and Adie, stating that they had experienced
 ie v. utmost difficulty in getting Mitchell to render accounts of his facts
 Mitchell, intromissions, and that trouble, expense, and litigation had arisen to
 trust in consequence of his irregularity; that they had lost confidence
 him as factor; and that they were divided in opinion as to the man-
 ment of the trust-estate against the other two co-trustees; that since
 death of the testatrix, the petitioner, Thomson, had gone permanentl
 reside in England, and Mitchell had left Edinburgh: that the trust
 thus in a position in which it could not be efficiently administered by
 trustees nominated, and, from their variance among themselves, was
 paralysed condition. They therefore prayed the Court "to recal
 appointment of the said William Mitchell, as factor under the trust,
 to appoint Holmes Ivory as judicial factor, with full powers to exec
 the said trust-settlement, particularly with full power to call the
 William Mitchell, and all parties concerned, to account," &c.

Mitchell lodged answers explanatory of his conduct, and contend
 inter alia, that the trust could not be paralysed even by the division
 the trustees, two against two, because he held a valid appointment
 factor made by the testatrix herself, and he was entitled to administer
 estate in his hands as factor until his appointment was recalled, whic
 could not be by two out of four trustees. There was thus no cas
 necessity to justify or permit the interposition of the Court, and he offe
 to find caution for his intromissions.

Much discussion ensued, in the course of which Mitchell received
 appointment as inspector of branches in the Agricultural and Commer
 Bank of Ireland. He then stated to the Court, that, as this would
 only require his residence to be fixed in Ireland, but would engross
 time to the exclusion of other business, he was ready to resign his of
 of factor under the trust deed. The Court thereon recalled his appo
 ment as factor, and appointed Donald Lindsay, accountant in Edinbu
 to be judicial factor, in terms of the prayer of the petition. On
 petitioner's motion, the Court also ordained Mitchell to consign
 admitted balance in his hands by the first sederunt day in Janu
 next.

GORDON & BARRON, W.S.—W. MACKERSKY, W.S.—Agents.

the 1st William IV., c. 69, sec. 40, it is enacted, that "summonses
 time and consistorial causes, instituted in the Court of Session,
 signed by one of the principal or depute-clerks of Session, and it
 not be necessary that any such summons shall pass the signet, or
 any concurrence for the public interest." And it is provided,
 for conducting such causes in the Court of Session, no agent shall
 be entitled to a higher rate of charge for any part of such duty than such
 would have been legally exigible for the same duty in the High Court
 of Admiralty, or in the Court of the Commissaries of Edinburgh respec-
 tively before the passing of this act; and no fee or demand on account
 of fee-fund of the Court of Session, or on account of any clerk or
 of that Court, shall be due or exigible in any such cause."
 James and Son, ship-chandlers in Leith, brought an action against
 the ship agent there, and others, for repairs, painting, and furnishings
 of a steam vessel. The summons was not subscribed by a clerk of Ses-
 sion, and it passed the Signet, and paid the fee-fund dues, as in an ordi-
 nary action. The defenders objected that this was a maritime cause, and
 should be dismissed, in respect it had not been brought into Court in the
 manner required by the statute above-mentioned.
 The pursuers answered, that the distinction between maritime and
 ordinary mercantile cases was very narrow, and that, in dubio, the pre-
 scription was, that a claim belonged to the latter description.
 The Lord Ordinary ordered notes of authorities, and reported the
 opinion.

Dec. 19, 183
 2d Division.
 Lord Jeffrey.
 T.

THE COURT, holding the cause to be maritime, and, as such, in-

- No. 71.** *Authorities for the Defenders.*—Stat. 1681, c. 16; 1 and 2 Geo. IV. c. 39, § 1; Erskine, 3, 33; Bell's Com. I. 496, 622; Bell's Principles, p. 107; Balfour's Practicks, p. 630; Erskine's Judicial Proceedings, p. 8; Hume's Com. II. 35; Campbell, ut sup.; Stephen, ut sup.; Kennedy, ut sup.; Clark v. Robertson, Aug. 8, 1783, Mor. 7532; Balderstone, Feb. 14, Mor. 1735; Menzies, ut sup.; Ogilvy, ut sup.; M'Kinnon v. M'Leod, July 9, 1828, VI. 1108.

L. M. MACARA, W.S.—S. BEVERIDGE, Solicitor,—Agents.

No. 72.

JOHN KINCAID, Suspender.—*Penney.*

JOHN LOVE, Charger.—*Neaves.*

Poinding—Stamp—Jurisdiction.—A party, alleging that certain effects, pointed on a farm for the debt of the tenant, belonged to him, and founding on an unstamped deed of assignation, presented a bill of suspension and interdict of the sale of the effects, although he had previously presented an application for the same purpose to the Sheriff, which he had judicially abandoned—the Court refused the bill.

- Dec. 19, 1835. **2^D DIVISION.** **Bill-Chamber.** **Ld. Cockburn.** **T.** THE charger, Love, having pointed certain effects on the farm of Finnock Bog, as for a debt due by the tenant, Montgomery, the suspender, Kincaid, made a summary application to the Sheriff to interdict the sale of the effects. The Sheriff granted interdict, but Kincaid subsequently abandoned the application judicially, and warrant was granted to sell. Kincaid then presented a bill of suspension, founding on a deed of assignation by Montgomery of the lease of the farm and the stamping, and alleging, that the pointed effects belonged to himself. The deed was not stamped.

Love answered, that an unstamped assignation could not be founded on, and that the present application ought not to be listened to, after proceedings which had taken place in the Inferior Court, where an application for interdict had been competently made, and afterwards abandoned.¹

The Lord Ordinary refused the bill, on account of the deed of assignation being unstamped.

Kincaid reclaimed, but

THE COURT adhered, on the ground of the deed being unstamped, and being also of opinion that the bill was improperly brought, as the matter had been already before a competent court, where such a question as the present was properly entertained.

J. J. SMITH, S.S.C.—M'KENZIE and M'FARLANE, W.S.—Agents.

¹ Scotland v. Laurie, June 12, 1828, ante, VI. 961.

ruer, Dempster, was proprietor of the lands of Mossend- Dec. 19, 1835.
th about £2000, to which he succeeded when in pupillarity.

2d DIVISION.
R.

had acted as his factor loco tutoris till he attained the age of
1826, after which time he farmed his own property. He
advances to the extent of £1110 from the defender, Potts, for
accepted a bill jointly with his father, and granted four heri-
s in his own name, and in that of his father, as his administrator
n 1832, he let his property at a rent of £105, and commenced
as an innkeeper. In 1833, he enlisted in the Second Life
at left that regiment in April, 1834. Returning to Scotland,
an ex facie absolute disposition of his property in favour of
Henry Graham, W.S., for an advance of £750, Mr Graham,
at the time, granting a back-bond declaring the disposition to be
and binding himself to denude, on payment of advances, and
expenses as might be incurred.

Having raised a process of mails and duties on one of the bonds
mentioned, Dempster brought a reduction of the bonds and bill,
on ground of minority and lesion.

In action it was stated, as a preliminary defence, that Dempster
lost of his property by the disposition to Mr Graham.

The defence was repelled by the Lord Ordinary (Moncreiff), the inter-
dict which was acquiesced in, being as follows :—" In respect that it
was not the disposition in favour of Mr Graham, though ex facie
it was in fact merely a security for debts contracted or to be con-

No. 74. Thereafter, Christie, the trustee, instituted the present action against Pourie, and the defender, Loudon, junior, concluding to have it decided. Dec. 19, 1835. Christie v. Loudon. and declared, that the reversionary interest acquired by the bank Loudon, under the purchase and back-letter by Pourie fell under the right of the trustee and creditors in the sequestration, and that the defender was bound to execute a conveyance thereof in favour of the trustee, and to have him ordained to execute such conveyance; and, for his doing so, to have the property adjudged to the trustee in implement for behoof of the creditors; and, farther, containing conclusions against Pourie for an accounting, which were superseded by an arrangement with Pourie pending the proceedings, whereby he reconveyed to the trustee all right and interest belonging to him under his purchase.

In defence, Loudon, junior, alleging that the trade carried on by his father after his sequestration had been so carried on with the knowledge and acquiescence of the trustee and commissioners of the estate, he having dealt and transacted with them, both individually and on behalf of the estate, in matters relating to his trade, and debts had been contracted to divers creditors (who, however, made no compearance or claim), in the course of that trade, pleaded in defence—

1. By the bankrupt statute, the trustee in a sequestration has a vested right in *acquirenda*. These can only be carried by a diligence or a supplementary sequestration, which last, though not expressly warranted by the statute, has been introduced in practice, and the bank is under no obligation to convey such *acquirenda*, being only required by the clause of the act touching that matter (39th), to “disclose” property that might be acquired by him, in order that the trustee “have an opportunity of taking such steps as are necessary and proper for the interest of his constituents.” The only steps which the trustee could competently take were either a supplementary sequestration sanctioned by practice, or the ordinary diligence of the law, in regard to which any posterior creditor might compete with him; and there being thus no legal obligation to convey, there were no *termini habiles* for adjudication in implement against the defender, who, as heir entailed *cum beneficio inventarii*, held for behoof of the creditors, posterior as well as prior to the sequestration, according to their rights and interests, and,

2. At all events, the trustee is barred from insisting in this action, as he and the commissioners having by acquiescence consented to the bankrupt carrying on trade after the sequestration, on his own account and for his own behoof, and so having sanctioned the acquisition of separate means and estate free from the claims of the creditors in the sequestration.

The trustee, in answer, denied the alleged acquiescence, and the statement, that there were any debts contracted by Loudon during his trading subsequent to the sequestration, and he pleaded—

1. The bankrupt statute creates against the bankrupt an absolute obligation to convey to the trustee, for behoof of his creditors, all property belonging to him or which he may acquire, and the express provision for a disclosure is just to enable the trustee to enforce that obligation. This is done generally by a supplementary sequestration, which has none of the force or character of a second sequestration, but is rather of the nature of a summary supplemental adjudication, and the only warrant or foundation for it is to be discovered in the legal obligation on the bankrupt to convey. This obligation, however, may equally be carried into effect by an adjudication in implement; and if this would have been competent against the bankrupt himself, it can make no difference that the right is now held by his heir; and,

2. Without, at least, an express agreement by the trustee and commissioners acting on behalf of the creditors, their right to the acquirenda cannot be held as excluded; while here there is no averment of any such agreement, or of any acting to bind the creditors.

The Lord Ordinary, after some procedure which it is unnecessary to detail, pronounced the following interlocutor, adding the subjoined note :*

* " There are several points of difficulty in this case, and it is very much to be regretted that they should have been raised, when the patrimonial interest of the parties is so small. The trustee probably will not gain £50 for the creditors by his success; and the heir (as there is no serious chance of a reversion) really loses nothing by his defeat, but the trouble and responsibility of dividing that sum among the creditors of his father, for whom he maintains that he also is bound to act as trustee. The first point is one of very general importance, and is far enough from being clear. The provisions of the 39th section of the Bankrupt Act prove, no doubt, that the sequestration creditors are understood to have an interest in subsequent acquisitions by the bankrupt. But it is equally clear that it is not an exclusive interest. As to moveable property, posterior creditors must certainly be allowed to rank along with them, and may often be entitled to a preference; and even as to heritage, though the sequestration is declared to have the force of an inhibition, the Lord Ordinary thinks it exceedingly doubtful, whether this was intended to affect any thing but the existing estate. The difference in the phraseology, and indeed in the substantive provisions of the 39th, and the 29th and 31st, and other sections, seems also to show, that such subsequent acquisitions were not intended to be dealt with in the same way with the original property of the bankrupt; and, in particular, there is nowhere in the statute, any order on the bankrupt to convey such acquisitions to the trustee. If it were not for the repeated decisions of the Court, therefore, finding a supplementary sequestration, at the instance of the trustee, competent for attaching such acquisitions, and for the order on the bankrupt to convey them over accordingly, contained in the deliverances in these cases, it might well have been doubted whether it was intended to lay him under any such obligation. But, though the particulars of none of those cases are report-

No. 74. —“ **1mo,** Finds that, from the terms of the Bankrupt Act, as explained by repeated decisions of the Court, in awarding supplementary sequestrations, it must be held that the late William Loudon, senior, was under

19, 1835.
ristle v.
uden.

ed, the Lord Ordinary must now consider them as having settled that the bankrupt is legally bound to make over, and the trustee legally entitled to require and to vest in himself all such acquisitions, and it is upon this ground that the main finding on the interlocutor proceeds.

“ Still, however, it must be admitted, that there is a difficulty in applying the principle to such a case as the present. The only mode by which it has hitherto been attempted to reach those subsequent acquisitions has been by a supplementary sequestration, and holding that posterior creditors are entitled to rank on such acquisitions, it is obvious that they may have facilities for so ranking under this form of proceeding, from which they would be excluded by that which has both here adopted. By the death of the bankrupt before the acquisition was discovered, a supplementary sequestration was thought to be incompetent, and the trustee has accordingly resorted to a suit against the heir to convey, and on his default, to an adjudication in implement. But if the subject in question becomes in this way a part of the sequestrated estate, it is easy to see that objections might be raised to the ranking of such creditors, and especially on the 38th section of the Bankrupt Act, which declares the whole estate and effects to be divisible ‘among those who were his creditors prior to the date of the first deliverance.’ Whether this difficulty would be materially lessened by the form of a supplementary sequestration, in which there is no proper first deliverance, no statutory meetings of creditors, no election of trustee and commissioners, no examination of the bankrupt,—and, in fact, no separate sequestration proceeding, might perhaps be doubted. But the ground of objection is, at least, more obvious in a case like the present. In answer to it, it may be remarked that the declaration in the 38th section, is made expressly only as to ‘such estate and effects as belonged to the bankrupt at the period of the sequestration,’ and may be held to be qualified by the provision as to acquirements, in the immediately succeeding section. And also that the provisions for the first distribution of the estate, in the 45th, and other sections, gave right to a dividend to all who had produced their claims and grounds of debt, &c. prior to the ascertainment of the fund. In the case of an acquisition at an early stage of the sequestration, suppose between the first deliverance and the confirmation of the trustee, it is thought there could be little doubt that the bankrupt would be bound to include it in his conveyance, or that it would be covered by the truster’s adjudication, without the necessity of any supplementary sequestration,—and yet the difficulty from the terms of the 38th section, would, on principle, be the same as in a case like the present. It likewise appears from books of authority in the law of England, where the regulating statute directs all subsequent acquisitions to be made over to the assignees, that posterior creditors are without difficulty admitted to claim upon such acquisitions without any supplementary commission.

“ But though the Lord Ordinary feels the weight of those difficulties, and is aware that his decision is liable to objections (with a view to the rights of posterior creditors), which might not apply to those cases of supplementary sequestrations, the authority of which he has chiefly proceeded, he has been induced to give the decision:—1st, Because he conceives those cases to have established that the bankrupt, if alive, would have been under a legal obligation to convey to the trustee, and that this obligation having clearly descended to his heir, must now be made effectual in the only way which seems practicable in the circumstances of this

conveyance of the said interest, for the benefit of the father's creditors, if such conveyance is withheld for decree of adjudication in respect of the said interest and property. 2do, In respect that no appeal is made for any creditors of William Loudon, senior, who were such subsequent to his sequestration, and that no specification is made of the names or claims of any such alleged creditors, finds it incompetent and unnecessary to determine in this process on the right of such creditors to claim upon the subject of this action, in the existing sequestration or otherwise, either as entitled to a preference or *pari passu* with other creditors. But finds that the contingent existence of such creditors is no bar to the conveyance or adjudication of the said subject, as concluded for by the trustee. 3tio, Finds that it is unnecessary to require the parties in a proof of their contradictory allegations as to the said subject having carried on a separate business after his sequestration, or the knowledge and acquiescence of the trustee and the creditors as represented, in respect that it is not averred that there was any collusion or engagement on the part of the trustee and creditors, not to share with the profits of such trade, or to allow the property in question to be redeemed by such profits, for the personal benefit of the bankrupt or his heirs; and that, without such a bargain, the fact of such separate business having been carried on is irrelevant, in a question merely as to whether the bankrupt himself or his heir. 4to, In respect that the right now in question is a right acquired by the bankrupt by a transaction (supposed to be profitable) with William Pourie, subsequent to his sequestration, and the original sale of the subject to which it attaches to William Loudon by the trustee, and is substantially a different right from that to

No. 74.
Dec. 19, 1835.
Hristle v.
Louden.

with William Pourie since this action was raised): Finds, that the circumstance of the subject, to which this right of reversion attaches, having formerly belonged in absolute property to the bankrupt, and having been sold as such by his trustee, is no legal bar to his insisting in the present action; and therefore, and on the whole matter, repels the defences for the said William Louden, junior, and decerns against him in the declaratory conclusions of the libel, in so far as they are applicable to him, and also in the conclusions for a valid conveyance of the subject in question; or failing thereof, for adjudication in implement, and for accounting as to his intromissions or those of his father, if any, with the rents or profits of the said subject: Finds the pursuer entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor, to be taxed."

Louden reclaimed:—

LORD JUSTICE-CLERK.—This is a case of considerable difficulty. Louden was sequestrated, and the property was sold, and purchased by Pourie, and full price paid. Then this action is brought on the allegation, that the purchase was for behoof of Louden, and that it is greatly improved, and now much more valuable. The heir is served cum beneficio inventarii; and we must presume that there are others interested in the succession. The summons calls on Pourie to account for the balance of profits in his hands; and concludes, that the Louden and he are to execute the necessary deeds for conveying to the trustee for behoof of the creditors. Then this is met by an averment, that it was known to the trustee and commissioners that the purchase was for behoof of Louden; and it is admitted that, if there had been an agreement on the part of the creditors to allow him the profits of his trading, it would be a bar to this action. It is also averred, that, in consequence of this second trading, there are other creditors and that they are interested. Now, in these circumstances, can we adhere to the interlocutor of the Lord Ordinary? As the case stands, I think we cannot. If, in point of fact, this trading, &c. was done with the acquiescence of the trustee and commissioners—for I do not think an express agreement was necessary—the question, with reference to the trustee's right to acquirenda would not be raised; though, as to it, I would have no doubt that he was entitled to make good his future acquisitions for the creditors. This, however, has been decided without investigation; and, as the averment is denied, it must be farther investigated. Further, there is no reservation of the rights of the subsequent creditors; and would be cut out by the interlocutor as it stands.

LORD MEADOWBANK.—I think we can do nothing else than allow an investigation, though I doubted whether the admissions were not of themselves enough to satisfy us of the cognizance of the creditors.

LORD MEDWYN.—I can scarcely suppose they were not cognizant. On the law of the case, I have great difficulty. When it was before me, I had doubt even of the title of the trustee, though I repelled the defence on that head, as preliminary. A subject like this having been purchased by a friend of the bankrupt, it would be a very hard state of the law, if in no case it could be without the express consent of the creditors. If not already settled by the practice of the Court, I would doubt of supplementary sequestrations as to acq-

... to see how the facts stand, in order to determine it ; and even if it is to be
a reservation as to the subsequent creditors would be necessary.

Court accordingly (February 19, 1835) appointed the parties to
draft issues on the point of acquiescence. Those proposed by
a were in these terms :—

Whether, between the said 13th August, 1829, and 28th June,
the said William Loudon, under his own name, or under the firm
William Loudon and Son, or under the firm of William Loudon and
ay, did carry on business in Dundee as a manufacturer, with the
dge of the pursuer, or of the said William Hackney, William
t, and George Moon, the commissioners on the said sequestrated
or any of them ?

Whether debts were contracted by the said William Loudon
course of carrying on the said business, or otherwise, subsequent
said 21st July, 1829 ; and whether debts so contracted by him were
owing at the time of his death, on said 28th June, 1832 ?”

trustee, on the other hand, proposed that the issue should be—
Whether, between the said 13th August, 1829, and 28th June,
the said William Loudon, under his own name, or under the firm
William Loudon and Son, or under the firm of William Loudon and
ay, did carry on business in Dundee as a manufacturer ; and
er it was understood and agreed between the said William
s and the pursuer and said commissioners, acting for, and in the
and for behoof of the said creditors, that the said business should
arried on, to the exclusion of all claim on the part of the said cre-

No. 75.

Dec. 19, 1835.
2d Division.
d. Moncreiff.

Tulloch v.
D'Eresby.

GEORGE TULLOCH, Pursuer.—*Deas*.

LADY WILLOUGHBY D'ERESBY and HUSBAND, Defenders.—

Rutherford—G. Dundas.

SEQUEL of the case reported, ante, XII. 754, which see. The Lord Ordinary, under the remit there mentioned, pronounced the following interlocutor, adding the subjoined note : *—" Finds that the defenders had a right of preference for the current rent, and so far sustains the defences, and assoilzies the defenders, and decerns : Finds of new, in terms of the interlocutor of the Court, that the defenders have no preference for arrears of rent, and reduces the decree under challenge, in so far as it sustains any such claim of preference for arrears, and decerns accordingly ; and, further, in respect of the said interlocutor of the Court, finds that the defenders are entirely excluded from any claim whatever for the arrears of rent in competition with the pursuer as a poinding creditor : Reduces, decerns, and declares to this effect : Finds expenses due to the pursuer, and remits the account, when lodged, to the auditor to be taxed."

The defenders having reclaimed, chiefly in regard to expenses,

THE COURT so far altered, as to find that the expenses should be subject to modification.

BROWN and MILLER, W.S.—DUNDAS and WILSON, W.S.—Agents.

* " The Lord Ordinary fears he does not fully understand the principles of the judgment of the Court in this case. He cannot see his way clearly through the judgments in this case, and in those of *Tullis v. White*, June 18, 1817, *Samson v. M'Govan*, May 15, 1822, *Campbell's Trustees v. Paul*, January 13, 1835.—(See especially Lord Balgray's opinion.) But, it appears to him, that if the landlady, in this case, has no preference by her proceedings, she is entirely excluded in regard to the arrears, by the pursuer's poinding, because he cannot see any case in the record for raising the *pari passu* preference of the bankrupt statutes. Objections to the validity of the defender's poinding are out of the question, on the judgment of the Court. But he can discover no case of bankruptcy under the statutes to admit the *pari passu* preference.

" As the pursuer substantially prevails by this judgment and that of the Court, he is entitled to expenses, if the case ends on this interlocutor."

S. J. HALLAM, Pursuer.—*Robertson—Anderson.*
 GYE and COMPANY, Defenders.—*D. F. Hope—Maitland.*

No. 76.

Dec. 22, 1835
 Hallam v.
 Gye.

Onus Probandi—Proof—Slander, Privileged.—1. (Note.) Issue refused (by Ordinary), in the circumstances, to try whether an action which turned out added, had been raised maliciously, and without probable cause. 2. In an judicial slander and wrongful arrest, where want of probable cause is to d by the pursuer, slight evidence thereof held sufficient to throw on the the onus of proving probable cause. 3. Notes taken by the presiding a trial, in the course of previous judicial proceedings, held not to be

pursuer, Hallam, had acted as manager of an extensive establish- Dec. 22, 1835
 i Edinburgh, for the retail of teas, &c. transmitted by the defenders, Lord Justice-
 d Company, merchants in London, to be disposed of for their be- Clerk.
 In 1829, he was suddenly discharged, and immediately thereafter B.
 i London to purchase stock, preparatory to opening a tea shop in
 igh on his own account. Gye and Company then raised an action
 him, concluding for count and reckoning, or, on failure, for pay-
 £500.¹ When about to embark on board the steam-packet, on
 en to Edinburgh, Hallam was arrested on a writ of capias, at the
 m of Gye and Company, who had instituted a suit, to the same
 with their Scotch action, in the Court of Common Pleas. The action

No. 76. length, a judicial reference, subject to an agreement that the expenses were to be paid by the losing party, was made to an accountant, who found, in his award, that out of a series of retail transactions, amounting to upwards of £45,000, a balance was due by Hallam of only £4, 3s. 11½d. The accountant, holding Gye and Company to be substantially the losing party, ordered them to pay full costs, and the Court gave judgment accordingly,¹ and their judgment was affirmed in the House of Lords. Thereafter, Hallam, founding on these judicial proceedings, which he alleged to be illegal and oppressive, and on certain statements by Gye and Company, contained in the pleadings, which he averred to be false and malicious, and also on the arrest in London, brought the present action of damages against them. The defenders admitted the facts as to the judicial proceedings, but denied that they were oppressive or malicious; and averred that the proceedings and statements were adopted and made in optima fide, and on probable cause; and that the English arrest was in accordance with the powers and privileges competent to creditors by the law of England. The case went to trial, on the following issues: *

“ It being admitted that, on the 3d day of February, 1830, the de-

¹ Ante, XII., 311.

* The Jury Clerks likewise proposed an issue to the following effect:—“ Whether on or about the 3d day of February, 1830, the defenders, Gye and Hughes, maliciously, and without probable cause, raised, and thereafter insisted in an action against the pursuer for payment of the sum of £500, or such other sum as should appear to be due by him to the defenders, to the loss, injury, and damage of the pursuer?”

This issue was refused by the Lord Ordinary (Jeffrey), who pronounced the following interlocutor, with the note appended. “ Finds that the pursuer is not entitled, in the circumstances of this case, and under the summons on which the action proceeds, to an issue in terms of the first issue reported or suggested by the issue clerks, in the said draft issues, or to any issue under which he would be entitled to prove, as a separate and substantive ground for an award of damages, that the action raised by him in February, 1830, was so raised or insisted in maliciously and without probable cause, it being reserved to him to establish, by all competent evidence, that the arrest and injurious expressions, which he undertakes to prove under the other issues, were made and used maliciously, and without probable cause.”

“ **NOTE.**—The Lord Ordinary would have great hesitation in sanctioning an issue for damages on a mere allegation that a party had instituted an ordinary action of count and reckoning, in which he made claims on the defender, which a jury might ultimately think that he must or ought to have known to be unjust. But he is clearly of opinion, that the summons as laid, does not embrace any such allegation. At the same time, he has no doubt, though he neither gives nor is entitled to give any finding or judicial determination on the subject, that the pursuer will be entitled at the trial to prove all facts and circumstances, either in the conduct of such action, or otherwise, as may be relevant to establish that the acts and expressions which are the subject of the other issues were done or used maliciously.”



defenders, Gye and Hughes, raised, and thereafter insisted in, an action against the pursuer for payment of the sum of £500, or of such other sum as should appear to be due by him, as a balance due by the pursuer to the defenders,—

“ 1. Whether, in a paper or pleading, entitled revised condescendence, in the said action, the said Gye and Hughes did insert, or cause to be inserted, the following words, or words to the following effect, according to the meaning hereinafter set forth, videlicet, ‘ The defender ’ (meaning the present pursuer) ‘ was responsible for this deficiency, and, if he had rightly discharged his duties subsequent to the 30th September, 1829, he would have been enabled to show how it had arisen. It arose entirely from his culpable management, neglect, or embezzlement; and the greater part, if not the whole, had occurred prior to 30th September, 1829.’ And the following words, or words to the following effect, viz. ‘ His ’ (meaning the present pursuer) ‘ final removal was resolved upon in consequence of his failure to give any explanation of his conduct, or meet the serious charges preferred against him by the other young gentlemen of the establishment.’ And the following words, or words to the following effect, viz. ‘ Admitted that the concern prospered, but it was from the good quality of the tea sold, and not in consequence of the defender’s ’ (meaning the pursuer) ‘ management. ‘ The diminution of the business of the defenders ’ (the defenders) ‘ since the defender’s ’ (the pursuer’s) ‘ dismissal, is owing to the public having discovered his improper conduct, and to the competition which he has entered into with them in a concern opened on his own account, which competition he has supported, in some instances, by the most improper means.’ And the following words, or words to the following effect, viz. ‘ The deficiency in both these periods arose under circumstances which necessarily infer gross negligence or embezzlement on the defender’s ’ (meaning the pursuer) ‘ part, and he is responsible for the consequences of such misconduct;’ meaning that the pursuer was dishonest in his dealings, and unworthy of confidence? And, Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or maliciously caused to be inserted, in the said paper or pleading, to the loss, injury, and damage of the pursuer ?

“ 2. Whether, in London, on or about the 27th day of March, 1830, the defenders maliciously, and without probable cause, wrongfully arrested the pursuer, or wrongfully caused him to be arrested, or wrongfully detained the pursuer, or wrongfully caused him to be detained, to the loss, injury, and damage of the pursuer ? ”

Robertson, in opening for the pursuer, stated the whole proceedings which had taken place at the instance of Gye and Company, previous to the raising of the present action, and argued that *the evidence arising from these proceedings was*

No. 76.

—
 No. 22, 1835.
 Hallam v.
 Gye.

sufficient to shift on Gye and Company the onus of proving that they had been adopted on probable cause ; and, in explanation of the law as to malice and want of probable cause, he referred to *Cotton v. James* (I. Barnwell and Adolphus, 128) ; *Mitchell v. Jenkins* (II. Neville and Manning, 301) ; *Nicolson v. Coghill* (IV. Barnwell and Cresswell, 21) ; *Shaw v. Robertson*, 13th December, 1803 (Mor. *Lis alibi pendens*, App.)

In support of his proof of malice and want of probable cause, Hallam put in evidence the judicial proceedings on which he had founded in his pleadings, the English writs connected with Hallam's arrest in London, and several letters.

Hallam also proposed to put in the notes taken by the presiding judge at the original trial, which had been printed for the use of the Court when advising the motion for the new trial.

The Dean of Faculty, for Gye and Company, objected to this evidence as not pertinent to the issue.

The Court sustained the objection.

Hallam then led parole evidence, chiefly with the view of showing the injury he had suffered in his credit and trade in consequence of the proceedings adopted by Gye and Company. In proof of the law of England with reference to personal arrest on a depending action, he adduced an English barrister,¹ who deponed, inter alia—An arrest can only proceed in an action for a money demand of an ascertained amount, in which case it is competent for the plaintiff to arrest the defendant at the commencement of the suit. In a case where goods have been sent to an agent and not accounted for, the proper action is a special action for not accounting, and not an action for money had and received ; but in such a case as the present, if the plaintiff should make affidavit that the agent received any certain amount of money, he might arrest for that sum ; the affidavit (above-mentioned) now shown him, does not import that it was made in reference to an action for not accounting, in which there could have been no arrest, and for which it would not have been good. Without this affidavit the writ of *capias* would not have been issued, nor the arrest made. To sustain an action for malicious arrest, it is necessary to prove malice, and want of probable cause ; what is probable cause, is a question for the Court, after the jury have found the facts, and then the want of probable cause is evidence of malice to go to the jury under the direction of the judge, but does not necessarily infer it. If a party were arrested on a claim for £94, and only £4 ultimately found due, this would be, in an action for malicious arrest, evidence of the want of probable cause, such as to throw on the defendant the burden of showing probable

¹ Mr Samuel Hughes.

cause; and this evidence, although slight, would be sufficient, because the plaintiff is trying to establish a negative, which it is hardly possible to do.

The Dean of Faculty, for the defenders, founding on the privilege attached to judicial proceedings, contended that the matters introduced in the defences lodged by Hallam in the original action led to the statements quoted in the issues, which Hallam, therefore, had no right to complain of, they having been called for by his own pleading; and they were, besides, made on reasonable grounds, and with probable cause of belief.

In support of his plea of probable cause, the defenders, *inter alia*, led evidence to show that Hallam, who, subsequently to his dismissal from the employment of Gye and Company, had fitted up a shop in the immediate neighbourhood of their warehouse, and carried on business on his own account, had, upon one occasion, executed an order apparently intended for them.

LORD JUSTICE-CLERK, in charging the jury, observed:—This is a case of judicial slander, and the rule is, that, to cases of this description, such a protection is afforded that the pursuer must prove the expressions complained of to have been both malicious and injurious, and also made without probable cause. I take the law as laid down by Lord Chancellor Eldon, in *Young v. Leven*:—"If a man's malice is as foul and black as it can be represented, but yet if he has probable cause for the complaint, he cannot be liable to any action for a malicious prosecution; and, on the other hand, if it has been found that he has no probable cause of complaint, but if his mind is devoid of malice, neither can an action be maintained." It is not necessary to prove malice by direct positive evidence, but by the general facts and circumstances of the case. It is not, however, on conjecture, or suspicion of malice, but on satisfactory proof of malice that the jury must proceed. In the proof of want of probable cause, slight evidence will be sufficient to shift the burden of proving probable cause on the defender, because here the pursuer has to prove a negative, which is a very difficult thing to do. In support of his proof of malice and want of cause, the pursuer founds chiefly on the judicial proceedings which took place previous to the raising of the present action; and this evidence is sufficient, though slight, to throw the onus of making out probable cause on the defender.

In regard to the first issue, the gravamen of the slander is the charge of embezzlement, which ought not to have been made unless the party had good ground for believing it true. In regard to the second issue, you will have to find, that, under the circumstances, the arrest of Mr Hallam was an illegal proceeding. You must be satisfied, on the whole case, that malice and want of probable cause have been made out; and, if you find damages, they ought not to be vindictive.

THE JURY found for the pursuer, and assessed the damages at £2000.

T. and T. DARLING, W.S.—CAMPBELL and MACK, W.S.—Agents.

No. 77.

HENRY PATULLO, Surgeon, Pursuer.—*Keay—Robertson.*JAMES ANDERSON, Physician, Defender.—*D. F. Hope—A. M'Neill.*

Dec. 21, 1835.

Lord Justice-
Clerk.R.
Patullo v.
Anderson.Aitken v.
Douglas.

Assault.—This was an action of damages at the instance of one medical practitioner against another, for an assault committed in the sick chamber of a patient.

Damages laid at £500.

VERDICT for the pursuer. Damages £50.

M'INTOSH and DUCAT, W.S.—JAMES BRODIE, S.S.C.—Agents.

No. 78.

MRS MARGARET DEWAR or AITKEN, Pursuer.—*Rutherford—Patton.*

ROBERT DUNCAN DOUGLAS (Clerk to Peebles-shire Road Trustees),
Defender.—*D. F. Hope—Anderson.*

Reparation—Road Trustees.—Circumstances in which road trustees consented to a verdict for £250 damages against them in favour of the widow of a carter who had lost his life through the misconduct of a servant in their employment, who neglected to take proper precautions for the safety of the public, though he knew that the road was in a dangerous state.

Jan. 5, 1836.

Ld. President.

ON the 8th of October, 1832, a breach was made in the turnpike road from Leadburn to Peebles in consequence of the river Eddlestone breaking in upon it. The river was unusually swollen at the time, and William Aitken, driving a cart along the road on that evening, fell into the river with his horse and cart, and was drowned. He left a widow and five children. Aitken, at the time of his decease, was earning about £100 per annum. His widow raised an action of damages against the road trustees of the district, in which the following issue went to trial:—

“It being admitted that the pursuer is the widow of the late William Aitken, formerly residing in Edinburgh, and that the defender is clerk to, and represents, the road trustees of the third district of Peebles-shire, and that the road from Leadburn to Peebles is in the said district;

“Whether, on or about the 8th day of October, 1832, by the fault or negligence of the said trustees, or those in their employment, the said William Aitken, while travelling along the said road, was drowned in the river Eddleston, to the loss, injury, and damage of the pursuer?

“Damages laid at £1000.”

It appeared that a servant in the employment of the road trustees, and having charge of the road, though he was aware of the dangerous state of the road, and had intimated, a few hours prior to the accident, that he was afraid some lives might be lost that night, had taken no precaution

whatever for the protection of the public. It also appeared that Aitken had been driving with some degree of negligence, as the reins were found tied to the cart when it was taken out of the water.

In these circumstances, the defender, at the conclusion of the pursuer's proof, in place of addressing the jury, stated that he had not previously been fully aware of the negligence of the servant of the road-trustees, and offered £250 of damages, with all expenses.

The pursuer accepted of the offer, and

THE JURY found for the pursuer, and assessed the damages, in terms of this arrangement between the parties.

J. MARSHALL, S.S.C.—W. MACKENZIE, W.S.—Agents.

JAMES DICK, Pursuer.—*Rutherford—Patterson.*

JAMES STEWART, Defender.—*D. F. Hope—W. Bell.*

Reparation—Landlord and Tenant.—This was a case of circumstances. Dick alleged that his landlord, Stewart, had falsely stated that he (Dick) had no power to assign his lease, which was of a shop in Edinburgh, for five years. He alleged that this statement was made to parties intending to purchase the lease and the good-will of the shop; and that it had deprived him of a valuable sum as a price for the lease and the good-will, which he would otherwise have obtained. Dick also claimed damages, alleging Stewart to have apprehended him, on a meditatione fugæ warrant, maliciously, and without probable cause.

THE JURY found for the defender; but, as they conceived the pursuer had been harshly treated, they gave a recommendation to the Court not to subject him in expenses.

R. NEIL, S.S.C.—J. A. ROBERTSON.—Agents.

GEORGE WALLACE, Pursuer.—*Robertson—G. G. Bell.*

ROBERT GRAY and OTHERS, Defenders.—*D. F. Hope—More.*

Stamp—Contract—Proof.—Where a contract for building a chapel was entered into by missives, and action was raised for the balance of the price of the chapel—~~held~~ that the missives, not being stamped, could not be received in evidence, and ~~verdict~~ for defenders accordingly.

GEORGE WALLACE, wright and builder in Portobello, raised an action ~~against~~ Robert Gray, architect in Portobello, and Others, setting forth, ~~that~~ in 1824, he had been employed by a committee of management of ~~the~~ **Portobello** United Associate Secession Congregation, who were no-

No. 80. **minated at a general congregational meeting, to execute certain work in**
their temporary meeting-house, for which work an account of £11, 3s. 4d.
remained due : that the committee afterwards applied to him to make them
an offer to build a chapel for them ; that he accordingly addressed to them
the following missive :—

June 6, 1831.
Wallace v.
Gray.

“ To the Committee of Management of the Portobello United Associate Secession Congregation.—Gentlemen, I hereby bind and oblige myself to finish, in every respect, according to the plans and specifications signed by me, of your chapel in Regent Street, and to have the whole of the work completed in every respect, on or before the 1st day of June, 1825 years, for the sum of £1733 sterling, to be paid by instalments, as stated in this missive, under the penalty of £500 sterling, and offer for my cautioners,

(Signed) GEORGE WALLACE, Jun.”

“ Instalments of payment as follows :—£100 to be paid when the walls are levelled round at the level of the base course ; £100 when the gallery joisting is laid ; £200 when the wall head is levelled ; £400 when the roof is finished ; £100 when the house is first coated ; £100 when the plaster is finished ; £100 when the floor is laid ; £100 when the seats are half up ; £100 when the seating is finished ; £100 when the house is fully finished ; £233 three months after the work is finished.”

The summons farther set forth, that this offer was accepted by Robert Gray, in terms of the following missive, addressed to the pursuer :—

“ Sir, We, the Members of the Committee of Management of the Portobello United Associate Secession Congregation, do hereby accept of your offer for erecting our chapel, in the terms of the missive on the other side of this paper, and to pay the instalments as noted ; and we are,” &c.

(Signed) “ ROBERT GRAY, President,”

and that the chapel had been duly erected, but a balance of £388 of principal, besides certain interest, and also some minor items, remained due. Wallace concluded for decree, jointly and severally, against Robert Gray and Others, members of the committee, or of the congregation.

Defences were lodged, in which some of the defenders denied all liability, and others alleged that the work had not been duly executed.

The cause was sent to a jury, under the following issues :—

“ It being found, by an interlocutor of Lord Corehouse, dated 11th March, 1831—‘ That all the members of the committee of management of the Portobello United Associate Secession Congregation, from the

I. Whether, in the years 1824 and 1825, the pursuer was employed, and did erect, a chapel at Portobello, in the county of Edinburgh, for the United Associate Secession Congregation, at the price of £, to be paid by instalments; and whether the defenders, or any of them, are indebted and resting-owing to the pursuer in the sum of £388, balance of the expense of erecting the said chapel, and of the sum of 6s. 4½d. for extra work, or of any part of the said sums, with interest on the said sum or sums?

II. Whether, in the year 1824, the pursuer was employed to fit up, and did fit up, a temporary place of worship for the congregation aforesaid, and whether the defenders, or any of them, are indebted and resting-owing to the pursuer in the sum of £11, 3s. 4d., or any part thereof, with interest thereon, as the expense of fitting up the said place?

At the trial, the pursuer tendered in evidence the missives above recited; to which the defenders objected, that they were unstamped, and not admissible.

The Lord President sustained the objection, and found that the missives could not be received; upon which the pursuer gave up the case.

The Jury found for the defenders.

CASES

DECIDED IN

THE COURT OF SESSION.

WINTER, 1836.

No. 81.

EARL OF STRATHMORE, Pursuer.—*Whigham—Tait.*

Jan. 12, 1836.
Earl of Strath-
more v. Trus-
tees of late Earl
of Strathmore.

TRUSTEES OF LATE EARL OF STRATHMORE, Defenders.—*Ruther*

Reclaiming Note—Process.—Where a reclaiming note had a copy of the
condescendence and answers appended, but no summons or defences—h
competent, although, at a previous stage of the cause, the summons had been
to the Court.

Jan. 12, 1836.
1st DIVISION.
Ld. Cockburn.
B.

IN a reduction, at the instance of the present Earl of Strath
against the trustees of the late Earl, the Lord Ordinary sustain
defences, and assoilzied the defenders, but found the pursuer entitl
his expenses out of the trust-fund.

Both parties presented reclaiming notes. The defenders recl
only on the point of expenses, and added no appendix to their not
merely referred to the appendix to the counter-note. The purs
claimed on the merits, and appended to his note the re-revised
scendence and answers on which the record had been closed, but
not append the summons or defences.

At moving the notes in the Single Bills,

Rutherford, for Defenders, objected to the competency of the pursuer'
as neither summons nor defences were appended. It was true that the
ders' reclaiming note was thereby rendered inept also, as it had merely r
to the record, which was understood to have been completely boxed along
the pursuer's reclaiming note on the merits. But the defenders, if they
to admit the incompetency of their own note, were entitled to object to th
petency of the pursuer's.

Whigham, for Pursuer.—The cause has previously been before the Cou
the summons was then boxed to the Court. A second boxing was n
cessary.

Bakerford.—That was at a preliminary stage of the process, while no defence had been lodged at all. There never have been defences boxed to the Court; and the want of defences, in the appendix, is just as fatal as the want of summons. Jan.
Lord
v. M

LORD MACKENZIE.—The words of the Act of Sederunt, 11th July, 1828, §7, are quite decisive on this point; and, if the defenders choose to give up their own note, I think them quite entitled to object to the note of the pursuer. It is enacted, in the above section, that the reclaiming note "shall not be received, unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, and of the summons, with amendment, if any, and defences." This enactment is perfectly express; and although, in this instance, the clerk of Court received the notes, yet it has been held, in similar cases, that if such act of the clerk was contrary to the provision of the Act of Sederunt, the Court would deal with the notes in the same way as if they were not received.

The other Judges concurred, and

THE COURT refused both notes as incompetent.*

J. HAMILTON, W.S.—**DUNDAE AND WILSON, W.S.**—Agents.

His MAJESTY'S ADVOCATE, Pursuer.—*Lord Advocate Murray*—*Sol. Gen. Cuninghame*—*Maitland*.

WILLIAM MACLEAN and OTHERS, Defenders.—*D. F. Hope*—*Robertson*—*A. McNeill*.

Service—Reduction—Expenses.—Question, Whether the Crown can be found liable to expenses.

THIS was a reduction at the instance of the Crown, as *ultimus hæres*, Jan. 2d
of an *ex parte* service, expedited by the defenders, as heirs to the deceased
Archibald Maclean. The cause depended entirely on the evidence ap-
pearing from a proof taken by commission. The Lord Ordinary decerned
in the reduction; and, on a reclaiming note being presented by the
defenders, the Court adhered, and, in respect that no expenses were
asked, found none due.

Doubts were expressed on the Bench, whether, if the claim for expenses had not been passed from, the Crown could have been found entitled thereto.

HON. MACKENZIE, W.S.—**JOHN NAIRNE, S.S.C.**—Agents.

A few days afterwards, this interlocutor was cancelled of consent of the parties, in consequence of some arrangement, under which they craved that the case should go to the roll. The interlocutor had not been signed.

CASES

DECIDED IN

THE COURT OF SESSION.

WINTER, 1836.

No. 81.

EARL OF STRATHMORE, Pursuer.—*Whigham—Tait.*

Jan. 12, 1836.
Earl of Strath-
more v. Trus-
tees of late Earl
of Strathmore.

TRUSTEES OF LATE EARL OF STRATHMORE, Defenders.—*Ruth*

Reclaiming Note—Process.—Where a reclaiming note had a copy of the condescendence and answers appended, but no summons or defences-competent, although, at a previous stage of the cause, the summons had been to the Court.

Jan. 12, 1836:

1st DIVISION.
Ld. Cockburn.
B.

IN a reduction, at the instance of the present Earl of Strathmore against the trustees of the late Earl, the Lord Ordinary sustained the defences, and assoilzied the defenders, but found the pursuer entitled to his expenses out of the trust-fund.

Both parties presented reclaiming notes. The defenders re-claimed only on the point of expenses, and added no appendix to their note, merely referred to the appendix to the counter-note. The pursuer re-claimed on the merits, and appended to his note the re-revised condescendence and answers on which the record had been closed, but did not append the summons or defences.

At moving the notes in the Single Bills,

Rutherford, for Defenders, objected to the competency of the pursuer's note, as neither summons nor defences were appended. It was true that the defenders' reclaiming note was thereby rendered inept also, as it had merely referred to the appendix to the counter-note. But the defenders, if they admitted the incompetency of their own note, were entitled to object to the incompetency of the pursuer's.

Whigham, for Pursuer.—The cause has previously been before the Court, and the summons was then boxed to the Court. A second boxing was necessary.

unless there be appended thereto copies of the mutual cases, if any, and papers authenticated as the record, and of the summons, with amendment, and defences." This enactment is perfectly express; and although, in substance, the clerk of Court received the notes, yet it has been held, in cases, that if such act of the clerk was contrary to the provision of the Sederunt, the Court would deal with the notes in the same way as if they not received.

Other Judges concurred, and

THE COURT refused both notes as incompetent.*

J. HAMILTON, W.S.—DUNDAS and WILSON, W.S.—Agents.

MAJESTY'S ADVOCATE, Pursuer.—*Lord Advocate Murray—Sol. Gen. Cunningham—Maitland.* No. 82.

LIAM MACLEAN and OTHERS, Defenders.—*D. F. Hope—Robertson—A. M'Neill.*

Reduction—Expenses.—Question, Whether the Crown can be found liable to expenses.

THIS was a reduction at the instance of the Crown, as ultimus hæres, Jan. 12, 1881, ex parte service, expedite by the defenders, as heirs to the deceased David Maclean. The cause depended entirely on the evidence appearing from a proof taken by commission. The Lord Ordinary decerned in favour of the reduction; and, on a reclaiming note being presented by the defenders, the Court adhered, and, in respect that no expenses were

2d Division
Ld. Cockburn
IL.

No. 83. **Jan. 14, 1836.** **Potter v. Greig.** cial amount of damage, nor has he proved any malicious or rec pass on the part of the respondent; which last consideration indispensable to support the claim of damages, as, by the article the purchases were expressly declared to be at the risk of the and the hazard of the trespassing of cattle upon corn in an field was one against which the purchaser was, by a fair const the articles, bound to protect himself.

“ Upon the whole, the Lord Ordinary considers this to those cases in which each party must bear the consequences of tion so uselessly persisted in, and he has therefore found no due.”

The judgment of the Lord Ordinary, proceeding on these in these terms:—“ Advocates the cause, and recalls the interlocution pronounced by the Sheriff; and, in respect of the advocator having in the Inferior Court, with his answers to the respondent’s original petition, a deposit receipt for the sum of £21, 17s. 9d., being with shillings of the sum claimed by the respondent as the price of corn purchased by the advocator, Finds that the advocator was date of the said answers, entitled to delivery of the corn so p Finds, that, notwithstanding the lodging of said deposit receipt respondent still maintained, in his replies, that the corn should be posed to sale for his (the respondent’s) behoof, in terms of the petition: Finds, that, in consequence of this opposition, the corn still remains stacked up on the farm of Cowdenlaws, formerly by the respondent, under authority of the Sheriff’s deliverance in the respondent’s original petition: Finds, that, in these circumstances the advocator is not bound at this distance of time to take delivery of corn so long withheld from him; and therefore, and in respect of the intimation made in the protest by the advocator of the 27th of September 1834, that he declines to receive the said corn, Finds that the respondent is entitled to recover the receipt lodged by him in process as and appoints the same to be delivered over to him accordingly further, that the respondent is entitled to keep possession of the corn stacked as aforesaid, and to dispose of the same as he shall think proper: Finds, that, in respect of the previous findings, it is unnecessary to determine the question of damages, but, in consideration of the circumstances of the case, and the unnecessary complication and expense incurred on both sides, Finds neither party entitled to expenses or costs.”

Greig reclaimed, but

THE COURT adhered.

J. B. WATT.—A. MILLAR.—Agents.

— — — — —
WILLIAM FERGUSSON was appointed judicial factor on the estate of **Jan. 14, 1836**
James Sutherland, builder in Edinburgh, who died intestate, **1st Division**
embarrassed circumstances. At a numerous meeting of **Suther-**
creditors, on 18th November, 1835, Fergusson was appointed a
D.
trustees, along with three other parties, to attend to the interests of the
estate. The four trustees were empowered to take whatever steps
seemed advisable for the immediate disposal of Sutherland's pro-

On 18th December, Fergusson, with the concurrence of these
parties, and also of the sister and the father of the deceased,
presented a petition to the Court, setting forth, that Sutherland, at
that time, was engaged in extensive building speculations; that he was
erecting one large tenement, and three self-contained houses in Rut-
square, Edinburgh, upon ground which was feued on missives from
Learmonth, and to which he had obtained no feu-contract; that
buildings, as they stood, were valued at £3450, but were burdened
with £2050, in consequence of advances made by Learmonth; that the
houses were roofed and slated, but as the lead work on the roof was
partially executed, and there were no doors or windows on the pre-
sent state, they were exposed to great deterioration during the winter season;
very considerable loss would immediately ensue, unless the houses
were finished; and that it would require upwards of £3000 to finish
and the petitioner had no funds in his hands. The petition farther
stated, that the deceased had a brother in the army, who was supposed to
be at Corfu, but who had not been heard of for nearly two years, and that

No. 84. Along with the petition, a report and certificate from a builder produced, instructing the allegations as to the deterioration to which property was exposed in its present condition, and giving a decision that it was necessary either to proceed immediately with the repairing of the houses, or to sell them.

Jan. 14, 1836.
Boyes v. Incorporation of Tailors of Canongate.

The petition craved the Court "to authorize and empower the petitioner, after suitable advertisements, to sell and dispose, by public sale, of the personal right which the deceased James Sutherland had in the unfinished property building by him in Rutland Square, subject to the advances made by Mr Learmonth, and the whole condition and circumstances under which the said James Sutherland leased the same; to concur with Mr Learmonth in granting dispositions or conveyances of the same to the purchaser or purchasers."

After intimation, the

LORD PRESIDENT observed, at moving the petition—

This appears to be a case of urgent necessity, and the prayer of the petition should be granted. But I apprehend it may be requisite, in point of law, to remit it in the first instance to the Lord Ordinary.

Dean of Faculty for Petitioner.—Such a remit is not requisite, and in this instance, would be very prejudicial, where the utmost despatch is necessary to prevent a purchaser from losing next Whitsunday term.

No opposition was offered.

THE COURT granted the petition, without making any preliminary remit.

J. PEDDIE, W.S.—Agent.

No. 85.

ANDREW BOYES, Pursuer.—*Pyper*—*R. Robertson.*

INCORPORATION OF TAILORS OF CANONGATE, Defenders.—*Wh*

Corporation—Friendly Society.—It being fixed by a final interlocutor, at an early stage of a cause, that the pursuer, on proving certain articles in his petition, was entitled to decree in his favour; and such proof being at the trial, a Decree pronounced in his favour, with expenses.

Jan. 14, 1836. **SEQUEL** of the case reported, ante, XIII. 1, which see.

1st Division.
Ld. Fullerton.
S.

Boyes, tailor, who became a member of the Corporation of Tailors of Canongate, and a contributor to their Widows' Scheme, was struck off the roll of the scheme by a vote of the members. They adopted a measure in consequence of his failure to pay his quarterly contribution of one shilling each, for a period exceeding two years, and thereby subjecting himself, in their opinion, to the penal provisions of one of the by-laws. Boyes raised an action against the Corporation, to

red, that, on paying up all arrears and interest, he was entitled to No.
 admitted to the benefit of the whole privileges of a member of the Jan. 14,
 poration and the Widows' Scheme; or otherwise, that he was entitled Thom v.
 payment of all the sums advanced by him, with interest. In support Graham
 is action, he made averments in articles 10, 11, and 12,* of his con-
 currence, as to which the Lord Ordinary pronounced an interlocutor,
 signing the relevancy of these averments to support his action, and
 giving a proof. The Court adhered to this interlocutor; and, a proof
 being led, the Lord Ordinary held that it was insufficient to support the
 action. His Lordship therefore assailed.

Now reclaimed, and

THE COURT, being of opinion that the averments were sufficiently
 proved, altered the Lord Ordinary's interlocutor, and decerned
 in terms of the first branch of the pursuer's conclusions, with ex-
 penses.

R. USQUHART, S.S.C.—J. MACANDREW, S.S.C.—Agents.

WILLIAM THOM, Pursuer.—*D. F. Hope.*
 THOMAS GRAHAME, Defender.—*Rutherford—Miller.*

No.

Jury Trial—Witness—Expenses.—Where a defender makes such allegations on
 record as render it necessary for the pursuer to have certain witnesses in attend-
 ance at a jury trial—the pursuer is entitled to the expense thereby incurred, though
 spared from adducing these witnesses, by an intimation from the defender
 at the trial, that the defender is to lead no evidence.

REQUEL of the Jury trial reported, ante, XIII. 1129. The pursuer Jan. 14,
 obtained a verdict, assessing his damages at £50, on account of having
 sustained a personal assault and verbal abuse. He was found entitled to
 expenses; but a question was reserved by the auditor, at taxing the
 same, whether he should be entitled to the expense of bringing up six
 witnesses from the country, none of whom were examined at the trial.
 It is now stated by the

1st Div

Opinion of Faculty, for the Pursuer. That he had advised that these witnesses
 should be in attendance, in order to rebut certain allegations of the defender, but
 that he had been unnecessary to call them, because the defender, after the first
 witnesses had been adduced, intimated that he was to lead no evidence at
 all. But as the cost of bringing up the witnesses had been rendered necessary
 by the allegations of the defender, which were not abandoned prior to the trial,
 the defender ought to be subjected in the expense of them.

The rules of the Society, are quoted at length in the previous

No. 86.

Jan. 14, 1836.
Ritchie v.
Little.

Rutherford, for the Defender, answered, That the issue was of a nature so simple, as to render nine witnesses altogether superfluous, the object being to prove what occurred at a public meeting in open day: that, even had the whole nine actually been examined, no more than the cost of three witnesses should have been allowed; and that, if an intimation by a defender of his not intending to lead evidence was to have the effect of subjecting him for the cost of all the pursuer's witnesses who might not be examined, no defender would ever make such an intimation again until after the pursuer declared his case to be closed.

LORD GILLIES.—In a question of this sort, I think that my Lord President, before whom the jury tried the cause, is the best judge.

The other Judges concurred in this observation, and the

LORD PRESIDENT intimated, that he considered the expenses in question ought to be allowed in favour of the pursuer. The pursuer was entitled to the costs of having witnesses in readiness to rebut every allegation which the defender had led him to expect he was to insist in.

Expense of the six unexamined witnesses allowed accordingly.

W. BELL, S.S.C.,—W. MARTIN, S.S.C.—Agents.

No. 87.

JOHN RITCHIE, Advocate.—*Sol.-Gen. Cuninghame—Shand.*

JAMES LITTLE, Respondent.—*Keay.—W. Bell.*

Triennial Prescription—Master and Servant.—In an action for wages, raised five years after the death of the master, the master's representative admitted that the pursuer was in the employment of the deceased, as a servant, at the time of the death; but he disputed the rate of wages. He also admitted, that he had not paid the wages in question. Held, 1. That, in regard to all wages, within three years prior to the death, there was no presumption that they had been paid by the deceased; and the admissions proving non-payment since the death, they must, therefore, be presumed to be still resting-owing. 2. That, where judicial admissions suffice to elide prescription, there is no room for a reference to the defender's oath. And, 3. That the rate of wages, being disputed, must be the subject of a proof.

Jan. 15, 1836.

1st Division.
Ad. Corehouse.
B.

THE late George Rea of Newton, who died in 1826, was a cattle dealer and farmer. At the time of his death, and for some years previously, John Ritchie was in the service of Rea. In 1831, Ritchie raised an action against James Little, writer in Annan, as representative of Rea, concluding for payment of wages, at the rate of £25 per annum, said to be due since August 1822, with interest on each year's wages, up to the date of Rea's death. The whole claim was for £106, 5s., with £8, 15s. of interest; but under deduction of £10, 2s. 10d., which were said to be payments to account. Of this, a sum of £3 had been received from Little in September 1830; and Little had farther offered Ritchie £17 for a discharge in full, which Ritchie declined to give.

Little pleaded the defence of the triennial prescription. He stated that receipts for wages were almost never taken from servants; and, if

him should be sustained, it would be open to all who had been servants of a deceased party, within three years of his death, to bring an action for wages, at any period within forty years thereafter. Little farther imputed the rate of wages charged. Ritchie answered, that, at the death of Rea, the account was not prescribed, and there was no ground on which it could be presumed to have been then paid; and as Little, the proper debtor in the obligation, admitted he had never paid it, the debt necessarily remained unextinguished; and this had been repeatedly so decided.¹ As to the rate of wages, that merely affected the amount, and not the existence of the debt; and, as to that point, the pursuer was entitled to a proof prout de jure.

The Sheriff sustained the plea of prescription, and followed up this judgment with several interlocutors, which resulted in assailing Little. Ritchie brought an advocacy, in which the Lord Ordinary "remitted to the sheriff, with instructions to recall the interlocutors complained of; to find that prescription does not apply to any of the wages pursued for, and falling due within three years of the late Mr Rea's death; to allow the parties a proof of their respective averments as to the wages claimed; and thereafter to proceed in the case as shall appear to him just, and determined and found the advocator entitled to the expenses incurred in this Court."

Little reclaimed; and, *inter alia*, objected to the application of the case of Elder¹ as a precedent, in respect that in that case the oath of a party had been taken before prescription was elided. Ritchie answered, that wherever the judicial admissions of a party were sufficient to elide prescription, there was no need to recur to his oath: and it was impossible to presume that he would admit one thing and swear another.

Lord GILLIES.—Wherever judicial admissions are made, which are sufficient to elide prescription; it would be mere supererogation, and indeed worse than supererogation, to have recourse to a reference to oath. A party cannot be said to say that he has a right to be allowed an opportunity of emitting a deposition contradictory of his deliberate judicial admissions; and, if he is merely to agree consistently with them, his deposition would leave matters just where they are. I think the case of Leslie is an authority directly in point to this one, and I am clear for adhering.

Lord PRESIDENT.—The claim in the summons was too broad, as it extended to wages which were already prescribed at the death of Rea. But every term has a separate prescription; and the wages unprescribed at Rea's death are proved by the admissions to have been unpaid since. They must therefore be presumed to be still due, as much as they were at Rea's death, and I think the interlocutor of the Lord Ordinary well founded.

¹ 1808 (F. C.) *Elder*, May 15, 1833 (*ante*, XI. 591).

No. 87. **LORD MACKENZIE.**—If the Court are to preserve consistency in their
 sions, there can be no doubt that this interlocutor is well-founded.
 15, 1836. **LORD BALGRAY** concurred.
 v.
 vart.

THE COURT accordingly adhered, and awarded additional expenses in
 of Ritchie.

W. & J. B. DOUGLAS, W.S.,—T. JOHNSTONE, S.S.C.—Agents.

No. 88. **JAMES DICK, Pursuer.**—*Rutherford—Paterson.*
JAMES STEWART, Defender.—*W. Bell,*

16, 1836. **Jury Trial**—*Motion for New Trial refused.*—Dick raised an act
 DIVISION. damages against his landlord Stewart, on account of improper interfere
 with him when about to sell and assign his lease of a butcher's sh
 Edinburgh along with the goodwill of the business. He alleged th
 sale of his lease had been defeated by Stewart's falsely alleging to ir
 ing purchasers that he had no power to assign. He also claimed da
 on account of Stewart's having apprehended him maliciously, and
 out probable cause, on a meditatione fugæ warrant. The jury (Ja
 5) found a verdict for the defender, and the pursuer now moved
 rule on the defender to show cause why a new trial should not be
 ed, on the ground of misdirection by the judge. The motion wa
 special nature, and in the circumstances

THE COURT refused it.*

R. NEIL, S.S.C.—J. A. ROBERTSON, S.S.C.—Agents.

* At returning their verdict, the Jury gave a recommendation to the Co
 regard to the question of expenses, as they thought that harsh proceedin
 been adopted against Dick, though he was not entitled to damages. In di
 of the above motion, the Lord President intimated, with the acquiescence
 other Judges, that the jury's recommendation would receive attention fr
 Court at the proper season.

THOMAS FINLAYSON, Petitioner.—*Monro.*

WILLIAM KIDD, Respondent.—*Sol.-Gen. Cuninghame—Buchanan.*

Lunatic—Curator Bonis—Aliment.—1. After the Court had authorized a curator bonis to sell the heritage of his fatuous ward for his suitable maintenance and protection, and the proceeds of the sale were reported to the Court,—authority granted to the curator bonis to lay out the free balance in the purchase of a suitable annuity (£55) on the most secure and advantageous terms; and curator directed thereafter to report his proceedings, and what surplus remained in his hands. 2. Observed, that, if the relations of the fatuous person were willing to give a larger annuity than the insurance offices would do, there was no objection to their entering into the transaction, if they gave undoubted security for the annuity.

SEQUEL of the case reported ante, XIII. 861, which see. The Court then found that it was expedient and necessary to sell the heritage belonging to Alexander Finlayson, the fatuous ward of Thomas Finlayson, petitioner, so as to provide a fund for the suitable maintenance, support, and protection of Alexander. The Court at the same time ordained the petitioner to lodge the price in a chartered bank, and to place the bank receipt in process, subject to the orders of the Court. The petitioner now lodged a minute stating that the subjects had been sold for a price of £1035—that, after deducting debts and expenses, the free sum would not exceed £700 or £750, and that a sum of £700, though sunk in the purchase of an annuity on the life of the lunatic, whose age was fifty-one, would not procure more from an insurance office than £53, 17s. 5d. The petitioner referred to the facts previously laid before the Court regarding the condition in life and habits of the lunatic, and submitted that it was necessary to apply the whole sum in purchasing an annuity for the lunatic. He farther stated that some of the relations of the lunatic were disposed to become bound for a larger annuity than any of the insurance offices would give, and were ready to find undoubted security. He therefore craved warrant to lay out the free balance in the purchase of an annuity on the most secure and advantageous terms that could be obtained.

Answers to the minute were lodged by Kidd, the trustee for the creditors of the brother and heir-presumptive of the lunatic. Kidd contended that the lunatic could be as well supported as he required, in any common farm-house in his own neighbourhood at the rate of seven or eight shillings a-week, or in the Dundee Lunatic Asylum at £25 per annum, and that the appropriation of the whole sum to buy an annuity of between £50 and £60 for him was unwarrantable.

Kidd also made objections to various items of expense incurred by the petitioner; but the petitioner explained, that he did not mean at present to crave a judgment sanctioning these, as good charges in his curatorial accounts, being quite satisfied that they must in due time be sustained.

No. 89. as proper charges, when he rendered his curatorial accounts, in common form.

. 16, 1836.

layson v.
d.

In regard to the authority craved, the Court expressed the following opinions :—

LORD GILLIES.—I highly disapprove of the views which have been pressed on the Court by the respondent. He is a trustee for the creditors of the brother of the lunatic, and if that brother predeceases the lunatic, the trustee's interest in this question will never emerge. But even if it did not depend on mere contingency, what is his interest, in competition with the right of the lunatic, to have a suitable and adequate maintenance out of this fund, if the fund can be made to yield it? The fund is the property of the lunatic himself. But for his calamitous disease, he could have spent the whole of it without his brother's creditors having the smallest right of interference; and though his disease incapacitates him from all control over his property, he is himself under the protection of this Court, and surely his own property is to be applied, in the first place, to his own suitable maintenance. I cannot acknowledge the right or interest of any heir-presumptive, or his creditors, to deprive this unfortunate person of the use of any part of his own funds which may be necessary for his proper maintenance. When I see the very limited annuity which the whole free fund can purchase, I am against tying down the curator to a smaller sum. The highest annuity which can be had from an insurance office for £700 is under £54, and that I do not think too much; the money is the lunatic's own property. As for the argument, that the poor man may be boarded at seven or eight shillings a-week, I cannot refrain from expressing a strong disapprobation of it. These creditors talk of treating this poor man as a common labourer, and having him fed and lodged at the lowest possible rate, in order that his money may thereby be saved for their behoof. I must say I never heard a demand like this before. The lunatic was not in the condition of a common labourer, and this Court will not permit him to be reduced to that level, for the benefit of his brother's creditors, so long as he has property of his own which can be applied to his maintenance. I am decidedly of opinion, that we ought to grant the authority as it is craved.

LORD PRESIDENT.—If the funds afford more than enough to purchase an annuity sufficient to supply suitable and comfortable subsistence to the lunatic, then I think the curator should lay aside the surplus, and preserve it; but if it takes the whole fund to meet that object, I think the whole fund should be so applied. It would seem to be difficult for the Court to lay down any precise sum of annuity as the limit; it is rather a matter for the discretion of the curator; and, in order to enable him to exercise it, I am for granting the authority in the general terms in which it has been craved.

LORD MACKENZIE.—I observe it is stated, that some of the lunatic's friends may be willing to give a larger annuity than the insurance offices, and to find good security for payment of it. I can see no objection to this. I understand that the offices do not take into account the circumstance of lunacy at all, but merely the single circumstance of the age of the proposed annuitant. Now, this may be a hardship; and if the relations of the lunatic, taking all the circumstances into consideration, are willing to give a larger annuity, and to find undoubted

security, it would seem to be an unobjectionable proceeding. I concur with your Lordship in the propriety of granting the authority as craved, and I am against fixing any limitation, in all the circumstances, to the amount of annuity which is to be raised.

LORD BALGRAY concurred.

It was now intimated by the curator, that, as an annuity of £55 would suffice for all the wants of the fatuous person, and as the funds would probably purchase this, and leave a small surplus, he wished that the interlocutor of the Court should expressly sanction an annuity of that amount.

This was directed to be done, and the Court accordingly pronounced this interlocutor :—

“ Grant warrant to the curator bonis to purchase, upon sufficient security, out of the proceeds of the estate belonging to Alexander Finlayson, an annuity for him, during life, of £55 per annum, or as large an annuity, not exceeding the said sum, as the free proceeds will yield, and appoint the curator thereafter to report his proceedings, and the surplus which may remain ; and grant warrant to the Clerk of Court to deliver up the deposit receipt to the curator, in order that he may obtain payment thereof, and decern.”

J. BURNES, S.S.C.—C. BRUCE, W.S.—Agents.

ALEXANDER, EARL OF STIRLING, Suspender.—*Anderson.*

SMITH and CHAPMAN, Chargers.—*Robertson.*

Diligence—Peer.—A party claiming a Scotch peerage, having brought a suspension of a charge, to the effect of being found entitled to exemption from personal diligence, on the ground of his being a peer of Scotland, and having voted at two elections of representative peers to the British Parliament—the Court remitted to pass the bill, but on caution only.

ALEXANDER ALEXANDER, calling himself Earl of Stirling, having received a charge on a bill of exchange, at the instance of Smith and Chapman of London, indorsees and holders thereof, brought a suspension to the effect of being found entitled to plead exemption from personal diligence, on the ground of his being a peer of Scotland. He offered neither caution nor consignation.

The complainer alleged, that with a view to qualify himself to vote at the election of Scotch peers, he had taken the oaths before the Lord Chancellor, and been received and qualified, and got the usual certificate in 1830 ; that his vote was received by the clerks at the elections in September 1830, June 1831, and February 1835 ; and he pleaded,—By the Act of Union, the privileges possessed by the peers of England, with the exception of the privilege of sitting in the House of Lords, were transferred on the peers of Scotland, who, in consequence thereof, became

to. 90. entitled to a perpetual exemption from personal execution.¹ In England, a writ of summons to Parliament, addressed to a commoner, constitutes him a peer, provided he exercise his privilege in taking his seat in the House of Lords, in virtue of the writ; but the royal proclamation to attend at an election in Scotland being analogous to the English writ of summons, the right in a peer of Scotland of exercising the peerage privileges, is evidenced by voting at the election in obedience to proclamation; and the complainer's title to sue, as Earl of Stirling, has been sustained in the Court of Session,² and in English courts he has been found entitled to be discharged from arrest on the plea of peerage.³

The chargers answered—The complainer having voted at the Peers' election can be of no avail in support of his plea, as there are no means of determining claims to vote, except under recent regulations of the House of Lords, not applicable to his case, and no power to refuse an improper vote tendered, while the suspender's votes besides were protested against. The peerage of Earl of Stirling is extinct, and the mere assumption of the title can never confer on a party the personal privilege of exemption from arrest, otherwise there is nothing to prevent any man from claiming any extinct peerage he thinks fit, and tendering his vote at an election, by which means, according to the complainer, he becomes free from all risk of imprisonment. In the Scotch decision founded on, the complainer's instance was sustained to the effect of allowing the matter in the summons to be entered upon, but he was not acknowledged as Earl of Stirling, nor has he been so in the English courts.⁴

The Lord Ordinary reported the bill and answers.

LORD JUSTICE-CLERK.—I think the bill ought to be passed, but I see no grounds for dispensing with caution. As to the suspender having voted at the elections of Scotch Peers, all that could be done was done to show that the vote was bad, when a protest was entered against it. If there had been any court which had said that the protest there made was a bad protest, I should have given some weight to the fact of the voting. We know, however, that any person can go to Holyrood at an election and say I am a peer, and no one is entitled to reject his vote. We are bound to pass the bill of suspension on his allegation of peerage, if caution be found, but not otherwise. The question of his right may thus be tried incidentally, as in Sir James Sinclair's case, when the freeholders of Caithness objected to his enrolment on the ground of his being a peer.

The other Judges having concurred,

THE COURT remitted to pass the bill, but on caution or consignation only.

E. LOCKHART, W.S.—T. DARLING, S.S.C.—Agents.

¹ Stat. 1707, c. 7. Blackstone, I. c. 5.

² Earl of Stirling v. Officers of State, Feb. 9, 1831, (ante, IX., 413).

³ Digby v. Lord Stirling, Nov. 22, 1831 (8 Bingham, 55).

⁴ Digby v. Alexander, (8 Bing., 416); same parties, (9 ibid, 412); Earl of Stirling v. Clayton, (3 Tyr., 154).

ALEXANDER REID.—*D. F. Hope—Rutherford.*EBENEZER WATSON.—*M^cNeill—Neaves.*

Competing.

No. 90.

Jan. 16, 1834
Reid v. Watson

as—Right in Security—Retention.—1. Circumstances which held not sufficient that a letter of guarantee was granted on reliance of an offer of security more than three months before, and with reference to a different letter. 2. Question whether at common law the keeper of a warehouse over goods deposited for payment of an extrinsic debt.

claimant Reid was proprietor of certain bonded warehouses in which George Young, wine and spirit merchant, who had dealings and transactions with him, was in use to deposit wine and spirits. In June 1832, Young applied to Reid to become cautioner for cash-account with the Bank of Scotland to the extent of £250, letter, of date the 30th June, in making this proposal, he stated, "the amount is only £250, and if you can serve me, I shall give you a security, if you wish it, for even the half of that amount; besides, I have more than double that amount in value in your bonded warehouses, which you could put into any shape you choose, to cover your debt."

2d Division
Lord Jeffrey
R.

Young followed upon this proposal, and the contemplated cash-account was not entered into. On the 16th October, however, Reid applied to Sir Charles Price and Company, of London, the following guarantee, on behalf of Young:—"Gentlemen, In consequence of having agreed to accommodate Mr George Young, merchant in London, I hereby guarantee to you the regular payment of his promissory-note, granted at three years' date, for £250, provided he has not failed previous to the expiry of this time."

In January, 1834, Young's estates were sequestered; and it turned out that he was indebted to Sir C. Price and Company in several thousands, while his estate promised a very small dividend. At the time of the sequestration, a quantity of goods belonging to the bankrupt, and in his name, were deposited in Reid's warehouses. Over this Reid insisted that he had a right of lien for the amount of the debt which he had become guarantee to Sir C. Price and Company. This claim of lien was disputed by the trustee on the sequestered estate, and of consent of parties, the goods were sold, and out of the proceeds the sum of £250 was consigned in the Bank of Scotland, and the process of multiplepoinding was brought to try who had right

in the fund, the trustee, and Reid having respectively lodged claims. That the goods in question having belonged to the bankrupt at the time of the sequestration, the fund in medio was

No. 90. **vested in himself as trustee; that Reid, as warehouseman, or depositary of the goods in a certain character, and for a certain temporary purpose**
 an. 16, 1836. **had no lien over them at common law; that there was no agreement**
 Reid v. Watson. **whereby Reid should have a right of retention for the sum contained in the letter of guarantee, the proposal as to the cash-account and the relative offer of security not having been accepted; and that the two transactions, in June and October, were totally distinct, both in regard to their nature and objects, and the position and liabilities of the parties.**

Reid, on the other hand, contended that he had come under the obligation to Sir Charles Price and Company, on the faith of the goods being deposited in his warehouse, and relying on the offer of security contained in Young's letter of the 30th June, and was, therefore, entitled to be preferred to the fund in medio.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note* :—Finds it sufficiently instructed by the writings pro

* “ The Lord Ordinary thinks there can be no doubt as to the meaning and effect of the proposal in Young's letter of 30th June, 1832; and that Reid and Company would have been clearly entitled to the preference now claimed, if, in consequence of that letter, they had actually become cautioners for a cash account, to the extent there stated. The terms of the letter distinctly import that the security was to extend to any goods that might be brought into the warehouse during the currency of the obligation contemplated, as well as to those which might be there at its commencement; and the expression that Reid and Company ‘ might put them in any shape they chose, for their complete security,’ can never be held to have made the security itself conditional, and dependent on their taking some ulterior step as to the goods in question. A right of retention of this nature plainly requires no formal act or instrument for its completion, but is effectually constituted by a naked paction of the parties, in all cases at least where onerous obligations have been undertaken on the faith of it.

“ But the difficulty is, that the claimants did not in point of fact become cautioners in the precise form which was then suggested, or at the very time of the proposal. The project for obtaining a cash-credit with the Bank of Scotland, which was contemplated in the end of June, proved impracticable. But in October, credit was established with the London house of Sir C. Price and Company; and the claimants then became cautioners to that house for the identical sum of one hundred and fifty pounds, for which they had been requested to interpose the credit, on the securities there specified, by the original letter of 30th June. The question then is, whether, as there is no evidence of any new or intermediate proposal, this is not to be held as having been done in compliance with that first proposal, and on the faith of the securities then held out?

“ Considering the right of retention to be in itself an equitable and favourable right, and finding that in many cases it is allowed, without any express power whatever, and upon a mere presumption, that credit was not likely to have been given, except on the faith of it, the Lord Ordinary has little hesitation in deciding this question in the affirmative. The identity of the sum for which the claimants actually interposed their credit with that proposed in the letter proffering this security, and the fact (which was not denied at the debate) that Young had not, *interim*, obtained any other accommodation, but merely got at last, in one of

company, had finally granted the credit in terms of the first application. If one of a few months would not have affected the rights of the cautioners, it must appear how a mere substitution of one lender for another should make any difference. That was plainly a matter of perfect indifference to the cautioners; and if their rights would have remained the same, though Young had only taken his credit with the Royal Bank instead of the Bank of Scotland, it seems that his ultimate selection of Sir C. Price and Company should have no effect.

In attending to the words of the letter of 30th June, there is one view of their meaning, which leads, on a separate ground, to the same conclusion. As the Lord Ordinary reads these words, they seem to imply that it was Young's belief, that by the common law the claimants would be entitled to the retention in question, without express stipulation; and he accordingly appears rather to hold out this view of the law as their inducement to grant the required accommodation, than to engage only for some privilege which the law would not otherwise allow. Such a representation, it is apprehended, if held out as a motive for granting a credit, and acted upon accordingly, would clearly, in a matter of this description, have all the effect of an express paction; and whatever the real state of the law might be, would bind the party making it, as if he had guaranteed that the law was truly as he represented. In this respect, the condition of the parties would be the same as if there had been an express paction, proceeding on the known insufficiency of the common law to give the intended benefit. But if the form of the undertaking was truly a guarantee or assurance, that the claimants, as owners of the shares, had at all times legal right to retain for their security, the case would at once be relieved of any difficulty as to the supposed transference of this undertaking from one specific proposal or transaction to another. If the claimants trusted to his general assurance in July, they must equally have trusted to it in October. It is a permanent notice that, as between those parties, the law should be held to be as one of them had represented it; and unless this representation was retracted, it must be equally binding as to all the transactions between them to which it could

No. 90. pany, that if the said claimants should become bound for the said bankrupt to the extent of £250, they should be entitled to retain or appropriate to themselves so much of any goods belonging to the said bankrupt, in the bonded warehouses of the said claimants, as might completely cover and secure them for and on account of their said obligation; Finds, farther, that, on the faith of this covenant and agreement, said claimants did bind and oblige themselves for the bankrupt to extent of £250, by subscribing and transmitting to Sir Charles Price Company, of London, the letter of guarantee in process, bearing date 16th day of October, 1832: Finds, that it is not necessary, in these circumstances, to decide what would have been the rights of parties, if there had been no such covenant and agreement as above-mentioned; and in consequence of such covenant, the said claimants are preferable to trustee on the sequestrated estate of the said bankrupt, to the extent of the fund in medio: But before farther answer, appoints the cause to be enrolled, that parties may explain what precise decerniture may be necessary to give effect to those findings in the present state of the process and of the fund in medio."

Watson reclaimed.

LORD GLENLEE.—If there is no more evidence to be produced, I am satisfied with the interlocutor. The Lord Ordinary has attempted what is hardly possible, to decide this case on the special circumstances, without having recourse to the general grounds of law. We must consider what was the state of things under the sequestration, and what were the rights of the trustee. Now, the statute gives him the same rights as an arresting creditor; so that even if the cash-account had been entered into with the Bank of Scotland, I cannot agree with the Lord Ordinary in holding, that Reid's preference would have been good. I think a warehouse-keeper is somewhat in the situation of a manufacturer, or other party in the custody or possession of goods for a temporary purpose; and I recollect the case of Harper's Creditors against Faulds¹ in relation to a bleaching concern—where a right of retention was found not to be available with reference to debts unconnected with the subject of the lien. But if a warehouse-keeper of a bonded cellar is a mere custodier, has he a right of retention for debts intrinsic to his business? I incline to think not, and therefore hesitate to agree with the Lord Ordinary, that this letter would, per se, have established a preference in favour of Reid, if the transaction as to the cash-credit had been gone into. As matters stand, this was a nudus contractus, and nothing was done in regard to constituting a lien; Reid might have been entitled to retain the goods against Young, and he, therefore, entitled to retain them against a party in the situation of an arresting creditor? It is a different question, whether, supposing we were to consider the right under Young's letter good, it would still hold, on a change of place in the transaction which it contemplated; and it is by no means certain that the obligation undertaken for one event ought to be transferred to another, and, therefore, for altering.

¹ Jan. 27, 1791, F.C., and Bell's Cases, 440, 475.

LORD MEADOWBANK.—My opinion has been expressed by Lord Glenlee, with whom I concur.

LORD MEDWYN.—I cannot discover any thing to connect the two transactions in June and October. Nothing appears to have been done implying that Reid addressed the letter of guarantee to Sir C. Price and Company, relying on the security contemplated in the previous letter of Young. I must, therefore, differ from the Lord Ordinary; but I say nothing as to the question of the right of lien.

LORD JUSTICE-CLERK.—I shall not mix up the question as to the abstract point of law with the other question. I am for altering the interlocutor, in respect it is not made out that there was here a special covenant or agreement that the letter of guarantee was to be granted on the same security as was proposed for the first transaction in June.

THE COURT accordingly altered the interlocutor, and remitted the cause to the Lord Ordinary, reserving the question of expenses.

JOHN MURDOCH, S.S.C.—**HORN** and **ROSE, W.S.**—Agents.

JOHN THOMSON, Suspender.—*Neaves.*

ANDREW BOUSIE, Charger.—*Cowan.*

Arrestment, Loosing of—Cautiomer—Admiralty.—Arrestments having been used on the dependence of an Admiralty summons before the Court of Session, a bill for letters of loosing was presented, with a bond of caution, in common form: the bill was passed, but the letters were never expedited, the pursuer of the action depending with this being done—Held that the cautioner was nevertheless bound.

THE charger, Bousie, part-owner of a vessel called the Skeen, in January 1832 brought an action against Laurence Skeen, another part-owner, and also the ship's-husband, concluding for count and reckoning, and to his intromissions in that character. The summons was raised in the Court of Session, as substituted in place of the High Court of Admiralty by the 1 William IV. c. 69; and, in accordance with the provisions of that statute, it was in the ordinary form of an Admiralty summons, containing a warrant to arrest, and it did not pass the signet. At the time when the action was raised, the vessel was lying in Port-Glasgow, under charter-party, for a voyage to the West Indies, nearly ready to sail; and on the dependence, Bousie had her arrested, conformably to the warrant in the summons, "aye and until sufficient security be found acted in the books of our said Lords of Council and Session, that the same shall be made forthcoming to him, as accords of law."

Upon Skeen presented a bill "for letters of loosing of arrestment in the premises at my instance, upon caution, in common form."

The bill was accompanied by a bond of caution by the suspender,

No. 91. Thomson, in these terms:—"I John Thomson, clerk of the police establishment of Edinburgh, do hereby judicially enact, bind, and oblige myself, my heirs, executors, and successors whomsoever, as cautioner and surety, acted in the books of Council and Session, that the brig or vessel called the Skeen of Leith, with her float-boat, sails, apparel, and appurtenances whatever, whereof Lawrence Skeen, ship-owner in Leith, is owner or part-owner, as they presently lie arrested at Port-Glasgow, at the instance of Andrew Bousie, writer, St Andrews, shall be made forthcoming to the said Andrew Bousie, as accords of law: And I consent to the registration hereof in the books of Council and Session, or others competent, that letters of horning, on six days' charge, and all other necessary execution, may pass on a decret to be interponed hereto."

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The Lord Ordinary having passed the bill on caution, Bousie at first objected, before the clerk, to the sufficiency of Thomson, as cautioner; but on an attestation by a Justice of the Peace, he withdrew his objection. The Clerk of the Bills accordingly, thereupon issued the bill with this marking: "Fiat ut petitur, as to said vessel and appurtenances, provided said arrestments be not laid on by virtue of a decree, and because John Thomson, clerk of the police establishment of Edinburgh, has become cautioner for the complainer."

Thereafter, a meeting took place between the agents of Bousie and Skeen, on which occasion, as was admitted by Bousie, he agreed to waive the expeding of the letters of loosing arrestments, and to hold them as loosed, and allowed the vessel to proceed on her voyage; but it was not alleged by Bousie, that any intimation was made to Thomson of the expeding of letters of loosing having been dispensed with. The letters of loosing were never expedite, but Bousie having obtained decree against Skeen for the sum of £200 (being the alternative conclusion, failing his holding count and reckoning), recorded the bond of caution, and gave Thomson a charge thereon. Of this charge, Thomson brought a suspension, on the ground, inter alia, that having bound himself judicially, and in the event only of the arrestment being loosed, the obligation could not be enforced, unless these were "judicially" loosed, and he could not be liable in the event of a private agreement to liberate the vessel. That without the letters being expedite, there could be no judicial loosing, the passing of the bill was merely a warrant to issue the letters, but could be of no efficacy in itself towards removing the nexus laid on the arrestment; and that Bousie having virtually discharged the arrestments, by extrajudicial agreement, and without intimation to him, could not insist against him, under his bond.

To this it was answered, that the arrestment was, by the terms both of the warrant and the execution, to subsist "ay and until sufficient caution be found;" that caution was found by the suspender's bond, judicially lodged and certified to be sufficient by the passing of the bill, and the clerk's certificate; and that the expeding of the letters was only necessary

interest of the common debtor himself, but that the cautioner had no title to require that this should have been done, or to the waiver of it, which in this case was in no respect of the nature of a discharge of the arrestment.

Lord Ordinary pronounced this interlocutor, adding the subjoined:—"Having resumed consideration of the debate, with the

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a suspender was a judicial cautioner in a loosing of an arrestment laid in dependency; and the charger proposes to deal with the bond so granted as if it had been an ordinary, independent, and extrajudicial obligation, to be enforced according to its letter. He founds upon the fact, that the vessel was only 'aye and until caution is found,' and contends, that, as soon as caution was found, the arrestment was virtually at an end; and that the execution of the expedite letters being merely an official intimation of that fact, was a matter with which the cautioner had nothing to do, and might, therefore, be entirely dispensed with by the principal parties, without discharging his liability.

But this, however, the Lord Ordinary apprehends there is a radical mistake. The Lord Ordinary, in express terms, 'judicially enacts and binds himself, in the books of Council and Session,' in reference to a bill of loosing arrestment, that the vessel shall be forthcoming, 'as accords of law;' and his bond being granted, and lodged along with it, is but one step of a public judicial proceeding, upon the regular completion of which its validity is accordingly determined.

If it were an absolute, independent, private obligation, there would be no need of a bill of loosing, or any judicial procedure at all. But if the arrester is satisfied with the security offered, the arrestment would be privately discharged, and the cautioner would be liable, as at common law. But a judicial arrestment of this kind is quite in a different situation. There, it is not the arrester, but the court of the bills, who must be satisfied that the caution is sufficient; and, undoubtedly, if the bill to which it is incident is refused, there is an end of the cautioner's obligation, whether the vessel is allowed to sail by private consent, or remains under detention. It is quite in vain, therefore, to refer to the terms of the arrestment. Though the words are, 'aye and until sufficient caution be found in the books of Council and Session, that the vessel shall be forthcoming as accords of law,' the meaning plainly is, till the arrestment is regularly loosed upon caution; and, as it cannot be regularly loosed except upon execution of the arrestment must subsist till these are executed, and, consequently, the caution cannot come sooner into operation. The charger cannot have, at one and the same time, both the security of his subsisting arrestment, and of the caution given for the loosing; and, consequently, till the arrestment is judicially loosed, the cautioner cannot begin to be bound. The case is the same in all other instances of caution. They only become operative when the matter comes to judicial determination. If a charger, for instance, settles matters by a compromise or judgment, after a suspension is passed upon caution, the cautioner is discharged—free—and the case is the same here. It is admitted that the suspender cannot be liable, if the vessel had been allowed to sail without presentment of a bill of loosing, but merely on getting the arrester's consent, upon showing that sufficient caution was found without any concurrence on the part of the granter. A dispensation with a bill of loosing would be quite as effectual as a bill of loosing, if the consent which was actually given in this case to dispense

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closed record, and whole process, in respect that the arrestment regularly or judicially loosed upon expedite letters, and that no obtained from the suspender to extend his cautionary obligation of the arrestment being discharged by private agreement between principal parties—Suspend the letters and charge simpliciter, and find expenses due; allow an account thereof to be given and remit the same, when lodged, to the auditor for taxation, port.”

Bousie having reclaimed, the Court ordered minutes of debate. In these, Bousie founded chiefly on the peculiarity of this Admiralty proceeding, which, though now transferred, under 1 William IV., to the Court of Session, was regulated by the practice of the Admiralty Court. According to these, the arrest is contained in the summons, which does not pass the so the arrestment, not being imposed under warrant passing does not require the authority of letters under the signet to but may be loosed as formerly in the Admiralty Court simple certificate of the clerk that caution has been found. This, as having been obtained here, the arrestment was properly and loosed, without expediting the letters; and, consequently, the founded on this not having been done, ought, he contended, be repelled.

Thomson, on the other hand, pleaded, that the bond, being given by him with reference to a bill, which prayed for letters of caution, could only be bound in the event of letters being expedite, and arrestment so loosed.

The Court ordered the minutes to be laid before the other judges for their opinions.

The following were returned :—

with the expedite letters. An extrajudicial consent was equally necessary if the judicial proceeding was not completed; for, notwithstanding the the arrester might have refused to liberate the vessel till the expedite was intimated. But such an extrajudicial agreement can only affect those parties to it; and, as the judicial cautioner had nothing to do with this, so he cannot be charged in consequence of it, upon a bond which forms part of a judicial proceeding, and was truly conditioned on its completion.

“As to the statement, that the cautioner has no interest to take the vessel, since the charger might expedite the letters at his pleasure, when he could not get a defence, it is answer enough, that a cautioner, charged on a gratuitous bond, has always interest enough to found upon any irregularity. But the cautioner might here have had a much more direct interest; since arrestments, regularly loosed, are still preferable in competition, according to their practice, the cautioner paying on his bond is entitled to an assignment of the diligence when discharged by a private agreement, the diligence falls altogether and longer be assigned to any one.”

LORDS PRESIDENT, BALGRAY, GILLIES, MACKENZIE, COREHOUSE, FULLERON, MONCREIFF, and COCKBURN.—This question relates to an arrestment used in the dependence of an action in the Admiralty Court at the instance of Bousie, the charger in this process, against Skeen. Its object was to attach a vessel, of which the defender was part-owner and ship's-husband, and which was then lying at Greenock, about to proceed on a voyage to the West Indies. The will of the summons, agreeably to the forms of that Court, contained an express warrant for the diligence authorizing all ship's goods, &c. to be arrested, "aye and until sufficient caution be found acted in the books of our said Lords of Council and Session, that the same shall be made furthcoming to him, as accords of the law ;" and these words are repeated in the execution. Skeen presented a bill for loosing this arrestment, setting forth that he was willing to find caution that the vessel should be made furthcoming to the charger, and the bill was passed on caution being so found. Thomson, the suspender, became cautioner, and by his bond, which is absolute in terms, he judicially enacted himself to make the vessel furthcoming. Having obtained this security, Bousie the charger's interest in the matter ceased. It was not his duty to expedite letters of loosing on the passed bill, nor could he have been heard in the Bill-Chamber, or anywhere else, either objecting to these letters passing the signet, or praying that they should pass. They must have passed, of course, on the demand of Skeen, the arrestee, without reference either to Bousie, the arrester, or to his own cautioner, Thomson. They would have been necessary if the vessel had been arrested in the hands of a third party, not the defender in the original action, and not cognizant of the proceedings in the Bill-Chamber, and who, on that account, might have required the production, or intimation of such letters, before he was in safety to allow the vessel to depart. But, as Skeen was not only the defender, who had found caution, but the arrestee, in whose hands the vessel was, it was unnecessary, and perhaps would have been absurd, that he should have expedite letters of loosing for no purpose, except to intimate them to himself. The suspender says that he was entitled to rely that the vessel could not proceed on her voyage till the letters were expedite ; but it is thought there is no foundation for that plea. He was himself a party to the proceedings in the Bill-Chamber, and knew that in consequence of his own bond he had a warrant put into his hand, by which he might have expedite the letters at any time without farther communication with him, the cautioner ; and in point of form, it is in no case necessary that expedite letters should be intimated to the cautioner, on the faith of whose bond the bill was passed. It is a postulate equally inadmissible, that, until the arrestment is loosed, the cautionary obligation cannot take effect. The cautioner's obligation takes effect from the moment the bond is received ; and the letters are expedite, not for his benefit, or even of the arrester, but for the safety of the arrestee. As soon as the bond is received, the arrester is entitled to require the cautioner to make the vessel furthcoming, in whose hands soever it may then be.

When a bill of suspension and liberation is passed on caution, the Lord Ordinary's interlocutor passing the bill is not a warrant for the magistrates of the place where the debtor is incarcerated to set him at liberty. In the general case they are not entitled to do so until letters of liberation are signeted, and either given upon them, or regular intimation made. But that form is dispensed with if the incarcerating creditor consents to the liberation, which he may

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do, without any communication with the cautioner ; and in practice not this consent frequently given, but it is thought a harsh proceeding to re It never was supposed in that case that the liberation of the debtor bel letters were expedite released the cautioner, or that his obligation did not co until they were expedite. It appears to us that this is not only a similar, a fortiori case.

LORD JEFFREY.—I have considerable difficulty in concurring in the op the other consulted Judges ; though I can no longer look with any confic the views on which my interlocutor proceeded. The difficulty of the case —If the mere words of the arrestment, or the bond of caution, are loo the cautioner's obligation should be complete from the moment the b signed and delivered ; and might consequently be enforced, though the s been allowed to sail the hour after, and without any bill of loosing being Nay, in this view, it might even be enforced, although the cautioner h rejected by the clerk of the bills as insufficient, and the bill ultimately upon lodging another bond by a different person. If that last person had bankrupt, and the first bond had come into the hands of the arrester, it easy to see why it might not be enforced against the granter, if its own te plain tenor only could be looked at, without reference to the judicial pr with a view to which it was granted. But it is supposed that this will not tended : and in the foregoing opinion it seems accordingly to be assumed t cautioner's obligation only begins from the passing of the bill. But it i difficult to see how, if this was necessary, the expediting of the letters shoul necessary also. There is no reference to the passing of the bill, more th an expediting of the letters, in the arrestment, or in the bond. Yet the forme to be held necessary to make the cautioner's obligation operative, because h himself only judicially, and with reference to a technical course of pr The passing of the bill, however, is but the first step of that procedure. not itself loose the arrestment ; but is merely a warrant for the letters, b alone it can be judicially loosed. If the judicial bond of caution, theref not be effectual, if the arrestment is discharged altogether extrajudicially is, without passing a bill, the natural conclusion seems to be that it ca effectual unless it be judicially loosed ; that is, by expediting letters of loosi not merely suing out a warrant for such letters. The opinion of the oth sulted Judges seems to adopt the principle on which my judgment proceed only to follow it half way to the conclusion.

In matters of form it is dangerous to reason from equity, or the reason thing : But the equity which entitles a cautioner to the most rigorous cons of his engagement is now a settled part of the law ; and I have suggested close of my note that he may have a substantial interest to require what seems here to entitle him to.

On these grounds I should certainly incline, though with great diffid adhere to the interlocutor : I am most moved to doubt it, by what is state minute for the charger, as to the settled practice in the Admiralty Court its jurisdiction was merged in the Court of Session, and the provision statute by which the benefits of that practice are held to be still prese suitors in proper maritime causes. My impression is, that this ground o ing was not touched upon at the debate before me ; and I am so much in

it now, that I can scarcely be held to dissent from the practical conclusion of the consulted Judges.

the cause was now put out for advising.

LORD MEDWYN.—In the Admiralty Court, the form of arrestment on a dependant was the same as in the inferior courts, where it proceeds on the precept of the court contained in the summons. It is different in this Court, where letters of arrestment are obtained by bill, and the arrestment is thus imposed under authority of the signet; and as it can only be removed by the same authority which imposed it, letters of loosing must be obtained by presenting a bill for that purpose, and the letters must, of course, in such case, be expedite, as otherwise there is no warrant for loosing. Summonses in Admiralty causes, though now proceed before this Court, are not signed by a writer to the signet, but by the clerk of the court, and the arrestment takes place upon the summons. There should be no difficulty, therefore, in loosing such arrestments in the same way as in the inferior courts, by mere authority of the judge, on caution being found, and without the necessity of applying for letters of loosing. The difficulty in the present case has arisen from this distinction between arrestments under a summons not passing the signet, and arrestments proceeding on letters under the signet, not having been attended to, and from the party having unnecessarily applied by bill for letters of loosing. Had this been attended to, the difficulty would have been avoided; but, as it is, I am for repelling the objection founded on the letters not having been expedite.

LORD JUSTICE-CLERK.—I was formerly of opinion that the Lord Ordinary's decision was right, and I retain that opinion.

LORD MEADOWBANK.—That was also my opinion.

THE COURT, in respect of the opinions of the consulted Judges, repelled the objection founded on the circumstance of the letters of loosing not having been expedite, and remitted to the Lord Ordinary to proceed, finding the charger entitled to the expense of discussing this point.

J. WOTHERSPOON, W.S.—D. M. ANDERSON.—Agents.

DAVID WEMYSS and RICHARD COWAN, Pursuers.—Keay—Pyper.
ISABELLA THOMSON and HUSBAND, and HENRY DUNCAN, Defenders.
D. F. Hope—Rutherford—G. G. Bell—Coventry.

Feudal and Vassal.—Circumstances in which held, that the superior in a build-
 ing was entitled to insist upon the vassals in the subdivided portions of the feu
 charters containing an obligation for payment of the whole cumulo feu-duty,
 and to have relief in the entry of heirs, but that the vassals were entitled to have
 from the charters an obligation by the superior to grant an assignation to the
 vassals enabling them to recover from the co-feuars whatever sums should be
 due from them beyond their own proportion of the cumulo feu-duty and

No. 92.**1. 19, 1836.****James v.
Thomson.****1. Division.****1. Medwyn****1. Jeffrey.****T.**

In 1785, Sarah M'Gill and Andrew Cowan feued out to one Archibald, a portion of the ground on which St Patrick Square now stands. By the feu-contract, Archibald became bound to pay a yearly feu-duty of £19, 11s. 3d., and the double of that sum for the first year of the entry of each heir to the feu. Archibald and his heirs were prohibited from sub-feuing, selling, or disposing of "all or any part of the said area, or of the buildings to be erected thereon, to be holden of himself, or of his or their heirs, or of any other interjected superior, but allenary to be holden of and under the said Miss Sarah M'Gill."

The feu-contract contained the following obligation on the granters:—"That in all contracts of feu in St Patrick Square to be granted by them, they shall take the vassals bound in the like conditions and prestations with those contained in this present contract, in so far as the said William Archibald, or his foresaids, may have an interest therein."

The contract also contained a precept for delivery of seisin to Archibald, "with and under the several obligations, conditions, provisions, penalties and irritances before-expressed, and which are to be verbatim repeated, not only in the said infeftment, but in all renovations of this feu, and that by delivery."

Following up the intention expressed in the feu-contract, Archibald erected buildings on the ground thus feued, and divided them into dwelling-houses and flats, which have been since severally conveyed to different proprietors. One of these, consisting of a second storey and cellars, came, by successive conveyances, into the hands of the defender, Mrs Thomson. A disposition, granted by the disponee of the original feuar, declared "that the house should be held of the original superiors, for payment of £1, 6s. yearly, being a proportion of the cumulo feu-duty, payable for the whole original area, and doubling the said diminished feu-duty of £1, 6s., on the entry of each heir to the said flat."

After the death of Archibald, none of the disponees of this house had entered with the superior; but the pursuers, Messrs Wemyss and Cowan, who had succeeded to the superiority, received annual payments from Mrs Thomson and her predecessors of £1, 6s., as the feu-duty effeiring to her portion of the subject.

In 1786, Sarah M'Gill and Cowan feued out a portion of the same lands to one Philp, who bound himself, his heirs and successors, to pay a yearly feu-duty of £15, 3s. 9d., and a duplicand thereof for the first year of the entry of each heir to the feu. The contract contained a provision against sub-feuing, and other clauses similar to those above-mentioned. On this feu, likewise, tenements were erected and divided into dwelling-houses, one of which, consisting of a ground and shop storey and certain cellars, was disposed by Philp to the father of the defender, Duncan, the present proprietor. After the death of Philp, this subject continued in non-entry. The feu-duty paid by Duncan to the superior

was 14s. ; and for this, as for the whole sum payable by him, the superior, each year, granted receipts. The entry of singular successors was not taxed either in Archibald's or Philp's feu.

In several instances, the superiors granted charters and precepts of clare constat to the different vassals, in the subdivided portions of these feus, for payment of a certain sum, as a part of the feu-duty payable for the whole feu, and proportioned to the size of the house, with a duplicand of this sum on the entry of heirs. One or two of these charters were granted simply for payment of this restricted feu-duty. The greater part of them contained a reservation of the superior's right to demand from the vassal the duties payable for the whole feu, without a corresponding provision for the vassal's relief against co-vassals. In the charter to one Clark, however, was the following clause, saving the rights both of superior and vassal :—" But declaring, nevertheless, that it shall be in the power of us, the said superiors, and our successors, in case we or they think proper, to exact and levy from the respective subjects above described the said whole feu-duty and composition, contained in and due by the feu-contract above-mentioned, in the same manner, and as freely in all respects, as if the property therein contained had not been divided, or these presents granted ; we and our successors, as superiors foresaid, being always obliged before, or at the terms of levying the whole feu-duty and composition, or any part thereof, other than upon the two respective proportions before mentioned, falling on the two respective subjects, to assign to our said lovite, and his heirs and assignees, at their own expense, the shares of the feu-duty and composition, so to be levied from them as may then be resting by the other proprietors, that they may be thereby enabled to operate their own relief."

In 1824, Mrs Thomson having applied to the superiors for a charter, they prepared a draft charter, which took her bound for payment of the whole original cumulo feu-duty, and also for the double thereof for the first year of the entry of heirs, reserving generally her right to seek relief against the co-vassals for the sums of feu-duty and composition referring to their portions of the feu.

Duncan having likewise applied for an entry, a draft charter was prepared, subjecting him substantially to the same liabilities.

These parties refused to receive their charters in those terms ; and, after some correspondence, Messrs Wemyss and Cowan, the superiors, brought a declarator of non-entry against Mrs Thomson and her husband and Duncan, as disponees respectively of the two dwelling-houses above mentioned.

Mrs Thomson and Duncan, while willing to enter, contended that the charter tendered by the superiors was unwarranted, in so far as it took them bound for payment of the whole cumulo feu-duty ; or, at least, that the superiors could not demand from them the original feu-duty, in so far

No. 92. as, by charters to other vassals, they had restricted their own claim, and thus, in effect, excluded the defenders' relief. Secondly, that, at all events, the superiors were not entitled to insert in the charter an obligation to pay a duplicando of the cumulo feu-duty on the entry of an heir; such claim being contrary to the import of the titles, and recourse against the other vassals being likewise cut off by the terms of the other charters granted by the superiors.

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The Lord Ordinary (Medwyn) ordered cases on the question as to the terms of the proposed charters, and issued the note subjoined.*

For the superiors it was pleaded—

1. The superior is entitled, on the principles of the feudal law, to have the whole of the feu-duty for which he has stipulated, secured over every part of the subject feued; the reddendo in a feu-charter being a reserved right to the superior in the subject itself, which, by virtue of his original and still dominant proprietorship, he may render effectual, as a debitum fundi, out of all and every part of the subject. In the case of an heritable creditor, who takes a bond over a property which is subsequently sold by the proprietor in different portions, it is clear that the seller could not allocate the debt proportionally upon the parts severally sold, to the effect of liberating any part of the estate from its liability to the creditor

* “The Lord Ordinary has bestowed a great deal of consideration on this case, without being able to form an opinion which is at all satisfactory to himself. In the vigour of the feudal law, and in the case of a rural subject, he could have little doubt that where the subject was divided among various feuare, without the act of the superior, he would not have been bound to divide the feu-duty, or duplicand, as contended for by the vassal in this case, but that he might levy the whole feu-duty by poinding any part of the ground, leaving the vassal to obtain proportional relief from the other vassals. At the same time, considering our relaxed notions on the nature of feudal casualties, and on the relative character of superior and vassal, and considering farther the nature of the subject here, a building feu, where, it may be presumed, it was contemplated on both sides that, when built upon, portions of the building would be sold to different proprietors, and where the feu-duty bears so large a proportion to the value of the subject conveyed, making the burden of the whole feu-duty a very heavy burden upon each individual portion of the subject, while the superior's means of recovery are pretty ample, it may well be doubted whether the pleas of the vassal do not find sufficient support to defend against the superior's claim.

“The parties may look into two cases which have some analogy with the present. No doubt it was in the case of Lordships of Erection, Viscount Stormonth, Jan. 1682 (Brown's Supplement, vol. ii., p. 13); Creditors of Eyemouth, Feb. 8, 1757 (Supplement, vol. v., p. 856).

“Even if the Lord Ordinary had decided the cause himself, the Court would probably have ordered cases, as there is not any recent precedent (if any) for the decision of it; so that, though there has been some delay, from the difficulty he has had in forming any opinion, the additional expense of cases would probably have been incurred at any rate.”

its operation. For, supposing each of the vassals in the subdivided s to obtain an entry, each of these portions may be again subdivided libitum.

According to the terms of the original charters, the superiors cannot be required to enter heirs of their vassals in any part of the feu, except payment of the double of the whole feu-duty, as stipulated by the charter.

The estimate which may have been put by the original vassals and assignees on the annual value and other casualties appertaining to the subdivided portions of the feu, cannot affect the rights or interests of the superiors.

The charters and precepts of clare constat granted by the superiors to co-vassals of the defenders, import no departure, on the part of the defenders, from any of their legal rights in reference to the feu subjects, or to the defenders personally. But, while the superiors have this protection on the one hand, the vassals are put in safety on the other ; for, independently of stipulations, a right arises to a party from whom the superior may have received a payment beyond the proportion appertaining to him, in the form of an equitable claim of relief against his co-vassals, in the extent of the feu-duty or composition appertaining to the portion of feu held by each ; the vassals, in regard to each other, being liable pro rata. And stipulations made by the superior, with a view to the preservation of his own rights, against any of the vassals, cannot completely affect that right of relief.

The payments of feu-duties made by the defenders and other vassals

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now be allowed to insist upon any of his supposed feudal rights in regard to framing of the writings under which the investiture is to be renewed, or otherwise, where his demand is to injure the rights or the property of his vassals, unless he could qualify a clear and legitimate interest for insisting on his original right, or plenum jus. But the superiors here are insisting on the proposed clauses without any fair interest, for, although no such clauses be inserted in the charters, the recovery of their casualties is secure. On the other hand, the superiors admit that they are bound to give an entry to the defenders, and they cannot dispute that they are bound to give that entry by a charter which will be not only effectual to the defenders as vassals, but which will secure them in all their legal rights; the superiors, nevertheless, propose to make the defenders liable perpetually for the whole cumulo feu-duty, and, what is still more unwarrantable, for the duplicand of the feu-duty on the entry of heirs.

2. The superiors are moreover excluded, by the special circumstances of the case, from insisting on the defenders being made liable in the manner proposed. Besides, the act of the superiors in granting one or more charters, taking the vassal, or vassals, bound in payment only of a portion of the feu-duty, is of itself sufficient to bar the superiors from insisting on their supposed right against the other feuars, as it is not only a recognition of the general power in the original feuar to divide the cumulo feu-duty, so as to bind the superiors, but it has the effect of cutting off the defenders' alleged right of relief.

Lord Jeffrey, before whom the Cases had come to be advised, reported the cause, and issued the subjoined note.*

* "The cases having been ordered by the former Lord Ordinary, with a view to a decision by the Court, the present Lord Ordinary has thought it right to report without a judgment; and certainly if there is not enough in the specialties to warrant a decision, the question is fitter for the consideration of the Court than of an individual judge. To the present Lord Ordinary the specialties appear very important, and even upon the larger view of the argument, he has a strong impression that the permission to subdivide the subject, or, in other words, to create out of it a number of smaller and separate feus, to be held of the original superior, is in a great measure exclusive of, and inconsistent with, the right to make each of these separate feuars liable for the undivided prestations of the original contract; and rather implies, that there was to be a separate and independent right in each such feuar, with a separate and definite liability, the practical extent of which was not to vary with the performance or failure of others. The natural and proper way of arranging this, would have been by such a provision in the original feu as occurs in those on the estate of Blythwood.¹ But as this has not been done, the Lord Ordinary inclines to think, that the terms of the charters may be fixed by the Court *secundum æquum et bonum*, with a view to the two objects of securing not less

¹ *Harley v. Campbell*, 1 W. & S. 690.

LORD GLENLEE.—I agree with Lord Jeffrey, that it would have been much better to define the terms of the feu-rights, which, however, has not been done. The right of the superiors is as fair an object to receive protection from the law as that of the vassals. Looking to the rights of both, I think the charter granted to Clark is not to complain of as a model to be followed. It lays on the vassal a proportion of the feu-duty only, with a reservation of the right to come on that vassal, if the other feuars fail; but this is accompanied with an obligation on the superior to grant an assignment of the claim for relief. Here the vassal chiefly complains of the whole reddendo being made due for a part only of the subject. Now, it is not enough for the superior to say that he does not intend to ask the whole; but still this is a different thing from merely having the security. The superior has not only a right to poind, but a direct personal action against the vassal for the reddendo; and I have no idea that the right of the superiors to recover the whole feu-duty from any one vassal is impaired by what has passed since the

then his original rights to the superior, and apportioning to each vassal his just share of the original burden. If there be room for this view as to the annual feu-duty, it applies with double force to the composition on the entry of heirs, and the form of the present action, which is a declarator of non-entry. It is quite plain there is no room for such a declarator as to the subject of the original feu. The fee is confessedly full as to the greater part of the subjects—or rather is full in each of the parts of that subject—which have since been erected into separate feus. The defenders are entitled, and are required, to enter only to that part of the original subject which has been separately disposed to them. If they refuse to enter, and no composition is agreed upon, the superior might take the rents, but of that portion only. The composition is what may be agreed to be taken in place of the rents; but it is not easy to see upon what principle a composition, or equivalent for the rents of the whole subject, should be held the only proper equivalent for the rents of a small part of it. If there be no feudal principle which requires this, the claim seems to derive little aid from the cases of obligation at common law which have been referred to. The several feuars are not bound *singuli in solidum*. In fact, they have no connexion with each other, either feudal or conventional; but each holds (or is to hold) a separate and independent right. That of the defender is still but inchoate; but the superior is bound to complete it; and the only question is, on what conditions he is entitled to insist. To assume that he is entitled to bind the whole co-vassals *singuli in solidum*, is plainly to assume the whole matter in debate. The case of separate purchasers of parts of a property, over the whole of which a catholic creditor had a previous security, is equally inapplicable. The creditor in such a case stands in no terms of relation to the purchasers, he is not bound to know of their existence, and they have no claim upon him. But in this case the superior has stipulated, that feuars of parts of the subject first disposed, shall all hold of him; and he is therefore confessedly bound to receive them as separate vassals. In point of fact, he is now suing them for an entry.

“It is plain that the terms of the charters prepared by the superior, do not in any degree provide or secure to the vassals, what in his case he admits they are entitled to. To effect this, they should have declared that they should each be liable primarily for no more than the feu-duty, or duplicand specified in their dispositions respectively, and subsidiary for what was due and unpaid of such sums by their co-vassals, upon being assigned into the superior's right of recovery. But it is far from being clear that they are liable even in this subsidiary obligation.”

No. 92. original feu-contracts. The possessions in question are portions of an entire subject not separated by any act of the superior ; and I see no solid difference between buildings such as this, and lands. The Crown has the right to come against any one having part of the tenement, who is entitled to recover from the co-vassals ; and a subject superior must have the same right.

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LORD MEADOWBANK.—On the general question, I concur with Lord Glenlee. I should have been glad if my view of the specialties had allowed me to coincide with the opinion intimated by Lord Jeffrey.

LORD MEDWYN.—I felt this a difficult case, but many of my difficulties have been removed by the paper for the superior. I agree that the right of the superior is as much entitled to be protected as the right of the vassal, and perhaps that is more necessary in urban tenements than in rural. A superior cannot be compelled to divide a feu. The Crown is the most lenient of all superiors ; and parties are not entitled to the same indulgence from ordinary superiors. Looking to the character of these feus, it was clearly intended from the first that the buildings should be divided into houses and flats. Though subinfeudation was prohibited, subdivision was not, and must have been foreseen. I think the charter to Clark a good model, on which an equitable adjustment may be made of the rights of superior and vassal.

LORD JUSTICE-CLERK.—Looking to the peculiar nature of this case, I could not consider the superiors justified in making their claim to its full extent. It is material to observe, that, when the original parties feued this ground, it was obviously not intended to be an entire tenement. Now, when there was no right to subfeu contained in the original charters, the superior's right to demand his feu-duty and casualties extends over the whole feu ; but as he can have right to nothing beyond these, he is bound, being aware of the original intention to subdivide, and of its having been carried into effect, to have the charters so framed, as to ensure the other parties being fully protected in their rights. While we look to the interest of the superiors on the one hand, we must not disregard the interests of the vassals, for whose protection some such clauses as those proposed by Lord Glenlee ought to be inserted in the charters.

THE COURT pronounced the following interlocutor :—“ Find that the pursuers, as superiors, are entitled to insist upon the defenders taking charters containing an obligation for payment of the whole cumulo feu-duty, and of the relief on the entry of heirs, but that the defenders, as vassals, are entitled to have inserted in said charters an obligation by the superiors to grant to them, whenever required, at the defenders' expense, an assignation, to the effect of enabling the defenders to recover from the co-feuars whatever sum or sums may at any time be exacted from them beyond their own just proportion of the said cumulo feu-duty and relief ; and also a declaration, that the demand for such relief shall not exceed the proportion thereof corresponding to the portions of the whole feu in non-entry at the time : Remit to the Lord Ordinary to carry these findings into effect ; and find neither party entitled to the expenses hitherto incurred in this process.”

RICHARD COWAN, W.S.—DAVID MITCHELL, S.S.C.—ROBERT WILSON.—Agents.

ANN and MANDATARY, Pursuers.—*Lord Advocate Murray—
Sandford.*

WILLIAM HENRY DON and his TUTOR, Defenders.—*Keay—
Maitland.*

No. 92.

Jan. 20, 1836
Lippmann v.
Don.

-Bill of Exchange—Res Judicata.—In 1809, the late Sir Alexander Don, who was in France during the war, accepted two drafts, or bills of exchange, drawn by Fagan, a French merchant, in favour of Lippmann, domiciled in France. The drafts were addressed to Sir Alexander, at the Hotel Richelieu in Paris, and were payable at that place of payment. In 1810, before they fell due, Sir Alexander died in Britain, the country of his domicile, where he remained until his death. He left no effects in France. After the drafts fell due, and about four years after Sir Alexander had returned home, Lippmann adopted proceedings in the French courts against both Fagan and Sir Alexander, which were sufficient, by law, to interrupt prescription as to both parties, and to result in a decree of the French courts prescribing for thirty years, and against which there was no mode of defence, except by certain proceedings in the French courts. Lippmann, in consequence, brought an action in Scotland, for the contents of the bills and decree, against the representative of Sir Alexander:—Held, 1. That the Scottish sexennial prescription did not apply to the case; and, 2. That, whatever might be the law of Scotland as to the force of the decree, yet, as it had been pronounced sine causa in the court of a hostile kingdom, where the defender could not safely appear at the time to defend himself, his representative was entitled to be reponed in the effect of being heard on the merits.

The Sir Alexander Don, Bart., was one of the British subjects seized and detained in France on the breaking out of hostilities between France and England in 1803. On 13th November, 1809, being then in Paris, he accepted two drafts for 20,000 francs each, drawn by Charles Fagan, in Paris, in favour of Lippmann, residing in France, and payable on 1st March, 1810. Each of the drafts was in these terms:—

Paris, le 13 9bre, 1809.

“ Bon pour 20,000 fr.

Le premier Mars prochain payez par cette première de change, a M. Lippmann, le somme de vingt mille francs, valeur reçue, en l'avis.

“ Bon pour vingt mille francs.
(Signed) “ CHAS. FAGAN.

Monsieur,
M. Don.

“ Hotel Richelieu, Rue Neuve, St. Augustin, Paris.
Je vous paye le somme de vingt mille francs, payable le premier,

(Signed) “ ALEXANDER DON.”

No. 92. Early in February, 1810, Sir Alexander Don quitted France, and passed into Great Britain, his native country, where he continued to reside and have his domicile until his death in 1826.

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After the drafts fell due, Lippmann raised an action against both the drawer and acceptor before the Tribunal of Commerce of the Department of the Seine. A citation was left for Sir Alexander at the Hotel Richelieu, where he had resided, and the officer was then informed that Sir Alexander had departed above four months previously, and that he was supposed to be in Great Britain, but that the part of Britain where he resided was not known. A copy of the summons was thereupon affixed to the principal door of the Tribunal of Commerce at Paris, and duplicates were given to the Imperial Procureur-General, who also countersigned the original.

On 25th July, 1810, Lippmann obtained decree against both Fagan and Sir Alexander Don. Fagan had appeared by his attorney and admitted the validity of the debt, but no appearance was made for Sir Alexander Don, and he had no effects within the kingdom of France. The decree was intimated on 2d October, 1810, according to the form of the French court, at the Hotel de Richelieu. In May, 1811, Lippmann put the judgment to execution against Fagan by seizing his household furniture, and making a search for his person. The sale of his effects produced only a nett sum of 434 francs. Fagan died at Paris in 1813. During the whole of the judicial procedure now mentioned Great Britain was at war with France.

Sir Alexander Don left a pupil heir, Sir William Henry Don, whose tutor was the Rev. Alexander Scott. Soon after Sir Alexander's death Lippmann made application for payment of the drafts, which was refused by the tutor, who stated that he was informed that large sums had been remitted by Sir Alexander to Paris, and that Sir Alexander had repeatedly stated all his debts in France to have been paid, and that no satisfactory explanation was given of the delay which had occurred before demanding payment.*

In 1829, Lippmann and his mandatary raised an action against Sir William Henry Don, and his tutor. He alleged that the bills, when due, had been duly protested for non-payment against the acceptor, and that the dishonour had been intimated to Fagan, the drawer; and he founded upon the procedure before the French courts already narrated. He concluded for payment of 40,000 francs, with interest from 1st March, 1810, and certain expenses, under deduction of the 434 francs recovered from Fagan's effects.† The defenders pleaded that the bills

* It was also said by the defenders that a demand had been made in 1814, which was refused.

† The summons was raised in the name of Lippmann, formerly resident at Baccarat, &c., now at Nancy, in France, &c. An objection was taken that the

specifying his last name. But a witness was produced, stating that he was a Jew, and had no prenomen, in consequence of which the objection to the designation was repelled.

1. According to the French law, has the Tribunal of Commerce, in the circumstances before set forth, jurisdiction over Sir Alexander Don, an alien, enemy, Britain at the date of citation, and of the judgment, by default, obtained against him? And is it competent, and consistent with the law of France, to cite subjects of a country at war with France, and not within its territory, nor any estate or effects there, to appear before the hostile tribunals of France, default thereof, to pronounce an effectual judgment or decree, against the not appearing?

Is there any period within which bills prescribe by the law of France, and is that period in the particular circumstances, as hostilities continued till 1814?

Does the French law hold, that a decree obtained under the foresaid circumstances against the debtor, on a bill in France, stops the prescription of the bill? If it does stop it, what is the period within which the decree itself prescribes?

What effect is given by the French law to a decree in absence, against a debtor, who has contracted a personal debt in France, where that foreigner has no country before citation, and he has received no citation, and never appeared in action?

Does it make any difference by the French law, in the present case, that the proceedings above mentioned, took place in the French court against the drawer of bills of exchange, who did appear, although the acceptor did not, and what be the effect by the French law, of such proceedings against the drawer, in connection with the heir of the acceptor, that acceptor having been a foreigner, who never appeared in the action?

Would it be held sufficient proof of a debt in the French courts, that a bill of exchange is produced, with the name of the father of the defender attached to the acceptor, followed up by proceedings, in which decree in absence was

No. 92. The following portions of the Opinion were chiefly founded on by the pursuer:—It was stated by the French counsel, “it will be looked upon as positively decided in each of these queries, that the question is con-
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 an. 20, 1836. Lippmann v. Don.

“OPINION of M. JACQUINOT PAMPELUNE, late Attorney-General at the Royal Court of Paris, and of M. BERARD DES GLAJEUX, late Advocate-General at the said court, on the questions which the Court of Edinburgh has done them the honour to submit to them in the case Lippmann and his mandatary against Sir William Henry Don, and his tutor-at-law.

“The undersigned being assembled, in order to deliberate on the question which the Lord Ordinary at the Court of Edinburgh, has done them the honour to submit to them,

AND

being penetrated with the duty imposed upon them by this honourable and important mission which has been confided to them;

AND

in consequence of the existing documents in the case of Lippmann and his mandatary against Sir William Henry Don and his tutor-at-law, and which documents they have ordered to be placed before them;

“They will, after having scrupulously examined the above-named documents and the points of law relative to this suit,

“Religiously pronounce their sentiments, and the principles of the French law on each of the questions submitted to them.

“However, they think it their duty first of all to make a few general observations, which appear to them to be of a nature to render their answer on each question more precise.

“In the first case, it is of importance that two points should be clearly established, the nature of the titles which form the subject in dispute, and the nature of the judgment which has validated these titles.

“1st, *The Nature of the Titles.*

“These titles, termed bills of exchange, do not unite in their form all the conditions required by the French laws, and consequently would not be susceptible simply of themselves to produce all the effects thereof.

“The value in the bill of exchange, is simply announced, received.

“But the French law does not content itself with this enunciation, it requires that it should be mentioned in what manner the value has been furnished, whether in cash, in merchandise, or in account (see Commercial Code, art. 110).

“The title which does not contain this enunciation, is, however, not entirely void or null, it does not cease to be obligatory; but it loses the privileged character of a bill of exchange, and it has only the value of a simple promise, such as a promissory note (mandat).

“There results from this circumstance an essential difference between a bill of exchange and a promissory note.

“A bill of exchange is always in itself a commercial deed, and consequently subjects whoever may have signed it, whether he be a merchant or not (save exceptions in favour of women), to the jurisdiction of the Tribunal of Commerce.

“A simple promise or promissory-note (mandat), is, on the contrary, a non-commercial transaction, only inasmuch as it has served for a mercantile transaction that it has been signed by a merchant.

law, which upon its provisions the defendant does not require the case
1 to the Civil Tribunal (Tribunal Civil). See Commercial Code,

2 of execution with regard to a promissory-note and a bill of exchange
3.

4 exchange carries with it the right of arresting a debtor; a promissory-
5 promise, is not liable to the same consequences.

6 and even in consequence of the privileges attached to a bill of ex-
7 change of a bill of exchange only lasts five years, at the expiration of
8 prescribed.

9 ry-notes, as well as common obligations, are only prescribed in thirty

10 distinctions being settled, and the titles in question being but simple
11 promissory-notes, from the defect of the value not having been suffi-
12 cied, they ought to be governed by the rules relating to promissory-
13 and these titles were only to be considered in themselves.

14 must be appreciated in this instance, in the character attributed to
15 judgment, which declared them to be valid, and which ordered them
16 execution; it therefore becomes necessary properly to determine the
17 judgment.

18 " 2d, *Nature of the Judgment of 1810.*

19 lgment is become definitive, if in other respects the legal formalities
20 filled, which will be the subject of an ulterior examination; it has be-
21 re, because no appeal was made against it, because no opposition in any
22 er took place; and as there was even acquiescence on the part of one
23 ants, who was present. This judgment from that moment acquired
24 ity of a case definitively judged: what the judgment, therefore, has
25 as become irrevocable.

26 racter of irrevocability does not only exist with regard to the nature
27 titles, but likewise exists with regard to the dispositions applied to
28 ery thing is coherent in this judgment, and the disposition necessarily

No. 92. the law of France, that a stranger, even a non-resident in France, may be cited before the French Tribunal, in order to fulfil the obligations
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because he acknowledged the debt, by acquiescing to the payment thereof, provided a term and delay were granted to him.

“ The character of bills of exchange, has, therefore, been truly and irrevocably acquired by these titles.

“ Whatever may be the vice in the form which might have reduced these titles to be only simple promissory-notes, they must henceforth be considered solely as bills of exchange, because it is impossible to retract what has already been acknowledged by the parties and definitively judged.

“ There results likewise from the titles having been acknowledged to be bills of exchange, that bodily arrest may have been, and has been in reality pronounced, in being the manner of putting the sentence into execution; it is thus that the disposition of the judgment is coherent with the nature of the title, and constitutes only the same case irrevocably judged.

“ These preliminaries were indispensably necessary to get to the clear solution of the questions submitted to us.

“ It will, therefore, be looked upon as positively decided in each of these questions that the question is concerning bills of exchange, and concerning a judgment which has acquired the force of law.

“ FIRST QUESTION.

“ ‘ According to the French law, has the Tribunal of Commerce, in the circumstances before set forth, jurisdiction over Sir Alexander Don, an alien, enemy, in Britain at the date of citation, and of the judgment by default obtained against him? And is it competent and consistent with the law of France to cite the subjects of a country at war with France, and not within its territory, nor having an estate or effects there, to appear before the hostile tribunals of France, and in default thereof to pronounce an effectual judgment or decree against the party not appearing?’

“ In order to answer fully this question, it will be necessary to appreciate the jurisdiction of the Tribunal of Commerce over Sir Alexander Don, in the respects:—

“ 1st, In respect to his quality as a stranger, enemy, and a subject of a country at war with France.

“ 2d, In respect to the quality of a merchant, which the judgment attributes to him.

“ In the first respect, the question is a general one, and would apply itself to the jurisdiction of every French Court.

“ In the second respect, the question is exceptional.

“ The question, considered in the first point of view, cannot cause any difficulty.

“ It is a principle of the law of France, that a stranger, even a non-resident in France, may be cited before the French tribunal, in order to fulfil the obligations contracted by him in France towards a Frenchman (Civil Code, Art. 14).

“ Every French tribunal is, therefore, competent, according to the nature of the obligations, to exercise, in such case, its jurisdiction over a foreigner.

“ A foreigner, on entering into a contract in any other country than his own, has done an act according to the law of nations, by obliging himself to perform that very country, an engagement which he has contracted; he has voluntarily renounced, in respect to this obligation, the jurisdiction, and the law of his country, and has no longer the right to invoke the maxim, *actor sequitur forum rei*.

contracted by him in France, towards a Frenchman (Civil Code, Art. 14), and that every French Tribunal is therefore competent, according

" It is not necessary, on that account, that the foreigner should still reside in France at the moment the performance of the contract is claimed ; it is quite enough for him to have resided there when the contract was entered into ; it is at that moment, and by that very act, that the competence of the French tribunal has been established.

" Article 14 of the Civil Code, which contains these principles, it is true, requires for their application this condition, namely, that the contract shall have been made with a Frenchman.

" But this quality does not appear to be disputed in the person of Mr Lippmann.

" It is, however, certain, that Mr Lippmann has been settled in France a long while, and that he enjoys there the same civil rights which are enjoyed by Frenchmen.

" This alone, therefore, would be sufficient to enable him (among the rest of these civil rights), to exercise the power of citing a foreigner before the tribunal of France.

" A decree of the Court of Cassation, dated on the 24th of April, 1827, has formally established this doctrine (Journal of the Palace, vol. the 3d of the year 1827, page 405).

" There is another reason, which leaves no doubt as to the application, in this case, of Article 14 of the Civil Code.

" The question is concerning bills of exchange, and commercial transactions ; consequently, of contracts respecting the rights of nations, subjected in their performance to the laws and to the tribunals of the country in which they have taken place.

" This principle is so general, that it has force and effect, even among foreigners, with regard to commercial transactions entered into in France, and which are to be executed there. In this case, one foreigner may even be cited by another foreigner to appear before the tribunals of France.

" This results, independently of Article 14 of the Civil Code, likewise from Article 420 of the Code of Proceedings (Du Code de Procedure), and from 631 of the Commercial Code. The first allows the plaintiff to summons the defendant before the tribunal of the district (arrondissement) in which the promise has been made, and where the payment is to be effected. The second subjects to the jurisdiction of the Tribunals of Commerce, the disputes relating to commercial transactions between every body.

" The terms of these dispositions of the law are, as may be seen, as extended as the necessities of commercial operations, in behalf of which they have been enacted, require it, no distinction has been made either in respect to the persons or their quality. Trade is proper to every country, and ought to meet with protection and justice every where.

" These principles, which have already been admitted by the jurisprudence, have been definitively acknowledged by a decree of the Court of Cassation, dated the 11th November, 1828 (Journal of the Palace, vol. 1 of 1829, page 75).

" Considering, in law (say jurisprudence), says this judgment, ' that article 14 of the Commercial Code does not make any difference between a foreigner and a Frenchman, and that it was not the legislator's intention to make any, as, according to the ancient jurisprudence, and the principles acknowledged during the discussion on the Civil Code, it is certain that the French tribunals are obliged to give judgment in commercial transactions effected in France by foreigners.'

" Such are the principles which are constantly acted upon in France towards a foreigner, with regard to the power of making him appear before the French tribunals, on account of obligations entered into in France.

No. 92. to the nature of the obligations, to exercise in such case, its jurisdiction over a foreigner." It was farther stated, that " Sir Alexander I
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" Would any derogation from these principles take place, in consequence of a foreigner having been an enemy and a subject of a country at war with France

" But these declarations of hostility and of war, exist only as far as regards the state towards another.

" They do not change the private relations between the individuals of a country, they being founded on the rights of nations. A foreigner, although subject of a country at war with France, remains always but a foreigner with respect to private Frenchmen with whom he deals, he is not the less apt to contract and make all such acts that do not emanate directly from the civil rights of the country in which he resides. But from this very power of being able to contract, he engages and binds himself towards others, just as much as the others bind themselves towards him. He, therefore, submits himself to the fulfilment of the contracts he has entered into, and, consequently, to the laws which regulate and protect the execution of these contracts.

" On applying, therefore, the right to the fact, on first part of the question answer, according to the French law, will be affirmative, namely, that Sir Alexander Don, although a foreigner, although non-resident in France at the period of citation, although the subject of a country at war with France, his citation before a French tribunal, on account of bills of exchange accepted by him, and made payable in France, was perfectly valid.

" In the second place, it becomes necessary to appreciate the competence of the French tribunal, inasmuch as it is a tribunal of commerce, and exceptional, on account of the quality of a merchant attributed to Sir Alexander Don.

" This competency can easily be proved. First of all, we must remember that the titles are bills of exchange, because it has been so acknowledged and judgment one of the parties concerned being present.

" Now, bills of exchange are, therefore, essentially commercial transactions, and every person, and, according to law, legally subject those by whom they are signed, whether merchants or not, to the jurisdiction of the Tribunal of Commerce (Articles 631 and 632 of the Commercial Code).

" All that was, therefore, required, was to know the nature of the commercial titles, in order to justify the jurisdiction of the Tribunals of Commerce over Sir Alexander Don.

" But there exists another reason for establishing the competency of the Tribunal of Commerce.

" This reason is drawn from the quality of Charles Fagan, the drawer of the bills, having been acknowledged to be that of a merchant, before the Tribunal of Commerce. Charles Fagan appeared before the Court, in the person of his attorney, and yet he did not deny the jurisdiction of the Tribunal of Commerce, on account of his not being a merchant; on the contrary, he acknowledged its jurisdiction, by consenting to the payment of the sum claimed.

" He has, therefore, been lawfully designated a merchant; this quality has therefore, been considered in him as unquestionable.

" If, therefore, a commercial effect, which, perhaps, might not even be a bill of exchange, but simply a promise or bill to order, bears the signature of different persons, not merchants, it will suffice for only one of their signatures to be that of a merchant, in order to give the Tribunal of Commerce a right of examining and passing judgment in the case.

" A merchant draws with him before its jurisdiction every person that is a merchant.

" Such is the express stipulation of Article 637 of the Commercial Code.

" The Tribunal of Commerce was, therefore, in a double point of view, competent to take cognizance of the demand made against Sir Alexander Don.

from the laws which affect the condition and capacity of the person, and to be every where subjected.

A foreigner in France always remains under the empire of the laws of his own country as far as regards his condition or capacity.

The question here, is, concerning obligations which belong to the rights of man and regards persons only inasmuch as they have entered into an engagement to execute them. The execution thereof must, therefore, be guaranteed by laws under which the obligation has been contracted.

Such are the foundations of the law in France, and, if, according to these

Sir Alexander Don has been duly cited in France, the necessary consequence that results from it is, that judgment may have been lawfully pronounced against him, although he did not appear.

The parties must always be able to acquire the means of having justice done, and it ought not to be in the power of a person to escape, by his absence, from the fulfilment of an engagement he has entered into.

Justice does certainly require that the party condemned should have acquired the means of defending himself; but the certainty, in this respect, cannot be founded upon the facts resulting from the good or bad faith of the parties; the law in question is entirely legal; it is acquired, if it has been proved that the law has been prescribed by law, in order that the parties should be considered as duly having been strictly fulfilled.

We must here add a consideration in equity.

Alexander Don was not sued alone; Charles Fagan was cited conjointly with him; their cause was a common cause—their liability was in solidum; their means of defence were the same; Charles Fagan appeared; therefore, received all possible assistance, and the condemnation was not pronounced without the defence having been heard.

“ SECOND QUESTION.

Is there any period within which bills prescribe by the laws of France, and what that period in the particular circumstances, as hostilities continued till

No. 92. citation before a French Tribunal, on account of bills of exchange accepted by him and made payable in France, was perfectly valid." It v
 20, 1836.
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has just been established ; for, if a condemnation has taken place, the prescript is no longer in force.

" The bearer of the bill of exchange, then, acquires his redress in a new title, the bill of exchange is annulled,—the judgment remains ; there then only remain to apply the prescription, and the laws relating to the judgment.

" Such is then the hypothesis of the present case, and this naturally carries to an examination of the third question.

" THIRD QUESTION.

" ' Does the French law hold that a decree, obtained under the above circumstances against the debtor, or on a bill in France, stops the prescription of the bill, and if it does stop it, what is the period within which the decree itself prescribes ? ' "

" The effect of the judgment obtained, as it has just been stated, is to cause the bill to take the place of the bill of exchange, and thus to become a new title in the hands of the creditor.

" There can, therefore, be no further question about the prescription of the bill of exchange, as this prescription could not have taken place if there had been a condemnation, ' unless the condemnation had not taken place,' and the condemnation having been pronounced, has rendered every prescription of the bill of exchange impossible.

" But the judgment itself may be prescribed, however it can only take place within thirty years. The action which results therefrom, is considered as belonging to the class of personal actions which article 2262 of the Civil Code, only subjects to prescription every thirty years.

" The prescription, therefore, cannot be opposed to the judgment of 1810.

" FOURTH QUESTION.

" ' What effect is given by the French law, to a decree in absence against a foreigner, who has contracted a personal debt in France, where that foreigner has left the country before citation, and he has received no citation, and never appeared in the action ? ' "

" A judgment by default, has in the above mentioned cases, the same effect in France as if it had been pronounced peremptorily (*contradictoirement*) after hearing the foreigner, if the necessary formalities to render the citation valid have been accomplished, and provided the judgment has not been prescribed in consequence of its execution not having been effected.

" This is not yet the place to examine whether all the indispensable formalities necessary to the validity of the proceedings have been exactly followed. This will form the subject of the answer to the seventh.

" But there exists another condition for a judgment by default to preserve its full force. It is necessary for it to have been executed within the six months (Code of Civil Proceedings, Art. 156) ; in default of which it is prescribed, rendered null, and as not having taken place.

" Prescription is a penalty attached to the negligence of the creditor, who, having obtained a judgment by default, has not taken steps to execute it. even this principle of the law supposed the execution of the judgment to have been possible.

the undersigned to declare, that the judgment of the year 1810 could be prescribed. Being called upon, by the important mission intrusted to make the sole authority of the law speak, they will not substitute for opinion, however well founded it might appear to them.

therefore, true that the judgment of the year 1810 was not executed in Alexander Don, in the sense of article 159 of the Code of Civil Pro-

It is true that the execution of the judgment has not been manifested to him by one of those acts, in consequence of which, the law reputes sent to have been executed. It is likewise true that the law does not distinguish in regard to the execution of the judgment between a foreigner and not being a foreigner.

therefore, Sir Alexander Don had been the only person concerned in the prescription might be opposed, and the judgment reputed null with regard

there is a decisive reason in this case to avoid prescription.

the nature of a bill of exchange to render the obligation which results in solidum, with regard to all those that have signed it.

Alexander Don and Charles Fagan were therefore liable in solidum for it.

One of the effects of this liability in solidum is, that the prosecution of one debtor interrupts the prescription with respect to all of them (Civil Code, 6), and the prescription is in reality nothing but a prescription applied to of the proceedings.

thus that it has been considered by ancient authors who have written on law, such as Dunod, Denisart, Ferriere; it is also in this manner that it is appreciated under the new laws, and particularly by a decree of the Court of the 7th December, 1825, which has decided ' that the disposition 1206 of the Civil Code is conceived in general terms, and that it applies to actions, and acts, capable of being prescribed, and consequently subscription or non-suited, established by article 156 of the Code of Pro-

that now remains to be done is to examine if, according to these principles judgment has been executed with respect to one of these debtors in

lo. 92. tradicatoirement), after hearing the foreigner," &c. It was also stated
 20, 1836. "that all the proceedings have been executed in conformity with the
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pronounced against one of the parties who has no attorney, the opposition may be received until the execution of the judgment.

"Such is the disposition of article 158 of the Code of Civil Proceedings; and article 643 of the Commercial Code declares this disposition applicable to a judgment by default pronounced by the Tribunals of Commerce.

"Here, then, is the combination which results from those dispositions of the law.

"The judgment being executed against one of the debtors in solidum, cannot be non-suited with regard to the other.

"But the person upon whom the judgment has not been executed is always at liberty to form an opposition to it, until it has been executed.

"This is likewise what results from the decree already mentioned, of the Court of Cassation, of the 7th of December, 1825.

"'The party not appearing,' it says, 'always retains the right of forming an opposition, and to make good all the reasons which he may have to offer against the condemnation, when they come to put it to execution against his person.'

"It must therefore be admitted, that, as the judgment of 1810 had not been put in force against Sir Alexander Don, he could still have been allowed to protest against it, and, likewise, that he would have the same right to-day; for, although the execution of this judgment against Charles Fagan may have preserved to this judgment all its effects, it has not deprived Sir Alexander Don of his right of protesting against it whenever it should be executed against him.

"This right, which would have belonged to Sir Alexander Don, has, without a doubt, descended to his heir or representative, as well as the liability to which he was subjected.

"It must therefore be considered as a fact, that Sir Alexander Don, or his heir, might, even to-day, protest against the judgment of 1810.

"But here it will be necessary to state a few rules.

"According to the law of France, there is no nullity by right.

"The protest against the judgment, which is considered null, must be made before the very tribunal which has pronounced the judgment.

"It is therefore in France, and before the Tribunal of Commerce, that the opposition ought to be made.

"Until then, the judgment remains in full force.

"Secondly, it is necessary to distinguish in this judgment the subject which has been judged, and which becomes, henceforth, inattackable from what may yet be judged, and which, therefore, is subject to opposition.

"One may easily conceive, that, when the question involves a liability in solidum, the same thing cannot at the same time be and not be—the same title, for instance, cannot be a bill of exchange and not be such.

"Thus, every thing that concerns the debt and the case itself can no further be placed in doubt. In this respect, the case is irrevocably judged, otherwise nothing would as yet have been finished in the judgments, and the dishonesty in one of the parties not having appeared, would suffice to revive all the questions again.

"But whatever concerns the person, or the exceptions to which a person is entitled, may be the subject of a new trial or examination, because, in point of fact, nothing has been judged in that respect, these exceptions hitherto not having been invoked.

"Thus, the exception concerning Sir Alexander Don personally, as not being a merchant, might be brought forward again to-day, with regard to the opposition.

"The right of bringing it forward, therefore, still belongs to his heirs. It is a part of the task of the undersigned to point out at the same time what will be the consequence of this right before the French tribunals.

"The exception drawn for Sir Alexander Don, not having been a merchant

French laws, and the judgment receives new force from the regularity of the acts by which it is surrounded;" and farther, that as Fagan and Sir

could not be invoked to show the incompetency of the Tribunal of Commerce with respect to his person.

"In the answer to the first question, the following double motive was brought forward, namely, that the question was concerning bills of exchange, and that Charles Fagan, one of the parties signing, was a merchant, or judicially reputed such—two points irrevocably judged.

"The judgment, ordering the payment of the bills of exchange, would therefore remain unattackable.

"The only effect of the exception might have been to discharge Sir Alexander Don from bodily imprisonment, in case the bill had been a simple promissory note, according to the last rule of Article 637 of the Commercial Code.

"But, on the one hand, this rule could not be applied, the title being a bill of exchange; and, on the other hand, even this exception would be of no use, for Sir Alexander Don being deceased, his heir cannot be subjected to bodily imprisonment in lieu of him, and he can only be made liable as far as regards his property, for the engagements entered into by Sir Alexander Don.

"We ought, therefore, not to hesitate declaring that an opposition against the judgment of 1810 would have no result.

"On recapitulating the question,

"It appears that the judgment rendered by default against Sir Alexander Don has not been prescribed, because its execution against one of the debtors in solidum has interrupted the prescription with respect to the other.

"It would still be susceptible of opposition, but this opposition could only be made in France before the tribunal which pronounced the judgment.

"Therefore, on appreciating this opposition according to the laws of France, it would be null in all its results.

"We are therefore led to conclude, that the judgment rendered by default against Sir Alexander Don in the above-mentioned circumstances, has the same force and the same effects as a peremptory judgment pronounced after the parties have been heard, and which requires the force of a case on which judgment has been passed.

"FIFTH QUESTION.

"Does it make any difference by the French law in the present case, that the proceedings above mentioned, took place in the French Court, against the drawer, on the bills of exchange, who did appear although the acceptor did not, and what would be the effect by the French law, of such proceedings against the drawer, on a question with the heir of the acceptor, that acceptor having been a foreigner, who did not appear in the action?"

"According to the French law, the bearer of a bill of exchange may prosecute jointly (indifferently?), either the drawer, acceptor, or both of them together, and the condemnation in both cases, produces the same effects.

"A bill of exchange creates an obligation, in solidum, between those that have signed it: it is therefore a rule, that a condemnation pronounced against the drawer or in solidum, is a judgment against all the others.

"In fact, says the author of the Repertory on Jurisprudence, in his questions on law, at the word 'chose jugée,' a debt in solidum is the same in its substance, and in its case for each of the parties interested. A debtor in solidum, against whom a judgment has been pronounced, forms, morally speaking, but one and the same co-debtor, because they could not bind themselves in solidum, without constituting themselves the mandataries of each

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n. 20, 1836. *solidum* is, that the prosecution of one of the debtors, interrupts the pre-
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other, in order to provide for the payment of said debt ; and, moreover, mutually to represent each other in all the acts, and all the proceedings which might lead to enforce the payment thereof ; and for their mutual advantage, to make good all the means they might possess, in order to exempt themselves from the payment.

“ Wherefore, Voet does not hesitate to declare, on the title of the Digest de *Dubus Reis*, No. 5, that the judgment pronounced in favour of one of the debtors, in *solidum*, turns to the advantage of his co-debtors ; *sed et si unus ex pluribus debendi reis judicio conventus per sententiam judicio absolutus sit alter ultra nequit efficaciter conveniri.*

“ But from the same principle, the judgment pronounced against one of the debtors in *solidum* is likewise considered, as being likewise pronounced against his co-debtors.

“ In consequence of these principles, even if the acceptor of the bill of exchange, should not have been prosecuted ; the condemnation pronounced against the drawer, would have its full effect against him.

“ We could only make good the exceptions which concern him personally, as it has been stated in answer to the preceding question, because these exceptions have remained entire, and do not affect the cause of the obligation.

“ But if it is so in the case where the acceptor was not a party concerned in the judgment, it is most certainly so when he has been cited, and when the condemnation has been pronounced conjointly against him.

“ The fact of his non-appearance can make no alteration in the consequences which proceed from the force of principles, and from the nature of the things.

“ Now, as to the effect of the judgment against the heir of the acceptor, it is the same, with regard to the property, as it was with respect to the acceptor himself.

“ The heir, in succeeding to the property of his predecessor, succeeds likewise to his obligations. But the property of the heir alone is engaged, and not his person.

“ Thus, bodily arrest, to which the acceptor of the bill would have been liable, cannot be put in force against his heir.

“ These rules do not admit of any exceptions in favour of foreigners.

“ SIXTH QUESTION.

“ ‘ Would it be held sufficient proof of a debt in the French Courts, that a bill of exchange is produced with the name of the defender attached to it, as acceptor followed up by proceedings, in which decree in absence was pronounced against him, as above set forth, at the distance of 19 years, from the date of the bill, without any proof of the value of the bill having been advanced to the acceptor, further than what appears from the bill itself, and without any action having been brought against the acceptor in his own country, although his residence then was well known, and his solvency not questioned, during a period of 16 years before his death, or is the production of the bill with the acceptor’s signature admitted, and the said judicial proceedings, sufficient to establish the debt against the minor heir, and to exclude all these considerations ? ’

“ An affirmative answer upon these questions, cannot be doubted in France according to the principles laid down.

“ The bill of exchange is of itself a proof, in as much as it acknowledges the value received.

bill of exchange.

unds not being supplied) becomes a matter of consideration between and the drawer; but the rights of the holder of the bill remain the regard to the acceptor, although no funds have been provided, and nevertheless, bound to pay, without prejudice to his claim against on account of the order he had received to that effect.

ed of 19 years and upwards having elapsed since the date of the a no manner modify the obligation, as it results at present, from a rich could only have been prescribed, at the expiration of a term of

ver, what has been said concerning the judgment and the citation in applicable here.

suffice to add, on the one hand, that although the fact of a foreigner rtone and estates in his own country be notorious, it would not de- achman of his right to prosecute him in France; and on the other the state of war, which existed between England and France, at the illu became due, did not allow the prosecution of the condemnation in

ntrary considerations remain without effect, in presence of these prin- it has already been explained, with regard to the heir, that his liability ; as his predecessor's, his minority can make no difference in this

"SEVENTH QUESTION.

there any informalities, or defects in point of form or otherwise in the or proceedings, which would render them ineffectual, according to the ces?"

question is of high importance, for if there existed in the documents or any defect which rendered them null, the judgment itself would be othing would have been done or judged; it must, however, be clearly , that this nullity would not follow as a right, but that a judgment must

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The defenders contended, that, in point of fact, the opinion did not distinctly state, that, by the law of France, the bills were there payable,

value, was deficient with respect to one of the conditions prescribed by the French law, for bills of exchange; but it was at the same time proved, that, as a general rule, these titles, although imperfect, were not on that account null, but that they were considered as simple promissory notes or promises, that in this particular case they ought even to be styled bills of exchange, their validity not having been disputed; and the judgment which acknowledges them to be bills of exchange having acquired the force of law.

" The judgment which has pronounced these titles valid, is, therefore, become the most essential document in the suit.

" The validity has been fully appreciated as to the right which Mr Lippmann had to cite a foreigner, his debtor, before a French Tribunal, and as to the peculiar competency of the Tribunal of Commerce.

" In its form this judgment offers nothing but what is regular, and conform to whatever is laid down by the French laws.

" As to the acts of proceedings, it has been proved in the judgment itself, that the citation was served twice upon Sir Alexander Don, first at his last place of residence, Hotel de Richelieu, Rue Neuve, St Augustin, but on the porter's declaring that he had left that hotel four months before, and that he was supposed to be in England, without his, however, knowing in what part, the assignations were stuck up at the principal door of the Audience Court of the Tribunal of Commerce, and duplicates thereof were given to the King's Attorney-General who countersigned the originals.

" The fulfilment of these formalities has accomplished the point of law, expressed in Article 698 of the Code of Proceedings, with regard to those persons who, having lived in France, are no longer resident there, and whose actual residence is unknown.

" Sir Alexander Don was in this case; he had left France without making known where he might be met with.

" The same formalities have been observed in signifying the judgment, and the order that followed it. The acts which are joined to the documents, bear testimony thereof.

" There is, therefore, in the proceedings no informalities or defects which might cause its nullity.

" All the proceedings have been executed in conformity with the French law, and the judgment receives new force from the regularity of the acts by which it is surrounded.

" This judgment therefore remains in this cause with all the authority of a judgment which has acquired the force of law, and the undersigned, on ending their honourable mission intrusted to them, hope that they may be allowed to submit the following consideration to the Court of Edinburgh:—That it is of importance to the transactions which bind people of different countries, that obligations founded on the rights of nations should be respected every where, and that the Tribunal in every country should lend itself a mutual support in order to cause them to be respected.

" Done and deliberated at Paris, this 20th day of June, 1834.

" (Signed)

JACQUINOT PAMPELUNE,
Ancien Procureur General, près la Cour
Royale de Paris.

" (Signed)

BERARD DES GLAJEUX,
Ancien Avocat General, près la Cour
Royale de Paris."

the effect of the contract was to subject both parties to the jurisdiction of the French Courts. The French Opinion proved it to be the law of France, that a contract, entered into in France with a Frenchman, had the effect of a contract, when he entered into it; and the late Sir Alexander Cockburn was equally held to have tacitly acquiesced in it. Had he exposed himself to submit to the French jurisdiction, though he left France, he would not have been more effectually bound to it, than he was in the circumstances of the case. But the effect of the decree was, according to the French law, to interrupt prescription, of the parties, liable in solidum along with Sir Alexander, made enforceable, and also had legal execution done against him. The decree prescribed before the lapse of 30 years; it had the force of a decree *in contradictoirement*, or *in foro*, and was therefore sufficient to bind the pursuer in a plea of *res judicata*, or at least to throw the onus on the defenders of challenging it on the merits.²

The removal of Sir Alexander Don to Great Britain was not material to the cause, (1.) The place of payment of the draft was not thereby affected. No place of payment was specified, and therefore it was necessary to look to the place of acceptance, and the French Opinion distinctly described it as "made payable in France," thereby proving that the French law made it to be a debt there payable; (2.) The decree in France was made before the prescription peculiar to bills had run either according to the law of France or of Great Britain; and, (3.) As Sir Alexander had gone into a country at war with France, the pursuer was not bound to

No. 92. follow him before the courts of that country, but was entitled to a procedure of the French courts requisite for keeping his debt in :
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 pmann v. 4. The validity of the French decree was not impaired becaus
 77. war subsisting between Britain and France at the time. T

4. The validity of the French decree was not impaired because war subsisting between Britain and France at the time. That war equally subsisted when Sir Alexander Don became a party to the contract, and subjected himself to the jurisdiction thence arising. Besides, the war affected the relations of the two kingdoms, and debts as between individuals of either kingdom. And the power of maintaining decree for a debt, and thereby preserving it in force, was not taken away from any individual against another, because the kingdoms they severally owed allegiance were in a state of hostility.

5. There were no circumstances connected with delay to enforcement which could affect the validity of the French decree. Not a prescription of thirty years could take off the effect of it, and the prescription had not run—therefore, unless the defender could now show that he had been satisfied, the pursuer was entitled to decree in terms of libel.

Pleaded by the Defenders—

1. The meaning of the contract was undoubtedly to be ascertained by the French law, but when the question came to regard the enforcement of the contract, and the nature of the remedy which would be allowed for enforcing it, the law of the country in which action was raised controlled and necessarily the rule.¹

2. As Sir Alexander Don was not personally within France a decree was taken against him, and he had no effects within the kingdom, he was not amenable to the jurisdiction of the French courts. Any decree then obtained against him was of necessity null and should be wholly disregarded; and such decrees had, on principle, been wholly disregarded in England.² Because Sir Alexander, in the situation of Sir Alexander, had no means of defending himself, or even of knowing that proceedings were adopted against him, a decree taken against a party in that situation was contrary to the principles of essential justice. Nor could any proceedings against the debtor of the bill interrupt prescription against the acceptor unless the debtor was duly made a party to them.

¹ Voet. l. i. t. 4, p. 2, § 58; Hber. de conflictu leg. div.; 3 Ersk. 7, valle, March 9, 1786 (Hailes, 926, and Ivory's ed. of Erskine, 788, note, 40 dal, July 13, 1768 (4520); Barret Feb. 4, 1772 (4524); Ker, Feb. 20, 1771 408); Campbell (6 Dow's Rep 134); York Buildings Company, Feb. (4528); Richardson, &c. June 16, 1824 (2 Shaw's App. Ca. 406); Kink 12, 1739 (4456); Gibson, March 2, 1831 (ante, IX. 525); Chitty on Bills 193; De la Vega, 1 Barn. and Ad. Rep. 284; British Linen Company v. Dr 10 Barn. and Cressu. Rep. 905.

* Story's Comm. on Conflict of Laws, 492-4, also 457, 461, 464, 482; 1 Russell, 351; Voet. I. V. t. 1, § 78; 1 Ersk. 2, 20; Buchanan (1 Comph. 2)

no place of payment was specified in the bill, the debt, like any
 veable debt, which had no specific place of payment, necessarily
 payable at the place where the debtor might fix his domicile.¹
 n if the debt was originally held to be payable in France, it was
 at to Sir Alexander, a Scotsman, when sued in Scotland, to
 e sexennial prescription applicable to bills of exchange, and, as
 remained domiciled for the full period of six years within Scot-
 hout any action or diligence being there raised on the bill, it
 or that prescription, and could now afford no ground of action

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the time of the decree in France there was open war between
 try and Britain. It was impossible, therefore, for Sir Alexander
 the citation to appear in the French courts, or to carry on any
 there. The decree against him was therefore null. And there
 hardship in applying this rule, as peace had followed before the
 ion of bills had run, at which time, if proceedings had been
 d, Sir Alexander, when duly certiorated, could have appeared
 ended himself.

e unaccountable delay in making a demand of payment, and the
 institution of proceedings so soon after the death of the alleged
 not only exposed the claim to much suspicion, but rendered it un-
 round an action in this country. It would be cut off in England
 e demand; and in the law of bills the same rule should be applied
 and, especially as a similar rule obtained here before the intro-
 of the sexennial prescription, and if that prescription was not
 le, the exception of stale demand should be allowed.

Lord Ordinary "repelled the plea of the sexennial prescription
 or the defender; found that the defender is entitled to be reponed
 the judgment of the Tribunal of Commerce in France; and ap-
 parties to be farther heard on the merits of the cause." *

ge (3 Campb. 463).

NOTE.—This action is laid on two grounds, 1st, On the bills of exchange
 at Paris by the late Sir Alexander Don; and, 2dly, On the decree of the
 of Commerce in that city, against Fagan, the drawer, and Sir Alexander,
 stor, jointly and severally, proceeding on those bills. This decree may
 lered either as an interruption of the prescription of the bills, or as a
 title of pursuit.

Aside the question of prescription, as applicable to the bills, it is neces-
 sary to enquire whether the debt sued for is a French or a Scotch debt, and that
 in this case on the point whether Scotland or France was the place where
 the debt was payable. If they constituted a Scotch debt, it is plain they are
 subject to the French quinquennial, but to the Scotch sexennial prescription,
 as Sir Alexander Don had resided more than six years after the time of pay-
 ment, they are not actionable unless resting-owing be proved by writ
 of *replevin*. Prescription interrupted by action or diligence. Action was raised
 by Sir Alexander Don, and decree obtained against him in France, but whe-
 ther it amounts to an interruption of the Scotch sexennial pre-

No. 92. The defenders reclaimed, and the Court, without calling on the counsel in support of the judgment, adhered.

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scription may well be questioned, whatever may be their effect as a separate title. He was not in France when the action was raised—he was not personally cited there, nor had he any property, either heritable or moveable, within the jurisdiction. Farther, and what is still more material, he was then an alien enemy in France, and could not appear in safety in a French court either to sue or to defend. Considered, therefore, purely as a question of Scotch law, it would seem that the sexennial prescription of the bills was not interrupted.

“ On the other hand, if France was the place of payment, and if the bills in consequence constituted a French debt, the case must be viewed in a different light. Our decisions have not been uniform on this point; but it seems the better opinion, that if a debt be payable in a foreign country the law of that country must apply, in so far as its extinction is concerned, although the debtor resides and may be sued in Scotland. On that principle, the bills were subject, not to the Scotch sexennial, but to the French quinquennial prescription, and every interruption of that prescription by the law of France is pleadable against the defender here. The bills do not specify the place of payment, and the defender argues, on that ground, that the debtor's domicile is to be held the place of payment. This point is not decided in the law of Scotland; but it seems well established in the law of England, that where there is no such specification, the place of acceptance is the place of payment; and that is also the law of France, as is stated in the Opinion obtained. As the bills in question were drawn and accepted in France by parties resident there, it must be held as *pars contractus* that Paris was the place of payment.

“ It would follow from this, that if the proceedings in the French court were held in that country as an interruption of the quinquennial prescription, they must be so held in Scotland also, however anomalous they may appear, either in respect that the debtor was not within the jurisdiction, and had no property there, or on any other view; or if it be the law there that a decree against the drawer is also a decree against the acceptor to the effect of interrupting prescription, the same interruption must be admitted in Scotland.

“ But the difficulty which occurs to the Lord Ordinary, and which is not met in the opinion of the French counsel, rests upon this ground:—They state, that in consequence of the lapse of five years, ‘ the bill of exchange is annulled, and the bearer acquires his address on a new title, namely, the judgment which remains.’ This doctrine lays prescription out of the question altogether. The only title in pursuit is the French judgment, which this Court is called upon to enforce; and the question arises, whether it be such a judgment as should be held as a *res judicata* without further enquiry, or whether it may competently, and should in equity, be reviewed on the merits.

“ It appears that by the law of France a judgment in absence prescribes in six months, unless execution has followed upon it; but this prescription was interrupted as to Sir Alexander Don, in consequence of execution against the drawer, Fagan, who was liable with him in solidum in the bills, and against whom a judgment also proceeded in so far as the constitution of the debt is concerned. So far as the question of personal execution is concerned, it was competent for Sir Alexander, and it is still competent for his heir, to be reponed, and to obtain a new hearing, in the Tribunal of Commerce, but in no other court; but that proceeding, it is said, would now be inept, as the representative of the deceased is not subject to personal execution.

“ But, whatever may be the provisions of the French law as to decrees in absence, the important question arises, whether, when a foreign court is called upon to enforce that decree, it ought not, in material justice, to repon the party on the effect of his being heard on the merits. A decree *sine causa cognita*, can not be considered in any other light, except either as a compulsoir to enforce the

It was accepted at Paris, and no other place of payment was specified. In circumstances, I understand it to be fixed by the law of England that the acceptance is the place of payment. This seems in itself to be a doctrine consistent both with good sense and with legal principle, and it ought to be adopted here, and the French counsel describe the bill as made payable in Paris. I consider, therefore, that any question as to its prescription, or as to discharge of the debt thereby constituted, is in the same situation as if it related to the bill had by a written deed consented that the laws of France should regulate. Suppose that a deed, purporting to discharge the debt, had been executed in France, and afterwards produced here, such deed must have been construed by the law of France. And, when a discharge, *vi juris*, is alleged to have been taken place, the question must be judged of by the laws of France.

As to the party against whom it is pronounced, or a penalty on his contumacy attending. In Scotland, at least for forty years, it is held merely as a penalty, and the party is entitled *de jure*, to be reponed on payment of the debt. And, therefore, in the case of *Douglas v. Forrest*, in the Court of Com-mons, cited by the pursuer, where a Scotch decree in absence was held not to be a decree *causa cognita*, it is probable that the law of Scotland had been fully explained to the court, because they gave much greater effect to it than would have been received in the forum where it was pronounced. On the other hand, although the judgment in the Tribunal of Commerce were held in France as a penalty on the acceptor for his contumacy for not answering the citation, it cannot be viewed in that light in this country, where he could not have appeared in safety, being an alien enemy. Admitting that he was a private individual, he had a *persona standi*, and might have been heard by an attorney or procurator, which may be inferred from the opinion obtained, that the principles of international law, no man is bound to answer in a court where he cannot be personally present without endangering his liberty, and that

No. 92. **LORD GILLIES.**—I adhere to the interlocutor of the Lord Ordinary. I re my opinion on the same grounds which have been so fully stated by the Lo Ordinary in his note. I have nothing to add to these views, and I shall n weaken them by repeating them.

LORD MACKENZIE.—I adhere to the judgment of the Lord Ordinary, and the grounds set forth in his lordship's note.

THE COURT accordingly adhered, reserving expenses.

J. F. GORDON, W.S.—TOD and ROMANES, W.S.—Agents,

No. 93. JAMES WILSON and OTHERS (Wilson's Trustee), Suspenders.—Robertson.

EWING, MAY, and COMPANY, Chargers.—Neaves.

Advocation—Cautioner—Expenses—Partnership.—1. Final decree being pronounced in a Sheriff Court against John Mann, he presented a bill of advocation, with bond of caution for “the whole expenses incurred before the sheriff, &c., in the process against the said John Mann, &c.,” “and whatever sum shall be awarded against the said John Mann, in name of expenses in the Court of Session, upon the record and issue of the bill of advocation, &c.” During the process of advocation, John Mann died, and his eldest son was decerned executor, qua next of kin, and was duly sisted as his representative; after which the process went on, and involved jury trial, in consequence of which, a large sum of expenses was ultimately found due by John Mann's representative,—Held, that the cautioner was liable for the whole expenses, though he denied that any notification of John Mann's death had ever been made to him. 2. Held, in conformity with Forsyth (ante, XIII. 42), that a mercantile company may give a charge on a bond, in name of the social firm by which they grant obligations, though the name of no individual partner be specified as a charger.

20, 1836. Ewing, May, and Company, merchants in Glasgow, presented a summary application to the Sheriff of Lanarkshire, against the late John Mann and Others. The Sheriff decerned against Mann, who presented a bill of advocation, and he found caution, in terms of 6 Geo. IV., c. 12, sec. 41, which requires the bill to be passed “on caution being found, to make payment of the expenses incurred in the inferior court, and also such expenses as may be incurred in the Court of Session.” The bond was dated 1st September, 1832, and bore that Wilson was cautioner for Mann, “That he will make payment to Ewing, May, and Company, merchants in Glasgow, or to any other person or persons to whom the said John Mann, may be ordained to make payment of the same, the whole expenses incurred or to be incurred in the summary action, process depending, or sometime depending, before the Sheriff of Lanarkshire, at the instance of the said Ewing, May, and Company, against said John Mann and Others, or whatever part thereof may be found due, as also that payment shall be made of the dues of extract in and

: two sons and three daughters. On 15th May, 1833, John (2) the eldest son of the deceased, was decerned executor, qua next

None of the rest of the family was conjoined in the office of r. On 13th June following, a minute was lodged in the process cation, sisting John Mann (2), "eldest lawful son and representative of the said deceased John Mann, in his, the said deceased's room ce." Of the same date, the Lord Ordinary, "in respect of the minute, whereby John Mann, son and representative of the advokhn Mann deceased, is now sisted as party in his place, allowed cess to proceed in his name, and made avizandum of new."

s months afterwards, a creditor of John Mann (1) confirmed as a-creditor. The decree in favour of John Mann (2), as executor of kin, was not extracted till after the process of advocation an end. In that process, subsequently to the sisting of John (2), the Lord Ordinary advocated the cause, and remitted it to the ll. A jury trial followed, which resulted in a verdict against John (2), and he was subjected in expenses, amounting to £189, 17s. 7d., , 12s. 8d., besides £2, 4s. 1½d, as dues of extract. Ewing, May, mpany then gave a charge to Wilson, the cautioner, for these

He presented a bill of suspension, which was "passed,"* and er his decease insisted in by his trustees.

orz.—The Lord Ordinary has no idea that the first reason of suspension ultimately sustained, though, as he understands there is not as yet any final s in the case of Hare and Company, he should scarcely consider himself

No. 93. *Pleaded by Suspenders—*

u. 20, 1836.
Wilson v.
Ewing.

1. The charge was given merely in name of Ewing, May, and Company, without specifying the name of any individual partner of the firm, and as they were not an incorporated body, they had no persona standi under that designation.

2. By the express terms of the bond of caution, the liability was restricted to the expenses "awarded against the said John Mann (1)," and this could not be extended to expenses incurred after the death of John Mann (1). This arose not only from the strict construction applied to all bonds of caution, but also from the equitable consideration, that, though a cautioner, relying on the discretion of John Mann (1), was willing to bind himself for expenses incurred by that person, yet he might not be willing so to bind himself in relation to his successor. And, in this case, it was denied that any intimation had been made to the cautioner of the death of the principal. The effect of a bond of caution in suspension was originally the same as that now contended for in regard to this bond, and it was only altered by express enactments, which did not apply to bonds in advocations.

3. The liability could not be continued, unless the proper representative was sisted. But the eldest son of John Mann (1), was not the proper representative in this moveable debt, and apparently there was no proper representative in mobilibus, as a creditor had conformed executor, and no extract of the confirmation in favour of John Mann (2) had been made, until after the process of advocacy was at an end.

Pleaded by Chargers.

1. The bond of caution was expressly granted in favour of Ewing.

to abrogate the common law as to cautioners, and not be held rather to apply to the form in which caution should be found, and its effects in entitling the party to have his bill passed. It seems rather a strong proposition to hold that this clause, if now in force, imported the extension of the Act of Sederunt 1650, to all cautioners in advocations.

"The Lord Ordinary fully admits that there is a strong analogy, and perhaps ratio, in the two cases, and that it may be just and expedient to subject them to the same rule. But the difficulty is, whether this can be done without a special enactment of the legislature. The Act of Sederunt 1650 did not assume this power directly. It only enjoined that in future all bonds in suspensions should expressly bind the cautioners to the end of the suit, whether the original suspender died or survived. And the subsequent decisions in 1743 go no farther (though it is gone far enough) than to hold it a presumptio juris that the regulation was complied with. There has been no such regulation, either by the Court or the legislature, as to advocations. And the form of the bond, as given by Mr Beveridge in his appendix, confines the obligation to the individual advocator. As the act of 50 Geo. III. was in operation (as to this particular) but a short time, and but a few years have elapsed since caution on advocations was put on its present footing by 6 Geo. IV. c. 120, and the subsequent Acts of Sederunt, the matter cannot have been settled in practice; and the Lord Ordinary cannot learn that the question has ever been decided."

May, and Company, as a company, and they were therefore entitled to give a charge on it under the social firm. But, independently of this specialty, it was now fixed that a company might sue or be sued by the social firm under which it granted obligations.¹

2. The statutory condition of passing a bill of advocation, was caution for the expenses incurred in both the inferior and supreme courts. This was the nature of the obligation undertaken by the cautioner; and, though the original advocator might die, yet, as it was competent for his representative to sist himself, and carry on the same process to a decree, the cautioner's liability for expenses must still continue. To this effect the rule applied *hæres est eadem persona cum defuncto*. As to the want of notification of the death of John Mann (1), even if it were true, it was irrelevant, as the cautioner could and should have looked after the state of the process sufficiently to certiorate himself as to this, and it must be presumed he had done so.

3. The proper party was sisted. It did not appear that there was any heritage in the succession of John Mann (1); and even if there were, there was no other of Mann's family who had confirmed executor as next of kin, but the oldest son, who was specially sisted as representative. Though a creditor made use of the diligence of confirming as executor-creditor, that was not till after John Mann (2) was decerned executor *qua* next of kin, and sisted in this process.

The Lord Ordinary "repelled the reasons of suspension, found the letters and charge orderly proceeded, and decerned; and found the chargers entitled to expenses." *

* * NOTE.—Previous to the year 1650, a cautioner in a suspension was liberated, if either the charger or suspender died before the letters were discussed. This rule was founded on a very rigid construction of the terms of the bond of caution, contrary, it is thought, both to principle and to the object of the transaction. It was corrected by the Act of Sederunt, 29th January of that year, which declared that the cautioner should continue bound, notwithstanding the decease of either charger or suspender, and it was directed that the bond of caution should in future contain a clause binding the cautioners as validly and in the same manner as the suspender, his heirs and executors are bound. It does not appear, however, that that clause was ever inserted in the bond of caution, at least it had fallen into disuse as early as 1688, when Dallas's Styles were written; and in the case of Dickie, December, 1743, it was found that the omission of the clause was immaterial. As the Act of Sederunt did not extend expressly to cautioners in the Admiralty Court, it was found (28th January, 1680, Hodge) that their obligation came to an end by the death of the party for whom they were bound. But that judgment was afterwards held to have been erroneous, in the case of Dundas, 13th December, 1743, when the point was very carefully considered. There appears, with great deference, to be a mistake in the note of the Lord Ordinary in the Bill-Chamber, where it is stated that the judgment in the case of Dundas was pronounced solely 'in reliance of the Act of Sederunt 1756, and of course, in cases to which it directly applied, *cases of caution in suspensions.*' The case of Dundas was not that case.

¹ Forsyth, Nov. 18, 1834 (*ante*, XIII. 42).

No. 92. The suspenders reclaimed, and, inter alia, intimated that they no longer insisted in the first of their pleas above quoted.

20, 1836.
 lson v.
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cautioner in a suspension, or in any way one to which the Act of Sederunt could directly apply, but in the case of caution *judicio sisti* and *judicatum solvi* in the Admiralty Court. It appears also from the reports, particularly from the report of Lord Kames, that the judgment did not rest exclusively on the peculiar nature of maritime causes, but also on the broad principle of the construction of cautionary obligations, as in reference to the nature of the transactions to which they are interposed. Not to mention the rule of the Roman law, adopted also into our own, that *hæres est eadem persona cum defuncto*, which of itself justifies the enlarged construction, it is plain that if caution fell by the death of the suspender, it might, in many cases, be altogether nugatory. Before the Act of Sederunt 1709, it was decided that the cautioner in a suspension was not liberated by the decree being turned into a libel, a much greater stretch than either the Act of Sederunt 1650, or the decision in the case of Dundas authorizes.

"If it had been the practice in 1650 that caution should be found in advocations as well as suspensions, and if the Act of Sederunt in that year had applied to the latter exclusively, it might have been plausibly argued that the former were intentionally omitted, and that the act therefore could not be applied to them. But caution was never required in advocations till more than a century afterwards, when it was first introduced by the Act of Sederunt 1756, in advocations of decrees of removing. The bond of caution in that case has always been in this respect identical with the bond in suspensions, and the same style has been followed in bonds of caution in advocations, under the late statutes 50 Geo. III., c. 112, and 6 Geo. IV. c. 120.

"There has been a practice, therefore, for about eighty years, in which cautioners in advocations, from the tenor of their bonds, seem to be placed in the same situation as cautioners in suspensions; and in the statute 50 Geo. III., it is declared that bills of advocation should be passed upon caution being found in the same manner as in bills of suspension at present. It is true that the 6th of Geo. IV. restricted that caution in the case of advocations of final interlocutors to expenses of process only; but that restriction, it is thought, cannot operate in favour of the cautioner, in so far as the point now in question is concerned. With regard to advocations on the ground of incompetency or contingency, the act of 50 Geo. III. is still in force, and it rests with the Lord Ordinary in the Bill-Chamber whether caution for the sum at issue, as well as expenses shall be found.

"Looking to the principle recognised in the Act of Sederunt 1650, which applied with equal force to suspensions and advocations, the practice of seventy-nine years as to the style of the bonds, the decision in the case of Dundas, which is an a fortiori case, and the terms of the act 50 Geo. III., c. 112, it is thought that Mr Bell has accurately stated the law in his *Commentaries*, that 'the cautioner is not freed by the death of the suspender or advocator, nor even by the decree being turned into a libel.' This was in 1819, previous to the act 6 Geo. IV., and he has repeated the same words in his last edition in 1826, subsequent to that statute.

"In bonds of caution *judicio sisti*, the rule is, and always has been different, the obligation being of a totally different nature. It may be enforced at any time during the dependence of the cause, and if the suspender is kept amenable to the Court while he lives, there is no reason why the pursuer of the action should not require a new bond of caution from his representative, if there be any occasion for that security. But the obligation of a cautioner *judicatum solvi* is not purified, nor can be enforced in any way, nor to any effect, till the termination of the cause, and the cautioner got free by the death of his principal, it would in many instances be entirely defeated."

of process after he was so sisted, just as in the lifetime of the original
an.

THE PRESIDENT.—I am of the same opinion. The Judicature Act not only
is the caution to apply to the whole expenses of process, but it does not
y qualification that these are the expenses to be occasioned by the original
or only. I am satisfied that the proper representative was sisted, and
is cautioner was liable, in this case, for the whole expenses.

MR BALGRAY.—I concur. As to the plea which was raised regarding the
tency of a charge by the social firm, I have no doubt whatever. It was
y the case of Hare and Company, and I understand it to be now given up
sunders themselves. And I have no doubt as to the liability of the
or, that it continued, as was held by the Lord Ordinary.

MR GILLIES.—The party who was duly sisted in room of the original advo-
was his representative, and the only representative he had at the time. I
is hesitation in adhering.

THE COURT accordingly adhered, and found additional expenses due.

T. DARLING, S.S.C.—R. WELSH, S.S.C.—Agents.

WILLIAM BRODIE and SPOUSE, Pursuers.—D. F. Hope—Shaw.

JOHN BLAIR, Defender.—Rutherford—McNeill.

No. 94.

of—Process—Slander.—1. Proof of the veritas convicii not admissible, where
is in justification has not been taken. 2. Circumstances in which this rule
4. 3. An action of damages was raised for judicial slander by irrelevant
all statements respecting a person who was not a party to the process.

No. 94. on account of defamatory statements maliciously made by him
 Sheriff Court process.

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 . 20, 1836.
 die v.
 ir.
 The following issue went to trial :—

“ Whether, on or about the 12th day of March, 1833, in a pleading, entitled, ‘ Answers for John Blair to the condescendence of William Brodie,’ in a cause depending before the Sheriff of Fife-shire, the defender did insert, or cause to be inserted, the following words, or words to the following effect, according to the meaning herein set forth, viz. 1st, ‘ The pursuer’s family peace is broken and destroyed, long before the date of the fama libelled. He was married three or four years ago. Previous to this he had been accused of attempting to have carnal connexion with his father’s servant girl, and of attempting to knock her down because she resisted. This came to the ears of his wife afterwards ; and he, on the other hand, accused his wife previous to the dates libelled, with being too gracious with one of his men-servants. Quarrels between them have in consequence often arisen, but without any reference to the matter libelled,’—meaning thereby to insinuate, and make it to be believed, that the pursuer, John Blair Brodie, had, previous to his marriage, been guilty of, or accused of being guilty of, an assault, with attempt to ravish one of the female servant girls of his father : That this had been communicated to his wife after his marriage, and that she had charged him with being guilty of the said offence. That, on the other hand, the pursuer, William Brodie, had accused his wife of infidelity, or of having taken improper liberties with one of her men-servants in his employment : And farther, meaning to insinuate, that the other pursuer, Mrs Mary Boyd or Brodie, had been guilty of, or had been accused of being guilty, of infidelity to her husband, or of adultery, with one of the said men-servants, or had so acted as to lead to the suspicion of her fidelity as a married woman, and that thereby dissensions and quarrels had arisen between her and her husband, and the peace of their family destroyed ? And, whether the whole, or any part of the said words, are of and concerning the pursuers, or either of them, and are false and calumnious, and were maliciously inserted in the said paper, to the loss, injury, and damage of the pursuers, or either of them ? ”

No issue in justification was taken.

The trial resulted in a verdict which found for the defender, in so far as regarded any claim of damages at the instance of William Brodie, but, for the pursuer, in so far as regarded the claim of damages at the instance of Mrs Brodie, whose damages were assessed at £200.

A bill of exceptions was presented at the instance of the defender, which set forth, inter alia, that “ the counsel for the defender, to sustain and prove his case under the said issue, did propose (on the

nomination of Robert Howie, a witness adduced on the part of the pursuer) to prove by the said Robert Howie, and by witnesses to be adduced on the part of the defender, that, previous to the date of any alleged slander or defamation on the part of the defender, it was current-
 Jan. 1
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 Blair
 reported in the country that the pursuer had attempted to have carnal connexion with his father's servant girl, and had attempted to knock her down because she resisted, and that this came to the ears of his wife afterwards; and also that the pursuer had accused his wife with being unchaste with one of his servant-men, and that quarrels between them had in consequence occurred; and that this also had been currently reported in the country before the date of any alleged slander or defamation by the defender. But the counsel for the pursuer did object to the proposed evidence on the part of the defender being adduced or received as competent or admissible evidence in the cause, in respect that the defender had taken no issue in justification, and that the evidence proposed could not meet the allegation of malice. The counsel for the defender, however, did insist that the said proposed evidence was competent and admissible, and ought to be allowed and received; but the said Lord President did sustain the objection preferred by the counsel for the pursuer, and did refuse to allow the said proposed evidence to be adduced, on the ground, that this is not an averment of general bad character, which may be admissible in a case of defamation with a view to mitigation of damages, but an averment of a general report of a specific fact, which is not admissible in evidence, unless there had been a plea in justification founded on that fact. Whereupon the said counsel for the said defender did then and there, on behalf of the said defender, except to the said opinion of the said Lord President, and did tender his exception accordingly. And thereafter, at the said trial, the said Lord President, directing the jury, gave it as his opinion and charge to the jury, in point of law, that 'neither the pursuer nor defender could be called upon to prove, as a matter of fact, that his adversary either believed, or did not believe, any averment made by him in his judicial pleadings: That belief was in the mind which could be known only to the man himself, and to God Almighty, unless the man had confessed his belief or disbelief: That whether the party believed it or not, must be left to the jury to infer from the whole circumstances of the case, such as the very nature of the words or fact averred; the way and manner in which they were spoken or written; the occasion and place, when and where, and the pertinency to the cause in hand; and that the paragraph libelled was quite irrelevant to the defender's defence in the action before the court, especially that part of it relating to the alleged misconduct of the pursuer.' Whereupon the counsel for the said defender did except to the said opinion and direction of the said Lord President, and contended, *the relevancy of the statements in the paragraph libelled is a question for the consideration of the jury, but the defender's disbelief in their*

No. 94. truth or relevancy, and that the Lord President should have told the jury, that it was necessary for the pursuer to prove that the defender disbelieved the truth and relevancy of the statements in his judicial pleadings before the Sheriff, and should not have directed the jury that the paragraph libelled was irrelevant to the defence in the action before the Sheriff. But the Lord President left the case to the jury with the directions aforesaid."

n. 20, 1836.
Brodie v.
Blair.

Pleaded by Blair in support of the Bill—

1. He should have been allowed to prove the pre-existence and currency of the report in question, because such a report was an important ingredient in the question, whether malice was proved against him in making the defamatory statement. And every fact or circumstance tending to rebut malice, was important to his defence. He ought also to have been allowed to prove the fact of the accusation. But, separately, he had a right to adduce such proof, in order to mitigate damages; and no issue in justification was requisite to allow him to lead such evidence. It was common, in jury trials, to allow such proof, without any issue in justification being taken.¹

2. It was enough for Blair if he merely believed that the statements judicially made, were pertinent. He might do this, whether they were de facto pertinent or not; and the jury should have been expressly told that, unless they held it proved that he did not believe the pertinency of the statements, they could not find against him, as he was otherwise within the privilege allowed to litigants, and must be presumed not to have made the statements maliciously.²

Pleaded by Mrs Brodie—

1. It was solely the proof rejected, in reference to Mrs Brodie, which were now in question, as the defender had obtained a verdict in his favour against William Brodie. But the offer, as against her, was just an offer to prove the veritas convicii. Mrs Brodie claimed damages, because Blair had stated that her husband had accused her of certain misconduct. Blair's offer of proof was just to establish the fact, that her husband had so accused her. This was an offer to prove the veritas convicii; and such proof was inadmissible, where no plea in justification was taken.

2. The charge of the presiding judge had been correctly given, and was not impeachable.

LORD GILLIES.—I am clearly of opinion that this bill of exceptions ought to be refused. The first ground which is pleaded is, that proof was rejected which ought to have been received. But the nature of the action in the sheriff-court should be attended to, in order to observe the circumstances out of which the action arose. William Brodie was the only pursuer in the sheriff-court: his wife had nothing to do with the action whatever. He raised an action of damages for

¹ Scot, 2 Murr. 486; Dougal, July 22, 1833 (ante, XI. 1026).

² Gilchrist, Sept. 10, 1823; Borthwick on Libel, 439.

y one believe it to be pertinent? NOW THIS BILL STATES, THAT DAIR OFFERED
"that the pursuer (Brodie) had accused his wife with being too gracious
of his servant-men, and that quarrels between them had, in consequence,
l; and that this had also been currently reported in the country before
of any alleged slander or defamation by the defender." The bill com-
at this proof was disallowed. But the offer to prove the fact, that the
on was made, was substantially an offer to prove the veritas convicii.
tedly the addition is made, that a proof of the currency of the report was
red; but still that was on the footing, that the fact of the accusation
been made was true, and that the report was well founded. I conceive,
e, that the offer of proof was rightly repelled.

gard to the charge by the Lord President, his Lordship told the jury,
: statements affecting Mrs Brodie were not pertinent to the cause. I am
ntified that they were not pertinent; and I hold, that it was within the
s of the judge to decide on the relevancy, and to instruct the jury on that

As to the rest, the Lord President left it with the jury to decide; and
lar that there is no ground for excepting against the charge which was

o BALGRAY.—I am of the same opinion. I think the bill should be

o MACKENZIE.—I concur. At first, I thought the offer to prove the cur-
f the report regarding the husband's accusation of the wife was something
etached from the veritas convicii, and distinct from it; but, on re-con-
; the case, I am satisfied that the offer of proof was to establish the fact,
e accusation was made, which was the convicium; and moreover, that
een currently reported. I do not think such a proof was admissible.

o PRESIDENT.—I concur in the opinions now expressed, and would only
at I cannot conceive how it could enter into the mind of any human being

No. 95.

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 n. 20, 1836
 Anstruther v.
 Anstruther.

SIR WINDHAM CARMICHAEL ANSTRUTHER, Bart.—*Rutherford—Anderson.*

MRS MARIAN ANSTRUTHER and HUSBAND.—*D. F. Hope—Keay—H. Bruce.*
 Competing.

Heir and Executor—Collation—Entail.—The heir-male and of line of a party deceased, being one of his nearest of kin, having succeeded in the character of heir-male to certain entailed estates, in which the deceased had been infeft under entail executed by a predecessor in favour of heirs-male—Held, on remit from the House of Lords, not entitled to claim a share of the execury, without collating his life interest in the entailed estates.

n. 20, 1836.
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 Division.
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THE facts of this case are detailed in the report, ante, XII. 140, which see. Against the decision there mentioned (23th November, 1833), Sir Windham Anstruther appealed to the House of Lords, who (15th April 1835) remitted the cause, with an instruction to have the matter of law in question heard before the whole Judges.*

* The Lord Chancellor (Brougham), on remitting the cause, made the following observations, which were frequently referred to in the subsequent pleadings and opinions:—

“ My Lords, I stated, when this case was argued this morning, that as the Little Gilmour case had been decided in 1809 by one branch of the Court without the concurrence of the other, and as the present decision had been pronounced only by one of the Divisions, without consulting the other Judges, it would be highly expedient to have so highly important a doctrine as is involved in the question finally established, after it should have been submitted to the whole Court. This was at once acceded to by the learned counsel for the respondents. The consequence was that your Lordships did not continue to hear the argument. Many doubts had suggested themselves to my mind, that I stated at two o'clock my wish for an opportunity of entering at some length into a statement of the difficulties, in order that a clearer view might be taken below, and a more satisfactory result might be obtained from remitting the cause. I added, that it was very desirable that any statement I might make should be put in an authentic form, and that I should therefore prefer adjourning for two hours, in order to have an opportunity of reducing my observations to writing. I have now endeavoured to do so, as well as the shortness of the time would enable me. I shall read to your Lordships the grounds on which I propose this case shall be remitted, stating, at the same time, that as I have not had an opportunity of looking into the case before this morning, and as my noble and learned friend, the Lord Chief Justice, who heard but a small portion of the case yesterday, had no opportunity of referring to cases cited, it is very possible that I may have overlooked some material points.

“ My Lords, the present question, confessedly one of great importance, and which I regard the difficulty as not inconsiderable, arises out of that provision of the Scotch law, which enables the heir, who but for his inheriting the real estate of his ancestor, would have taken a share in the personal property among the nearest of kin, to take that share as one of the children, or other heirs in *mobilibus* at election, but only upon paying the price, by bringing in his inheritance as part of the whole fund or succession, and letting it be divided with the heirs in *mobilibus*.

ntago were he confined in all cases to the real estate, an option or
on him, by which he may be no worse off than the other next of kin,
ll not be better off than they if he elects to interfere with their fund ;
et let them share his land if he is to share their gear. Nothing can
ore just or fair than this fundamental principle upon which the doc-
on rests, always assuming it to be right that the heir should have the
regards real estate—a preference which excludes the other next of
lection as against him—while it gives him his option as against them.
ce rests upon feudal principles, and may be unjust in itself, but upon
n undeniable equity is grafted.

table view of the subject which gave rise to this doctrine has been
as to require an heir claiming his share of personalty to collate even
which he succeeds in another country. This point was first con-
7, in the case of *Robertson v. Macvean* (in the Faculty Collection),
urt, after two opposite judgments by two Lords Ordinary (Lord
ord Alloway), held it clear that a party claiming legitim in Scotland
the Jamaica estate to which he had succeeded from the same intestate
the moveables. This seems to be a considerable stretch of the prin-
as admitted to be then first decided. Would it not follow from the
ognised, that if a youngest child in Scotland succeeded to lands of
'Borough English,' in Middlesex, he must bring those lands into the
before he could take his legitim or legal provision? For though
lty he is a younger child, yet in England, where the land lies, he is

He is heir here as much as Robertson was in Jamaica, for heir is
and does not denote one child more than another. Does not this
culty of holding that land situated in a foreign country, and dealt
ending according to a foreign law, is to be regarded as if it were
trol of the Scotch law?

tanding this rigour, however, in applying the principle, and making
the price, it never was contended that equality is to be worked out
next of kin at all hazards, and that whatever the heir has, and how-
ve come to him, he must bring it into the common stock. The real
to him from the father, or other ancestor whose personal property
is all that he can be required to collate; and I presume, upon a

No. 95. This is now to be considered as an open question, and one decided on principle. When the heir of line is also one of the nearest heirs, he is not excluded from his right to share in the moveable estate.

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20, 1836.
Cruther v.
Cruther.

the last heir of tailzie, could in no way be either helped or hurt by any predecessor could do, and takes as regards him, by a title altogether as if he had received the estate from a stranger, in which case it must be a question at all could have arisen upon collation, whether the estate were or not? It may, indeed, be said, that the ancestor's presumed will as to the personalty is here the ground of requiring collation to be made by the heir. But why is there more presumed intention in this case than in the last, namely, that of a tailzied estate coming to the heir through the last ancestor of the personalty, and coming by the fact of his decease? Surely he must be supposed to have had this advancement in fortune also in his eye, and it must be that had he thought the heir would claim on the gear, he would have willed to the younger branches, because he knew full well, that the same event would take the goods and chattels to them left the land to the eldest branch. At the same argument from presumed intention would apply to the case of coming from a mere stranger, but which the immediate ancestor, owning the gear, knew would so descend upon and provide for his heir.

"The next difficulty which I have felt is akin to the former. It is undoubtedly laid down, that an estate coming to one, though by conveyance, be collated, provided it be such, as but for the conveyance or destination at all events have come to the heir, the estate to which he was *alioqui successurus*. Now, granting that this is settled in the case of one taking the fee by conveyance to which he would have succeeded at any rate by descent, and granting the more general proposition, that whatever interest, whether fee-simple or any other more restricted interest a person takes by singular title, he must provide he would have taken it by inheritance, in the event of no succession having ever been made in his favour, still I do not see that this principle, and it is a pretty large one, can cover the case of a person taking, under a will or as heir of tailzie, an estate, which, but for there having been a tailzie, he would have taken as heir-at-law. We seem here to be confounding two very different things. We suppose the capacity of heir of tailzie to be lost and merged in the capacity of heir of line, because the same individual happens to be clothed with two different characters; and we also suppose, that because the estate which is tailzied, would have descended upon the heir as heir of line, therefore the same tailzied estate is in the same person in two different capacities; in other words, that he takes in one way only what he would have taken in another had there been no entail to interfere with the succession. If this were true, no doubt the principle of collation would apply, and all the arguments which can be urged for it would exist here; but it is neither true, nor like the truth. The heir of tailzie, as such, may be the same person who would be heir of line; but as regards the estate tailzied, he stands in a perfectly different position from the estate tailzied, and which he enjoys under the entail, is not at all what he would have taken by succession. By succession he would have taken the fee-simple with all its incidents, the absolute liberty of enjoyment and disposal during his life, and leaving it after his death. By the tailzie, he only takes the estate tied up in every way, both as to enjoyment and as to succession, from one who might have given it as he chose. He takes the estate from one who was himself tied up, supposing him to be only heir of line. He takes the fee from the immediate ancestor: he takes the tailzied estate from some one else; admitting that he must collate whether he takes that estate or not, he was *alioqui successurus*. He was not *alioqui successurus* to the same estate as he took under the entail, but to another and to a very different thing. He takes a tailzied fee by entail, and he would have taken a fee-simple by succession. That the doctrine upon the ground of *alioqui successurus*, when so applied, does not appear at all to decide the question.

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A subtle kind of argument appears to be raised in order to meet this difficulty. It is said, that the heir of tailzie takes a portion of the fee which he would have succeeded to, and that this portion being common to both his ~~of~~ heir of tailzie and heir of line, he must collate to that extent as *alioqui* as. Thus, it is considered, that he was *alioqui successurus* to a thing of two parts, the life-rent and the fee; that by the tailzie he takes one part, the life-rent, and that therefore he must, as *alioqui successurus*, collate the fee. Now, though I will not deny the force of this observation, I must express my repugnance to the doctrine of a Scotch entail, for it rather resembles, closely, our English doctrine of remainders and particular estates. A tail is a succession of fees to be successively enjoyed, not a carving out of a fee or interest into a number of portions to be vested immediately, but successively enjoyed, and therefore, consistently with that Scotch law doctrine, I can hardly hold that the heir was *alioqui successurus*, unless the kind of fee which he took under the tailzie was exactly the same with that which he would have taken by inheritance. Perhaps, indeed, the best support of the proposition, and of the case of *Little Gilmour*, is to be found in the principle of the law of tailzie taking a fee, only restricted in so far as it is tied up. But, the heir takes not a fee-simple to which he is *alioqui successurus*, but a fee-tail, he never could have by inheritance succeeded at all.

We now consider shortly the case of an heir of tailzie under a simple descent, holding by a tailzie without the fencing clauses. He takes no fee, not a fee-simple, nor any thing like it, but a *feodum talliatum*, as both the law of England and of Scotland term it, a fee-tail. He is not validly prohibited from converting it into a fee-simple, as in England, by fine and the conveyances substituted of late for that proceeding. So in Scotland, by conveyance he may convert his right into a fee; or in Scotland he may, without any such process, validly deal with it as a fee in most particulars; but he does so—until he suffers a recovery here, or otherwise affects it in such a way, that is, so long as he does nothing but enjoy it, he has only a fee-tail. When he is called upon (and this I beg to press particularly), shall he be required to collate the whole corpus of this estate, or only the portion which

No. 95. with the rest in the event of the deceased leaving no heritage descendible to the heir-at-law, and if there be only one party who is both heir-at-law and next of kin, he takes the real as well as the personal property of the

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tion will bear very materially upon the principle of these cases; I ask, what is he to collate? The estate tail, such as he has made it, or the estate tail, such as he received it from his ancestor, or through his ancestor, the owner of the fund? This is a question of some nicety, and I do not see how it is to be dealt with upon the principles which have governed the decision in these cases. For surely it would be going a great way to hold, that he must collate not only what he got under the entail, but what he made of that since he came to it, and which no power on earth would have compelled him to make of it, namely, a fee-simple.

"Again, what shall be said of one who takes an estate by purchase for a valuable consideration? Suppose the heir buys the estate to which he was *alioqui successurus*—it is agreed on all hands that he is not to collate that, and yet how can an heir of tailzie, in contemplation of law, be said to be other than a purchaser? But the value given is said to make the difference. Value, however, in law, is not merely money had, or land changed. Marriage is just as binding a consideration, and a consideration just as valid to exclude the claims of subsequent heirs or onerous creditors, as money price. Then, suppose the heirs of tailzie and provision to take, under a marriage contract, estates to which they were *alioqui successuri*, why are they to collate more than heirs who gave value in money? They may not have given the consideration themselves, but their parents, or other ancestors, who contracted the marriage, upon the faith of this settlement, gave value, executed the highest and most binding consideration known to the law. We may put a case of everyday's occurrence, a settlement by which the father, on his son's marriage, makes him heir of tailzie and provision, failing himself. Then the son must collate this, though he has given just as high, if not a higher consideration, than if he had paid a sum of money, in respect of which his father had executed an entail, making him the disponee and institute. It is admitted on all hands that he is not to collate if the father sells him an estate, though, as eldest son and heir-at-law, he was *alioqui successurus*. Then, how is he bound to collate that which he takes by marriage contract, being made the disponee in consideration of his intended marriage?

"My Lords, I have stated these difficulties without pretending to say that they weigh against the decision under review, so as to make me think it erroneous. But they make me anxiously desire further light upon its principles than I can find in the reasons of the learned Judges by whom it was pronounced. Their Lordship rely entirely upon the *Little Gilmour* case, which is entitled to very great deference no doubt, both as having been most ably supported in argument, and as having now stood for above a quarter of a century unimpeached by decision, though how far approved, and how far acted on in practice, we are not informed. The able argument of Lord Meadowbank in that case, full on many points, does not give me the light I desiderate upon the points to which I have adverted, and which I deem the main difficulties that encumber this question, nor can I close my eyes to the manner in which a very high authority, Mr Erskine, treats the subject. Though he gives no very explicit opinion upon the general question, and refers chiefly to the case of their being heir-portioners, one of whom is made an heir of tailzie, and to the decision of *Riccart v. Riccart*, in 1720, yet he so expresses himself as to leave no manner of doubt in my mind that the rule in the *Little Gilmour* case would have been to him a great surprise. Lord Meadowbank, in his able ingenious argument on that case of *Riccart v. Riccart*, does in no way meet the authority of Mr Erskine, nor the reason assigned by the learned commentator for that decision, namely, that the heir-portioner succeeding to the heritage by the father's entail or destination takes from one having full power over that heritage as well as over the moveables—a reason just as applicable to the case upon whom the father entails lands to which he was *alioqui successurus*.

"It is certain that the learned Judges have stated the *Little Gilmour* case

different interest—he cannot dispose of it by his voluntary deeds, and creditors cannot attach it for his debts, which of all others is the best of property.

Heritage which a party is bound to collate is that which he takes of line, and this obligation cannot be defeated by his taking one *hæreditatis* or making up titles as a singular successor, *e. g.* collation on a trust bond, provided always the estate he so takes is such in the ordinary course of legal descent, and in the usual form of letting titles, he would have succeeded to as heir of line. But if he thus disregards the form and looks to the substance of the thing, he makes against the interest of the heir, it ought by parity of reason to look to the substance rather than the form in a case where this happens to tell in favour of the heir. Now although, according to forms, an heir of entail, who is also heir of line, takes the estate from his immediate ancestor, yet in substance and reality he takes not from the ancestor, but independent of him, under the deed, and by virtue of the right under which all the heirs of entail claim in common. The ancestor can do nothing by which he can be either helped or

maintain only the same law with former decisions. I have examined those older decisions without being able to satisfy myself clearly and fully that it is so. The case of *Gray v. Murray*, in 1678, comes the nearest to it without touching it, while the case of *Rae Crawford v. Stewart* is far from going to that extent in my apprehension.

As for the *Scotsbaronet* case, that goes much further, if we take it to its full extent, and further than I conceive any one would think of holding to be law, it states the position that there is collation wherever the heir takes, whether

No. 95. hurt. He incurs no representation, either active or passive, to the son last infest. He succeeds in virtue of a *jus crediti*, and that to he succeeds is in point of fact a mere *liferent* interest. If this question then, is to be decided on popular principles, as was laid down in the Little Gilmour case, the equitable view is clearly against the collation of such an estate.

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But, even looking to the form of the titles, the party necessarily takes up the succession as heir of tailzie, in which character that of heir of provision is sunk. In their legal effects, especially in reference to the personal liability for the ancestor's debts, these two characters are perfectly distinct, and it seems contrary to legal principle to make a man, becoming heir of provision, take a particular estate in one character, subject to an obligation which is attached to another and inconsistent character.

On another view, the heir of entail, whether he be of line or not, takes the estate *provisione hominis et per formam doni*. He comes to the estate as a stranger, and as the creature of the will of the original entailor, to whom he receives the inheritance as a gift. Even where the entail is taken from the immediate ancestor, the circumstance of an heir-portioner taking by deed of provision an estate, to part of which she was heir *alioquin*, entitles the heir to share in the moveable estate without collation. A fortiori must the heir be so entitled, when he takes by the deed of a remote ancestor; since the property which a man receives, not from the deceased, but by the gift of a third person, he can never be bound to collate.

Farther, according to the view of the defender, the heir is required to collate a fee under strict entail, which implies alienation to the extent of the fee, and thus renders collation impossible without exposing the heir to a manifest risk of incurring an irritancy. But this is a state of things which is to be presumed to have been anticipated by the law, which has provided a remedy for the heir.

For Mrs Anstruther it was pleaded,—

The moveable succession is the fund intended by law for the support of the children, and the heir's exclusion from it is a fundamental principle of the law;¹ collation having been introduced as the sole condition on which he was to share in it. It matters not in what character the heir takes the heritable estate; an heir of provision, taking by singular titles, is bound to collate as well as an heir of line.² In the case of a tailzied fee, coming to the estate in the form of a simple destination, which has been transmitted through several descents, the heir is likewise bound to collate.³ So, an heir

¹ Rickart, Nov. 19, 1720 (Mor. 2378).

² Erskine, III., 9, 19, and 26; Stair, III., 8, 53; Mackenzie, III., 8, 10; Lord Nisbet's Opinion in Little Gilmour, *supra*.

³ Murray v. Murray, July 23, 1678 (Mor. 2374); Baillie, Feb. 23, 1609 (F. 1609).

⁴ Little Gilmour, *supra*, where this is admitted.

by, in virtue of the personal obligation on the heir, but is invalid as
there; and the estate remains the absolute property of the holder,
as if it were an estate in fee simple. An heir taking under such
will would unquestionably be bound to collate; from which it follows
necessary consequence, that down to the date of the statute 1685,
introduced the solemnity of recording, every heir of entail, just as
as an heir in fee-simple, must have been liable to collation. Now,
nothing which can lead us to infer that this statute intended to
upon the heir, as in competition with the younger children, any
in the moveable succession beyond what had previously belonged
2 But, unless it did so, the situation of an heir under a strict entail
is precisely what it was, under the previously existing forms of en-
In other words, the act 1685 left the heir exactly in the same posi-
which he had stood under the most ancient state of the feudal law
country, when the incapacity under which the vassal lay of alien-
the subject of the feu, without the consent of his superior, operated
nentially the very same restraints which are in our days the result of
tection afforded to entails by the statute.³
argument of the pursuer is founded upon certain vague analogies,
form a very unsatisfactory basis for a legal discussion. Thus, it is
that an entail presents nothing but a succession of liferents; to which
answer is, that an heir of entail is fiar, not liferenter. Again, it is
stated, that an heir of entail takes in virtue of his peculiar jus cre-
as a creditor or singular successor, not as an heir: but this rests on
dent fallacy; for, although the heirs of entail might, perhaps, be
said to be creditors in the burden which is laid upon the fee, they

No. 95. present, the Court is guided in most instances solely by the form in which the titles are made up, sometimes apparently against the substantial justice of the case.¹

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The heir of entail is bound to collate, in respect that the estate he takes is radically and substantially, not less than formally, an estate the same in genera with that which is held in fee-simple; being a fee of inheritance,—which constitutes each successive heir the absolute proprietor of the lands, in every particular to which the fetters of the tailzie do not expressly reach.² The whole ground of distinction between the heir under a strict entail, and any other heir, consists simply in the estate's being subjected to greater burdens, and consequently in the heir of entail possessing, qua proprietor, more limited powers in the exercise of its right. The investiture, which carries the radical right of property, carries to each successive heir of entail the plenum dominium of the estate which is affected by the burdens. Thus, an heir of entail may receive and enter vassals, and exercise all the other functions of superiority, which is beyond the powers of a liferenter or mere creditor in possession. Unless there be the most express declaration in the deed to the contrary, the widow of an heir of entail is entitled to her legal provision, as from the property in which her husband was seised.³ An act of treason on the part of an heir of entail forfeits the estate, not merely during his own life, but during “the continuance of such male issue of his body as would have been inheritable to the estate, in case he had not been attainted.”⁴ The existence of this radical right is assumed in those cases where a distinction is taken between the institutes and substitutes in an entail.⁵ If the heir under a strict entail contract debt, the debt will in itself be good both against his successors and the estate, unless the statutory means be followed out to reduce and set it aside; the debt is not void but merely voidable. And in the case of provisions to widows and younger children, and leases beyond the granter's life, and feus, the heir is not unfrequently left free to incur debt and grant deeds affecting the estate, and obligatory on his successors, without committing any contravention. It is only by force of the inherent right of property existing in the heir of entail, and by the operation of the ordinary rule of law, which entitles every proprietor to deal with his own estate, that the relative position, in this particular, of the heir and the substitutes is to be accounted for. On this

¹ Law, April 24, 1554 (Balfour); Stewart v. M'Naughton, Dec. 2, 1824 (ante, III., No. 253); Spalding, supra; Russell, supra.

² Erskine, III., 8, 29; Stair, IV., 18, 6; Bankton, v. 1, p. 587; Mackenzie, III., 8, 17; Kaimes' Elucid., Art. 42, p. 345.

³ Cant, Dec. 27, 1726 (Mor. 15554); Ersk., III., 8, 30.

⁴ Case of Sir William Gordon of Park, as reversed in House of Lords (see Kaimes' Elucidations, 42).

⁵ Lesly, Elchies, Tailzie, 49; Erskines v. Hay, Feb. 14, 1758 (Mor. 4406); Edmondstone of Duntreath (Interlocutor of House of Lords, Mor. 4409).

1540, c. 106, and 1601, c. 27, providing for the enforcing of
heirs and their ancestors, by means of a charge to enter
been found to apply to heirs of entail, on the principle, that
ows no distinction between them and any other class of heirs.⁵
e estate is attachable for the debts of the existing heir of entail,
lifetime, in so far as the diligence shall not interfere with the
f the substitutes, as expressly secured by the deed; but, for
e, the fee of the estate must be adjudged, and any attempt to
existing heir's interest as a mere life interest, is incom-

sulted Judges returned opinions as follows :—

PRESIDENT, BALGRAY, GILLIES, MACKENZIE, COREHOUSE, and
N.—“ The question remitted by the House of Lords for the recon-
f this Court is, Whether the heir-at-law, taking the heritage of the
by succession, or, what is equivalent, *præceptione hæreditatis*, can
d to a share of the moveable estate, as one of the next of kin,
lating the heritable estate, when it is holden under the fetters of
ail? This question, occurring in the simplest and most abstract
ecided in the negative by an unanimous judgment of the Second Di-
he Court, in the case of *Little Gilmour*, December, 13, 1809,—a
hich has ever since been considered and acted upon as having settled
but, in pursuance of the remit, it is proper, in the first instance, to
lgment out of view.

ink it unnecessary to engage in any inquiry as to the origin of the
tion between heir and executor, at what period, or on what account it
aced, and, in particular, whether it arose from the collision of the

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with regard to it; and we should not have known that the privilege of collation existed before that time, had it not been for a single decision in 1555, short noticed by Maitland and Balfour. Instead of resorting to conjectural history therefore, for a principle to guide us in this case it is safer to confine our attention to the rules laid down by our institutional authors of acknowledged authority, or expressly sanctioned by the decisions of this Court.

“ With regard to the persons who are entitled or bound to collate, the following propositions are indisputably established :—

“ 1. If the heir-at-law claim a share of the moveable estate as one of the next of kin, he is bound to collate the heritage. This is the general and fundamental rule.

“ 2. If the heir-at-law is himself next of kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

“ 3. In the case of heirs-portioners being themselves exclusively next of kin there cannot be collation, for they are all heirs, and all executors.

“ 4. Heirs-portioners being in the same degree of kindred with others, and heirs-portioners, the former claiming a share of the moveables, are bound to collate with the latter.

“ 5. One of the next of kin, not being heir-at-law, may take his share of the moveables, and is not bound to collate, though he should succeed to the whole heritable estate by destination.

“ 6. The heir-at-law, not being one of the next of kin, is not entitled to collate.

“ Proceeding next to the subject of collation, it is established on similar authority, that the heir who shares the moveables, and who is bound to collate, must collate the heritage vested in the predecessor, and transmissible by succession; and therefore, conversely, that he is not bound to collate what is not heritage, what is not vested, and what is not so transmissible. The rule is laid down to this effect, and in unqualified terms, by all the text writers; and none of them is there an allusion to any distinction arising from the subject being holden under a destination or under no destination; and if under a destination, from the nature of the destination, as whether it be to heirs whatsoever, to heirs-male, to heirs of tailzie, to heirs of provision, or to heirs of a marriage. If any such distinction existed, it was unknown to Stair, to Stewart, to Erskine, and to Erskine; for, if it had been known to them, it was too important to have remained unnoticed.

“ Let us consider, then, the grounds on which the appellant contends that the estate now in question, which was heritage vested in the person of the deceased and which has passed to the appellant by succession, should be exempted from the general rule, to which none of the text writers knew of any exception.

“ In an early stage of the cause, the appellant maintained, that collation had place only in the case of intestate succession, understanding by that term, he thought, what the heir succeeds to by the act of the law, independently of any deed or conveyance executed by the defunct or his predecessors. That position is plainly erroneous, and is now admitted to be so. He is bound to collate, without distinction, property which has not been made the subject of destination, whether by heirship moveables, a personal right to land under a minute of sale and

erty which is holden under the most express destination in the investiture, thus he must collate an estate conveyed by the defunct to himself and his heirs, or to himself, whom failing, to his eldest son nominatim, or to his heirs of his body; whom failing, his heirs whatsoever. If the collation of a feudal investiture in the ancestor, containing a destination, were collation, there are few estates in Scotland which would not be exempted.

The distinction between intestate succession and succession by destination is therefore plainly untenable.

Thereafter, the appellant's argument took a different form, and it was maintained that the subject of collation is that to which the heir succeeds in the case of heir-at-law exclusively, or that which it is said he inherits in fee.

Some misapprehension seems to have arisen here from the use of an ambiguous term. In the law of Scotland, 'fee-simple' has two significations. Sometimes it means a fee destined to heirs-at-law, in opposition to a tailzie; for example, a fee taken to heirs-male, heirs of a marriage, or other heirs of the blood. Sometimes it means an absolute fee, in contradistinction to a limited fee, that is, a fee holden under conditions or fetters. If the term is employed in the latter sense, it is inconceivable how it should form the ground of any distinction in the question of collation. Whether the eldest son, for example, takes an estate being an absolute fee, as heir-at-law of his father, or as heir-male of his father, his situation in reference to that estate, and his rights over it, are identical. In either case, the investiture may have been framed by the father himself, or it may have been framed by an ancestor more remote; but in both it is collation to whom he succeeds, and to whom he must enter heir. His powers and liabilities, after he has entered, are the same in both; he may gift, he may burden, he may alter the investiture at his pleasure, and by the same means. In both he takes by an universal, and not a singular title, and both the effects of his representation are the same. It is not necessary, as it is in England, to convert the fee-tail by fine and recovery, or by any other means, into a fee-simple, that the heir may enlarge his powers over it; it is possible for him to enlarge his powers by any such act. If he dies without having enlarged it otherwise, it goes to his heir-male, just as if he dies without having enlarged a fee-simple, otherwise it goes to his heir of line, or his heir of consanguinity, as the case may be. He cannot alter the succession of the tailzied fee on the one hand, but neither can he alter the succession of the fee-simple. Then, why should he not collate what he takes by the force of an investiture, in the one case as in the other; the thing which he has taken being absolutely the same, the use, disposal, liability, and every other conceivable attribute of ownership being the same whether the fee is tailzied to a man and the heirs of his body alone, or to a hundred extraneous substitutes in the male line, or what is said of a tailzie to heirs-male applies to every other species of destination being unfettered, and the heir-general succeeding under the same conditions, for example, a tailzie to heirs whatsoever, excluding heirs-portioners, to the heirs of a particular marriage, excluding other children, or, what is intended by the law of Scotland, a tailzie to a series of individuals, excluding the heirs of every one of them.

A tailzied fee, unfettered, is indisputably a fee-simple as to every right of disposal, and as to the heir, so it presents as little difficulty in applying the rules of collation to heirs whatsoever. Thus, if the heir of a tailzie succeeds to the fee, no conveyance, nor any other act on

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his part, is requisite to enable the next of kin to obtain a share of this estate. Though he refuses to execute a disposition, by simply taking a part of the executry, he incurs a debt to them, which they may render effectual by a decree of constitution, and a charge to enter, followed by an adjudication. It may be argued, that the very same steps would be necessary on the part of the executors of the estate, instead of being destined to heirs of tailzie, were destined to heirs whatsoever, and if the heir, with the view to avoid collation, should refuse to make up titles, and to dispone.

“ But it is needless to enlarge upon this point, which seems to have created some difficulty in the House of Lords, because it is distinctly abandoned by the appellant himself. He admits, that whatever is the form of the title—whether the investiture stands to heirs whatsoever, or whether it contains a special designation to heirs of provision—yet, if the deceased had the full power of disposal of it during his life, it must be collated. ‘ Where the deceased,’ he observes, ‘ has held an estate in fee-simple, and over which, during his life, he had the full power of disposal, the heir-at-law must collate it, though the investiture may have been one of special destination, instead of leaving the succession to be regulated by the mere operation of law. But this peculiarity, namely, where the heir-at-law must take in form, as an heir of provision, an estate which the ancestor held in fee-simple, and which, without adverting to the particular form of the investiture, he has allowed to descend to his heir-at-law, is just one example of the more general rule, that the form of the title makes nothing against the truth of the case, and the rights of parties thence arising.’¹ This is in some measure to reverse the argument, as it was put at first, holding that the subject of collation is the heritage which does not descend ab intestato to the heir, but which he takes in virtue either of the express or implied will of the deceased. If the deceased has made an unfettered investiture, under which his heir-general takes in the first instance, it is admitted to be of no moment whether that investiture be conceived in favour of heirs-general, or heirs of tailzie or provision. And, in like manner, if he allows an investiture made by a remoter ancestor to remain unaltered, when he had the power of altering it, which gives the estate, in the first instance, to his heir of line, this is said to be equivalent to a donation by himself to his heir of line, it being the indirect expression of his will to that effect. The admission is very material; it discards from the argument all pleas resting on the form of the destination, as whether it is simple or tailzie, and on the circumstance whether it was framed by the deceased or by a remoter ancestor; and puts the case on the point, whether the deceased had, or had not the power of disposing of the property, which on his death has devolved on his heir-at-law as in his right. Stating the question in this general and abstract form, it is plain that it must be answered unfavourably for the appellant. There are many well-known instances in which the deceased has no power to alter the investiture, whether standing to heirs-general or heirs of tailzie, in which collation undoubtedly takes place. The investiture may have been framed by a remoter ancestor; and the deceased, who succeeded and made up his titles, may have died in minority, or he may have been insane from the time he succeeded till his death, or he may have succeeded while he was on deathbed. In all the

¹ Appellant's case, p. 7.

collated. It is in vain, therefore, to contend that the criterion of collation is whether the estate was, or was not, taken by the express or implied ancestor.

Some preliminary observations have been thought necessary to clear the ground of such irrelevant matter which has been introduced into it, and to raise the question of law on which parties are properly at issue, namely, Whether the question are not subject to collation, because they are not absolute but relative? If the case of Little Gilmour is not to be held a precedent, this requires very careful consideration.

The general rule of law, as already stated, being, that all heritage in the hands of the deceased is subject to collation, and that rule being laid down by authority, without qualification or exception, it is incumbent on the appellant to show why the lands in question, which, though strictly entailed, were in the person of the deceased, should not fall under it. He attempts to do so on various grounds. First, he maintains that heritage, in the sense of the law, is heritable property; but that an estate holden under the fetters of entail is not the heir's, because he has no power to alienate, burden, or otherwise dispose of it in order of succession. The criterion of ownership, he says, 'is the right of the estate for the proprietor's debts;' and, as the heir in possession of an entailed estate cannot affect it with his debts, therefore it cannot be collated to his estate.

There is one point undoubtedly settled in the feudal law of Scotland it is that the heir of an entailed estate, however strictly limited or fettered, as soon as he completes his titles, becomes the proprietor of that estate. Before he does so he is in the *hereditas jacens* of his predecessor. He takes it up by *reversion*, the mode by which feudal property is transmitted from the dead to the living; or by some equivalent form. The inquest declare that the predecessor died vested and seised as of fee, and that the claimant is the next heir,

No. 95. himself to the danger of forfeiting his right, that is, of being divested of the whole fee, which before was wholly in him. In the words of the revised case for the Marquis of Chandos, now at avizandum before the Second Division of the Court, 'The title by which the estate is held,—the powers which may be exercised in regard to it,—the legal provisions that are payable out of it,—the mode of constituting securities, whether legal or voluntary, over it,—its liabilities for the debts of apparent heirs,—the operation against it of the statutory certification on a charge to enter heir,—the application of the law of treason in regard to it,—and the manner by which it descends to, and the title by which it must be taken up by, the next successors; in not one of these particulars is there the shadow of distinction in point of principle between an estate held under the strictest entail, and the present instance of an estate in fee-simple. Both estates may be restricted and qualified in various respects by burdens, and there may be a certain degree of peculiarity in that special class of burdens which more immediately form the characteristic of an entailed estate. But in all that relates to the essence of the matter—in all that enters radically and fundamentally into the constitution of the estate itself, or in any respect touches the inherent character of the right and title of its proprietor, or of those succeeding to him, there is not so much as an iota of difference.'

"All this is so familiar to every one acquainted with the feudal law of Scotland, that the statement of it here may be thought superfluous, and the proof by authority or precedent would certainly be inexcusable.

"That the *jus disponendi*,—that is, the power to alienate or burden,—is not a part of ownership, is a point equally clear. On the contrary, it is excluded by the very definition of that right in the law of Scotland, as well as in that of Roman Property, says Erskine, 'is the right of using and disposing of a subject as one's own, except in so far as we are restrained by law or paction.'¹ And this is exactly the language of the civilians, who define dominium to be '*jus in re corporali, in quo facultas, de ea disponendi, eamque vindicandi, nascitur, nisi vel lex, vel conventio, obsistit.*'²

"In the case of a strict entail, there is a convention between the entailer who frames it, and the institute or heir who takes under it, that the latter shall not have power to alienate or contract debt,—that is, the entailer disposes it under these conditions, and the institute or heir, by his entry, accepts the estate under these conditions, and becomes bound to comply with them. This convention, express or tacit, is authorized and rendered effectual against third parties by the statute 1685, and consequently the right of the heir, notwithstanding the restrictions to which it is subject, comes under the express legal definition of the right of ownership.

"But the argument is put by the appellant in a form at first sight more plausible, and it is the ground on which he now chiefly, if not exclusively, relies. He says, granting that the heir of a strict entail, when entered, is the proprietor of the entailed estate, in point of form, and in correct legal language, nevertheless in substance and reality, he is nothing more than an usufructuary; in equity therefore, he ought not to be called on to collate his interest under the entail, on the same principle that he does not collate heritage, which, under the disposition

¹ Book II. tit. 2, sec. 1.

² Calvin, ad verba.

ly to the heir in the present case, on the same principles.

begin with the illustration—the appellant's inference would have had no force if the doctrine of præception had been introduced into the law of Scotland, the sole purpose of equalizing the interests of the heir and executor in the case of collation, for it might have then been considered as an interposition of a legal remedy to remedy the defect of the general and strict rule of law. But that is not the case. The doctrine of præceptio runs through the whole law of succession, whether of the real estate, or any part of it, is propelled by the ancestor during his life to his heir *alioqui successurus*, without a valuable consideration, the property so taken shall be accounted inheritance, and to a certain extent shall create a representation and liability for debt. The heir receives it by an universal, singular title. It constitutes a succession, and not a gift, and is not subject to a prohibition to alienate under which the ancestor may have been laid. In accordance, therefore, with this rule of universal application, and without any reference to equity in the particular case of collation, the heir must communicate the property he has taken præceptione.

The doctrine of præceptio, therefore, though affecting collation, as well as other departments of the law of succession, affords no analogy for holding a fee as equivalent to a life interest, though in some, but indeed in very few cases, they may be similar. In truth, the common law of feudal succession strongly resists the intervention of equity to temper or modify its rules. Thus, if a tenant dies infeft in lands, his sister-german succeeds; if he has omitted that relation, his brother consanguinean takes the estate. Thus, in the case of heirs-portioners, if one dies infeft, her sister-german is preferred to the other heirs-portioners, being consanguinean only. Thus, if an heir-portioner dies, leaving a child who dies uninfeft, his aunts, the other heirs-portioners, succeed; but if the child has been infeft, the estate does not go to them, but to the child's brother or sister consanguinean, if he has any, and if he has not, to his father, or failing him,

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and therefore capable, under the statute, of burdening the estate with his debt shall remain unentered, his eldest son and heir-at-law making up a title to the lands, may take a share of his moveables without collation ; but if he has passed a infeftment, his heir-at-law is bound to collate. It is in vain to say, that, in the one case, the defunct is proprietor of the estate, and, in the other, that he is not. This is true, but it is the very same circumstance which imposes the obligation on the heir of entail having completed his titles, and by so doing having rendered himself proprietor. If equity were to interpose to relieve the heir of entail, from collation, *è converso* it should interpose to make the successor of the apparent heir liable to that burden. A distinction resting on the naked ceremony of infeftment alone, ought not to be adhered to in the one case, and abandoned in the other.

“ So also, had equity been regarded, a younger son succeeding to the whole heritage of the defunct by destination, would at least have been equally bound with his elder brother, the heir of line, to collate. Here, in like manner, it is in vain to argue that there is an analogy between the younger son and the heir of entail, because they both inherit, not by the act of the law, but *provisione hominis*. It has been already observed, that although the heir-at-law takes an unlimited fee by a deed of provision not made by his immediate predecessor, who from circumstances might never have possessed the power of altering it, he is nevertheless bound to collate. The analogy, therefore, entirely fails, while the strict rule of law, contrary to every equitable view, bestows a privilege on the younger child which it withholds from the elder, the heir *alioqui successurus*.

“ Another illustration of the danger of resorting to equity may be found in the case of a grandson by the eldest son deceased representing his father, and coming into his place, who has not the privilege of collation which was competent to his father. Here the equity is so manifest, that even Mr Erskine was led to hazard an opinion, in the absence of precedent, that the grandson was entitled to the privilege ; but the Court soon after decided otherwise.

“ But even if equitable considerations were admissible, or, in the words of the appellant, ‘ if the substance and not the form of the right ’ were to be regarded, it would not avail him. The right of an heir in possession of an entailed estate is generically different from that of a liferenter, to which the appellant resorts for an analogy. When the heir of entail has completed his title, as already observed, he is *fiar* in every respect ; but no infeftment which the liferenter can take, or ceremony which he can perform, will vest a fee in him, or any thing of the nature of a fee. His powers are different from those of a *fiar*—his liabilities are different—his liferent is incommunicable *inter vivos*, and intransmissible by succession. In the language of the civilians, *inhæret ossibus usufructuarij*.

“ The appellant pleads, that, since it is conceded that the fee of an heir of entail is limited, on that ground alone he should be exempted from the burden of collation, which he assumes to exist in the case of absolute fees exclusively. But there is no ground for that assumption. The reverser, the wadsetter, the approprietor before the legal has expired, the owner of every other redeemable right, the *fiar* burdened with a liferent, or any other incumbrance, or with a clause of pre-emption, or an obligation of real warrandice, are all vested with limited fees ; not absolute proprietors, but subject to restrictions more or less extensive, according to the nature of their respective rights : Yet all these *fiars* are indisputably bound

to collate. Nay, it has been decided that a tenant under a lease for years, who, according to modern ideas, has no feudal fee in him at all, whose right is not only limited as to duration, but restricted to one among all the various uses of property, if he, being heir-at-law, take the lease by succession, is bound to throw it into the fund of division before he can obtain a share of the executry;—a decision resting on the general canon of the law of collation, so often referred to, the lease, though not a fee, being heritage in the person of the defunct.

Next, it is said that the heir of entail is not the heir of his predecessor who entered under it, but of the remoter ancestor who framed the entail, and that he does not take by legal succession, but *provisione hominis et secundum formam doni*; and then again, not very consistently, that he does not take as an heir at law, but as a purchaser, and by a singular title.

But an heir of entail does not enter by his service to the maker of the entail, as in the solitary case when the maker is his immediate predecessor. The Act of 1685 expressly declares that he shall serve himself heir to the heir who last infeft in the fee, and did not contravene, that is, whose right was not lost by forfeiture. By service, he necessarily becomes an universal, and not a singular successor; for it is a contradiction in terms to say that a right transferred by service is not a right of inheritance but a right by purchase. By his service he represents the deceased, to whom he succeeds in all his rights and all his obligations, in so far as those obligations are not prevented from attaching to him by the act of the law itself. In other words, he must fulfil every obligation of the deceased which is not prohibited and declared to be null by the entail, prohibition and irritancy which the statute has rendered effectual. He is not *ultra valorem* for obligations not prohibited, for the same reason that the heir of simple destination is not liable *ultra valorem*, if he enter *cum beneficio inventuræ* on a precept of *clare constat*. But under the protection of the statute, he is heir of the person last infeft; therefore, he does not take by a singular title. That he takes *provisione hominis et secundum formam doni*, is to say no more than that he takes in terms of the investiture, in the same manner as any whatsoever, or any other heir of a simple destination, takes in terms of investiture. The heir *alioqui successurus* succeeding, not by virtue of an inheritance to heirs whatsoever, not in the character of heir-at-law, but by virtue of a provision, by a service as heir of provision, *et secundum formam doni*, in his deed, is nevertheless bound, if unfettered, to collate. That was explicitly admitted in the case of Little Gilmour, and is as explicitly admitted here. The fetters of an entail create no distinction in this matter any more than an incumbrance on the fee, or any other limitation of the fiar's right, as we have satisfactorily shown, it is plain that the combination of these two, added with the groundless assumption that the heir in possession is the heir, not of his immediate predecessor, but of the maker of the entail, must be entirely wrong.

Great weight is laid by the appellant on another view of his case, presented by itself, and sometimes in support of the pleas which have been already cited. Granting, it is said, that the substitutes under a Scotch entail have no portion of it, vested in them, in which respect their situation differs from the remainder-man of an English fee-tail; still they

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have a right of credit to the estate, not feudal indeed, but personal, which entitles them to demand that the entail shall be recorded, to insist in declarators of irritancy, and to take other steps for enforcing the fetters; and that right is not derived from their predecessor, but conferred upon them directly by the entailer. Further, it is a right which is frequently not gratuitous, but purchased with a price; for example, the execution of the entail may have been stipulated in a marriage-contract, marriage being confessedly an onerous consideration. If the son purchase the estate from his father, or from a third party, for a sum of money, and obtain a disposition to it, he is not bound to collate it; and, therefore, by parity of reason, it is said he ought not to be required to collate in the case supposed. This view seems to have occasioned considerable difficulty in the House of Lords.

“ But the law of Scotland affords an obvious, and, it is thought, an invincible answer. The substitute, as already mentioned, has no right to the fee; his right is to succeed to the fee as an heir, and, therefore, under the obligations which attach to an heir. As a personal creditor, he is entitled to nothing, but to enforce the conditions of the grant; and unless he actually obtains a decree of irritancy, the heritage remains in the defunct, and as heritage, therefore, must be collated. A personal claim which the heir can have against his father can prevent collation of what he takes from his father by inheritance, although it may indirectly and ultimately render the subject which he has collated less valuable. An heir so situated must collate the estate under its burdens, and so does the heir of entail when he collates his fee, which is a limited fee. It is true the heir is not bound to collate a subject which he has purchased from his father, if by the terms of the purchase it is to be conveyed to himself. But if he has not purchased the subject, but only a right to succeed to the subject, as heir of his father; and when, therefore, it is not to be conveyed to himself, but to his father in fee, whom failing himself, such purchase is no bar to collation. So it is in the case of a marriage-contract, in which, for example, the father of the bridegroom, being a party, binds himself to the bride and her relations, that he shall execute an entail of his estate in favour of himself, whom failing, of his son, whom failing, the heirs of the marriage, in consideration of the marriage, and of the portion of the bride, conveyed to the married pair. This was stated to be a settled point as early as 1678, in the case of Murray,¹ and it was not disputed on the other side of the bar. The question arose in the case of præceptio, the father having put forward a tenement to his son; but it is said, that ‘ it is ordinary for fathers in their sons’ contract of marriage to infeft them in their whole heritable estate, whereby there remains no heritable succession, and yet they were never admitted to partake of the movable, but were excluded as heirs per præceptionem hæreditatis.’ Thus in the aforesaid case, where the father, an obligant in the contract of marriage, and bound to make a provision for his heir, instead of leaving the heir to succeed to that provision, actually put him into the fee in fulfilment of his obligation, no doubt was entertained, for it was an ordinary case, that the son was bound to collate. There is another case,² in 1680, where the same principle is recognised: ‘ By contract of marriage the lands being provided to the heir by the first clause, and the care to the bairns in a subsequent clause—the Lords found the heir had a share in

ation ; but he does so by conveying to the heir a share of the move-
ables so conveyed, would have gone to the executors ; and it is plain
decidendi that if the father had left personal estate which was not
a marriage, and therefore not falling under the second clause of the
heir could not have claimed a share of it without collating his

appears that a *jus crediti* in an heir (even although it be not acqui-
t for an onerous consideration), to succeed to his predecessor's heri-
ces not relieve him from the obligation to collate ; nor is he relieved
predecessor, in fulfilment of his obligation, chooses to propel the suc-
cessed *inter vivos*.

men said that the heir is not bound to collate a fee strictly entailed,
not alienate the lands to the executors without the risk of incurring

If it were so, the consequence would be, as is well laid down in the
r case, that he would never get a share of the personal property at all,
uld not comply with the condition under which exclusively he is
at share. But it is undoubted law, that the heir collating is not
ry to the executors an absolute fee. He must share the heritage
bject to all the burdens under which he himself has taken it. There
prevent him to convey to them a right to the lands, or to their pro-
de in the event of his own death, or of a decree of irritancy being
not him. This is no contravention, if the decision in the case of
the ordinary practice of the Court, in dealing with entailed succes-
sioned upon. If not, certainly there is no impediment to his sharing
f the tailshied estate with the executors ; and if they consent to hold
on, it is enough. It is a case *a fortiori* in their favour, that he is
g all the price which ordinarily they receive for a communication of
the moveable succession.

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rule. The case of Scotstarvet shows that lands holden under a special des or tailzie fall under it. And in the case of Rae Craufurd,¹ where the estate was strictly entailed, it follows, by plain inference from the interlocutor of the court, that if the lady had been heir of line, which she was not, but only heir of possession, which by itself imposed no such obligation, she would have been bound to collate.

“ That neither the case of Rickarts nor that of Scotstarvet can afford aid to the appellant is, in our opinion, sufficiently obvious. In the former, it was insisted that there could be collation, because the succession did not divide into different channels. All the daughters were heirs-at-law, and all of them were excluded from the moveables. The fundamental principle of the law of collation is, that the heir who is excluded from the moveables shall purchase a share of them by throwing the heritable estate into the common fund. But in the case of heirs-portioners, each, *de jure*, has a share of the moveables, and therefore the eldest has no occasion to purchase the share of the others. And this was only a repetition of the judgment pronounced in the case of *Scott v. Balfour* many years before, where the Lords found that there was no collation to be required by the law of Scotland, but only in the case of moveables, which, according to Gosford's report, was looked upon ‘as a constitute custom, without all controversy or debate.’ The case of Scotstarvet, so far from giving any countenance to the appellant's plea, affords a direct precedent against one of his arguments; the Court held, that an estate taken by the heir-at-law provisione hominis, and not by provision made, not by the immediate, but a remoter ancestor, was liable to be collated equally as if the investiture had stood to heirs whatsoever. It is inferred from the report, that the eldest heir-portioner was found by the court to be liable to collate, not only with her cousin, Mr Hay Balfour, but with her other heirs-portioners; but that was not the case. It appears from the pleadings and session papers that the action was raised at the instance of Mr Hay Balfour against Miss Scott, and though her younger sisters were directed to be made parties, they withdrew from the contest.

“ An ingenious view was thrown out by Lord Meadowbank in the case of *Gilmour*, as to the extent of the subject which Miss Stt was bound to collate with the Balfours, the other executors. His Lordship observed, that she was undoubtedly bound to collate that portion of the inheritance to which she was heir *alioqui successura*; but that it might be questioned whether she was bound to collate the other two-thirds, to which her sisters were heirs, for the thirds were given to her by destination alone; and with regard to them, she did not seem to have been in a different situation from a second son, or any other heir *alioqui successurus*, who is not bound to collate what he takes by destination. He states the ground on which he holds that it was successfully maintained that the collation should extend to the whole subject. It may be thought by reading this part of the report, which is somewhat obscure, that his Lordship had been more successful in raising the doubt than in solving it. Be that as it may, that point in the case does not touch the present in the remotest degree. This is not a case of heirs-portioners, where no one is heir *alioqui successura* exclusive of the others, nor is it a case where the executors are contending, not with an heir, but with an heir, but may be called an aliquot part of an heir. Here the appellant, as in the

ther is now compelled expressly to admit, is the established law of Scot-

views which we have taken might be illustrated and enforced by much additional argument, and a citation of various other authorities and decisions. We consider this to be unnecessary, as the question is, in our opinion, ably answered in the respondent's appeal case, and still more fully and elaborately in the case for the Marquis of Chandos and Others, now at avizandum before the Division of the Court, to which we beg leave to refer.

Coming, in obedience to the remit from the House of Lords, treated this as a new question, we must now advert to one consideration, which, in our humble opinion, ought alone to set the matter at rest. We allude to the decision in the case of Little Gilmour, pronounced, as already mentioned, by the Second Division of the Court, in December, 1809. That decision was as sound and deliberate as the forms of this Court allow. It was unanimous, it was acquiesced in by the parties, it has been subsequently followed by one other decision at least to the same effect, and one other case at least of great importance has been extrajudicially settled upon the faith of it. To disturb such a precedent, in our apprehension, be contrary to principle, and might be attended with the most disastrous consequences. It is no impeachment of the authority of the Court's judgment, that it was pronounced by a Division of the Court, and not by the whole Court. Many thousand decisions have been pronounced since the separation in 1808, when the separation took place, by one Division, without any communication with the other. Those decisions are all the country has to rely upon for the established law of Scotland, in the matters to which they relate, and on which the country does rely. Still less is it an objection that the judgment in the respondent's case was never sanctioned by an affirmance of the House of Lords. That is essential, considering how extremely few cases comparatively are appealed to the House of Lords, and how few are affirmed. In cases of this kind, it would be nearly to overrule the whole common law of Scotland. In ques-

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what they have been taught to consider as the safeguard of their most important rights."

LORD MONCREIFF.—" I concur in the foregoing opinion. I certainly can think that it is an open question ; because I have long considered it as settled the case of Gilmour, and can never think, that no point of municipal law can come settled unless it has been determined in the House of Lords. But, if question were open, I agree in every word of the above opinion, and should be prepared to deliver the same judgment if it were a case of first impression. I think that the principles laid down are in all points sound ; and the exposition of the manner in which these principles are to be applied to the present case appear to me to be clear and satisfactory : I could only express my own opinion by writing the same thing in other words. I beg leave, however, only further to observe, that the argument of the appellant has been brought almost directly to an avowal of a principle, that the interest of an heir of entail, in possession of a Scotch entailed estate, is little better than a life-rent, and that the entail of a Scotch estate does not differ in substance from a trust, with a succession of life-rents ; and that, if the case does at all depend on any such assumption, I can only say, that it is contrary to all the principles and fixed rules of the law of Scotland, as they have been uniformly recognised, both by this Court and by the House of Lords. But, whether the argument be pushed so far as this or not, I am of opinion that it is a point of settled law, and that, if it were not settled, it ought to be settled in the same manner."

LORD JEFFREY.—" If I could consider the question as entirely open, I should have some hesitation about concurring in the preceding opinion ; and certainly could not bring myself to regard it as so clear and simple as it is there represented."

" The difficulty of the case I take to be this. The fundamental principle of the whole law of collation being that the obligation (or right) attaches only to the heir of line, it seems to follow, almost as a necessary conclusion, that they should collate only what they take in that character. Certainly they can be called upon to collate nothing that was not vested in the ancestor to whom they stood in that relation ; and nothing that has not come to them on a proper title of succession to that ancestor ; and, this being the case, it seems difficult to suggest a reason why they should ever collate more than has actually descended to them in the course of that relation. If the whole question were open, therefore, I conceive there could be little doubt that this is the rule by which it should be governed. It seems to have been long settled, that collation may be required in those cases, where the heir of line takes the heritage which was in his ancestor, not as a service in that character, but as heir of provision or investiture, and by the act of a predecessor in the fee ; and it is said that the case of an heir of entail is not substantially different."

" There is no doubt that those cases are exceptions to the literal or peremptory application of the rule. But it appears to me that they may still be reconciled to its principle ; and that, except only in the case of a strict entail, there are grounds upon which it may be held, though perhaps not without some aid from hypothesis and construction, that what is thus collated is always truly taken in the character of heir of line."

" Where a fee is taken simply to a man and his heirs whatsoever, it is, on the disposal of the fee in possession ; and if he makes no disposition, it

held to be exactly parallel to his not making any disposition, in the case absolutely unlimited; and the heir of line may be held to take the succession in both cases, ex presumpta voluntate of his predecessor, and truly in his character of heir of line, because in consequence of the favour which the law holds to that character. The predecessor, in short, may be held, in both cases, as adopted and made his own, the destination of the common law in the one, and an earlier ancestor in the other, out of love and affection for his natural heir, and he may therefore be regarded as owing his succession, in the latter as well as in the former, to his possessing that character.

But if the other cases of apparent exception may be reconciled in this way to the principal rule of law, it is plain that such an explanation will not serve for that of a strict entail: where the heir apparent has no power whatever, either to defeat or confirm the succession of his substitutes. The cases of personal or accidental incapacity, as from infancy, insanity, or individual paction, do not seem to have any application; the inability to alter arises, not from the quality of the right, but from circumstances of the persons. As heirs they have full power—though, as individuals they may be disabled from exercising it.

The case of heirs of a marriage is more perplexing; and certainly comes nearer to that of a strict entail. Yet it is not exactly parallel; since the heir, though under a personal obligation not to disappoint the succession of such heirs, is absolutely disabled, by the quality of his right, from so doing. He may freely sell or burden the settled lands, though he will be answerable in his personal estate for the value.

But though doubts may be thus raised, and plausible distinctions suggested, the question as to heirs of entail could really be considered as open, I am bound to say that I have no such confidence, either in the grounds of doubt or the sufficiency of the distinctions, as would induce me now to depart from such a prece-

No. 95. is matter of notoriety that it has ever since been regarded, and acted upon :
 — settling the law.”
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The cause was this day put out for advising before the Second Division.

LORD JUSTICE-CLERK.—In obedience to the order of the House of Lords pronounced in this case, the question of law was most fully and ably argued before the whole Judges ; and as the judgment ordered to be reviewed had been pronounced by this Division, we thought it right to require the opinions in writing of the Judges of the First Division, and permanent Lords Ordinary, in order that judgment may, in terms of the order, now be pronounced, “ according to the opinions of the majority of such whole Judges.”

Those opinions are now before the Court, and they unanimously concur in holding, in substance, that the judgment of this Division of the 28th of November, 1833, finding, “ that Sir Wyndham Carmichael Anstruther cannot claim an share in the executry of the late Sir John Carmichael Anstruther, without previously collating the heritage to which, as heir of Sir John, he has succeeded,” is well founded, and ought to be adhered to ; so that, even if all of us present were now of a contrary opinion, such must be the deliverance of the Court.

Directed, however, as we all were by the House of Lords to have the matter of law deliberately argued, I have, in common with your Lordships, paid ever attention to the able arguments of counsel, and the various authorities referred to by them. But, so far from being shaken in the opinion I had formerly entertained upon the case, I have been more and more confirmed in it by all that have heard from the bar, and since read in those most able and elaborate pleadings that have been laid before us in the important question, embracing the same point, that has arisen between the Marchioness of Chandos and her brother the Marquis of Breadalbane, relative to the succession of their late father, and which also stands for judgment in this day's roll.

I am not at all surprised that the argument for Lady Chandos has attracted the marked attention of the Judges, who have favoured the Court with a full opinion in this case, because it does contain a most masterly and satisfactory examination of the whole principles of law that are applicable to this question and which are expounded in a way to remove, in my opinion, all room for doubt or hesitation as to the manner in which it ought to be determined, if the law of Scotland is to rule the decision.

Concurring, therefore, as I most entirely do, in the luminous exposition which is given in the opinion of the Lord President, and the other Judges who concur and subscribed it along with him, I should consider it as an unpardonable and useless encroachment on the time of the Court were I to attempt to state in more imperfect language those views of the case which I entertain, and which in that opinion are so clearly and admirably expressed.

But as some notion seems to have been entertained, that in pronouncing our judgment in this case in November 1833, we proceeded merely upon the authority of the case of Gilmour, I shall, in my own vindication, now read the notes of the opinion which I then delivered, as deliberately formed, and to which I still adhere in every respect, after all the investigation that the case has since entitled

These notes, which are now before me, are in the following terms:—
 on considering these cases, in which the Lord Ordinary has taken this cause
 port (and which are drawn with great ability, and particularly that on the
 of Mrs Anstruther), raising the question whether an heir of tailzie, who is
 e same time heir of line of the deceased, is bound to collate his interest under
 entail before he can claim a share of the executry of the deceased, as one of
 ext of kin, I have formed a most satisfactory opinion, that, according to a
 review of the whole authorities in our institutional writers and decisions, that
 tion must be answered in the affirmative.

The question indeed was so fully discussed, both by the bar and the bench,
 in the case of Gilmour v. Gilmour, 13th December, 1809, when the whole train
 authority and decision was most thoroughly sifted, and a most elaborate opinion
 rendered by the late Lord Meadowbank, embracing the whole law of the case,
 grappling with every sort of distinction that could be drawn as to the appli-
 cation of the principle of the judgment which was there solemnly and unani-
 mously pronounced against the heir of tailzie and of line who refused to collate,
 it appears to me wholly unnecessary to enter at any length into the discus-
 sion. That decision has not been altered by a higher tribunal. No contrary
 decision has since been pronounced, but, on the contrary, the law, as there ex-
 pressed, has been held as settled and finally fixed. It would therefore have been
 no light grounds, and certainly on no thin or fanciful distinctions as to the
 circumstances of particular destinations of entails, that I, for one, would have
 been disposed to depart from that judgment.

"But upon full consideration, however, of the argument in those cases, I have
 no reason to doubt of the soundness of the decision in the case of Gilmour,
 which establishes that the doctrine of collation does attach to an heir of entail,
 who is also heir of line of the deceased, claiming, as one of the nearest of kin,
 a share of his executry. I must therefore be for preferring Mrs Anstruther to
 the whole fund here in medio."

I abstained at that time from enlarging more on the grounds of my opinion,
 because I held then that in the arguments and opinions in the report of the case
 of Gilmour, every thing was to be found that was necessary for the sound deci-
 sion of the cause. And upon reconsidering that report, with the admirable
 opinion of the late Lord Meadowbank, in which the Lord President, the late
 Lord Polkemet, Newton, and Robertson, concurred, not to mention the high
 authority of my brother on my right hand (Lord Glenlee), I do maintain that
 it is to be found in it the basis of every thing that has since been urged in
 the elaborate discussion of the question, taxed as the abilities of the bar and
 the bench have been in regard to it.

It then, a case, after having been argued by the first counsel at the bar, so
 considered, and so solemnly determined as that of Gilmour, and which has
 usually been ever since held to have settled the law in that department, and
 has been repeated, as it certainly was by us in the case of Straiton, as I find from
 reports, and so long acted upon by the country at large, is to be departed from
 overturned, merely because the whole Court was not then consulted, or an
 opinion of it pronounced on appeal, it may well be asked, where is there secu-
 rity of the legal rights of the people of Scotland?

REPLIES.—*I am one of the number of the Judges who concurred in
 Gilmour's case; and if I was satisfied of the soundness of that*

decision then, I am still more so now, from the able argument seen laid before us. I am clear as to the propriety of adhering to the decision.

LORD MEADOWBANK.—As I, upon a former occasion, stated would be a waste of time to enter into the matter now. I concur with the consulted Judges ; but I would not be doing justice to me if I did not to add, that I never read a more able and satisfactory argument more exhausted the subject, than in the case for the Marchioness of Eglar.

LORD MEDWYN.—I am in the peculiar situation of not having had an opportunity, as all your Lordships have had, of giving any opinion in the case. I reported it at once from the Outer House, without even having seen the case, as I was told it was intended to argue the point upon which was contested the decision of Little Gilmour's case, and call for a judgment of the House. Your Lordships, along with my predecessor in the Inner House, pronounced the decision which was appealed from, and gave their opinions. When the case came back for the opinions of the judges who had in the mean time become a member of the Division, and not having been consulted judges, had it not been in my power to join in their deliberations, I should have subscribed their opinion, but was under the necessity of studying the case for myself, and giving my opinion alone, and unassisted by those mutual consultations which take place on these occasions. I accordingly studied the case in the mean time, and drew up my opinion before I had seen the opinion of the consulted judges, and knew of their unanimity. Upon seeing that opinion, as I concur with it, I was much inclined to content myself with simply announcing my assent to it ; and indeed for some time I had determined to do so, but on further reflection, lest it should be supposed that I assented merely to the opinion of authority, without due consideration, or the necessary study which I should have derived from the House of Lords for the deliberate opinion of the whole, I have been induced to request permission to occupy somewhat of your time in giving my opinion on the opinion I have come to (and I am sorry to say I have not been able to make it a brief one), after a very patient examination of the case. I only hope, seeing I profess my entire assent to every word of the opinion of the great majority of the consulted judges, that nothing that I say will diminish the effect which that opinion ought to have in the ultimate decision of the case.

The parties have, in their pleadings, discussed at some length the question of collation between heir and executor, and its introduction into the law of Scotland, and other points in our legal antiquities, the materials for elucidation of which are few, and some of doubtful authenticity ; and, in truth, as the law has little practical value as a guide for the decision of the present case, I am not competent to discuss it, am I competent to do so ; but assuming that the privilege of collation is a consequence of the introduction of primogeniture, and that primogeniture was introduced among us by the feudal system. We may conjecture, that prior to this the Saxons in the southern district of Scotland were gradually introducing the feudal system into the country, and that land was then divided equally among the children, and the *cluse* of the daughters, as it was in England by the feudal law did not exist in England in a complete state, but was probably received among us, and gradually ext

a contrarium" was the rule throughout the country at large, that the heir had the same portion of the moveable goods of his father as the other children, with the addition of the heirship moveables; L.L. Burg., c. 124, 125. It came to be firmly settled that the eldest son took the whole hereditary estate (as seems to have introduced it as a reasonable and equitable consequence of the rule, where there was no statute either for the one or the other), that the moveables belonged to the younger children, which it will be afterwards seen, came to be the rule in Burghs also; so that finally, if the heir was named executor, he was treated in the same light as a stranger, and had the privileges of such.—*ib.* t. 8, § 53. As with us, not merely the landed proprietor's or baron's heir was his heir, but the beneficed clergyman and the burgess enjoyed the same privilege. In fact, it would probably happen in so poor a country as Scotland was in those times, that in the case of the two latter classes, rather than in the case of the baron, the eldest son would sometimes find his a less lucrative succession than if he shared his father's succession equally with the younger children. To remove such an inequality, the doctrine of collation was introduced by the courts, and perhaps first in the succession of churchmen, from consideration of equity, in the same way as in other instances they adopted rules of equity in preference to the strict provisions of the common law. For the churchmen, in their capacity, were the great masters of equity in those times. Of course, the same privilege would be extended to heirs of barons and burgesses also, and came to be a rule of our law, that the heir, being one of the next of kin, was permitted, in the case of intestate succession, to claim an equal share in the moveables, provided he contributed or collated the heritable estate, to which he succeeded as heir to his father or predecessor, to whom he and the other children were alike next of kin, and in which estate his said father or predecessor had died. This was early the rule with us, and perhaps it may be illustrated nearly to a statute of Robert III., c. 35, in an analogous case, *de collatione*

No. 95. necessity of collation :—" Quod non est de hæreditate patris sui ; unde pater non fuit saisitus tempore mortis suæ." Hence we may conclude that it was admitted law, that the father being infeft at the time of his death, and then taking up the succession from him, was the criterion which rendered the heir bound to collate when he claimed a share of the moveables.

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But the obligation to collate has not been confined to the heir of line who takes the estate by service in that character, and it is admitted, that to obtain a share of the moveable succession with the other next of kin, the heir of line must collate, although he holds the estate præceptione hæreditatis, or as dispone-
tis causa, or although he succeeds in virtue of an unaltered destination in the deed of a remote ancestor, or under a marriage-contract. It is contended, however, that if the heir of line succeeds to, and takes a strictly entailed estate, he can claim a share of the moveables without being obliged to collate, on the ground that he has not succeeded, has taken nothing by the death of his predecessor, who succeeds by the will of a remote predecessor, whose heir of line he may not be at all events does not take in that character. For it is said to be highly repugnant and irreconcilable with any sound principle, to call upon one who takes the benefit as heir of line, but who succeeds in another character altogether, to bear a burden applicable only to the heir of line. But it is obvious that this difficulty does not affect the case of an heir under a strict entail alone; it applies equally to the case of an heir-male taking the estate under a simple disposition. He also takes in virtue of the deed of the original granter, and not in consequence of the disposition; he owes nothing to any act of the immediate predecessor to whom he serves heir, and it may be equally said that it is in form only that he is to be considered as his heir. Yet, as already observed, in this case it is not disputed that collation applies. It may be difficult to assign a sound principle, or any principle at all for this; and perhaps we must rest satisfied with the rule itself, and the probable reason which engrafted it upon our practice. Lord Kenzie,¹ in his Treatise on Tailies, says, that in the noted case of the Earl of Callander v. Lord John Hamilton, "The Lords thought that the heirs of the deceased were una et eadem persona cum defuncto," which is also Craig's opinion, as well as that of Stair and Erskine,² as to a feudum novum seu masculinum. Accordingly, on this principle it was held that "heirs of tailzie and provisor are liable universally, in suo ordine, for the debts of the deceased, and not beyond the extent of the succession." Indeed, with our feudal notions and principles of male succession, this was natural enough. In the direct line, a descendant or heirs-male gave the estate to the heir of line, and even when it carried the estate past the heir of line, to a hæres factus, it was natural enough that he should be viewed in the same light as the heir he had superseded. Now, this being the light under which such heirs were viewed, when it happened that there was no heir of line to limit and qualify the effects of this universal representation, when they themselves had the character of heir of line, and would have taken the succession as such, is it at all to be wondered at that they should have been held liable to fulfil this condition of collation in favour of the younger heirs, if they claimed any of the privileges of heir of line? The heir-male, by a



¹ Works, vol. ii, p. 488.

² Lib. 2, D. 13, § 27.

³ Ersk. b. 3, t. 8, § 51.

ing to the heritage, is excluded from any share of the moveables, and if he claims a share, he uses a privilege competent to him as heir of line, and it is natural that this should be subject to the same burden as in the case of one having the character of heir of line, and no other; and the circumstance mentioned by Mackenzie,¹ that "tailzies in favour of heirs-male are now more ordinary than tailzies in favour of heirs whatsoever," probably confirmed our judges in applying this burden in the case of the heir of line, who took the estate not in that character, but as heir-male or of destination, from the evident hardship upon the younger children, if they were obliged to surrender a portion of their scanty funds to their elder brother, who was already amply provided by his succession to the whole landed property of their father. But whether this be the reason or not, it is admitted that collation applies to the case of an heir under a simple destination to heirs-male, when he is also heir of line and one of the next of kin.

Now, if instead of succeeding under such a deed, the heir of line succeeds to his father or predecessor, as heir under an entail, which effectually prohibits alienation and the other modes of disappointing his succession, why should this have any influence on the privilege of the younger children to call upon the heir to collate, if he claims a share of the moveable succession?

It does not appear that when the act 1685 sanctioned strict entails, so as to secure the estate of a father to his son free from the claims of creditors or purchasers, it could be contemplated that it was in any other way to affect the interest of the heir, and still less of the younger children, either to deprive the heir of his right to participate in the moveable succession, if he found it for his interest to do so, or, on the other hand, to authorize him to claim a share without collating or contributing, if not the estate as a fee-simple, at least the value of his succession. That the predecessor had only a restricted right in the estate, and not the fullest powers of property in it, does not deprive him of the character of proprietor: he is vested in the estate—he is infeft as fiar, and not as liferenter—his right in it can be adjudged from him only by an adjudication of the lands themselves, not of his life interest in them—on his death they fall into the estate of his hæreditas jacens, till they, the lands themselves, are taken out of it by the service of the heir to him; and the heir further proceeds to vest himself with the estate in the same manner as if it were an estate in fee-simple, that is, by service to the person last infeft. In so far, then, as the heir takes these lands, he takes them by succession to his father or predecessor, to whom he is heir; and there seems to be no principle for any distinction as to collation between the case of the predecessor having the power of disappointing the succession, or not having such power. Collation was fully recognised when the proprietor had no such power. It was necessary even in 1672 to provide that the superior was bound to receive an adjudger as vassal, and a voluntary purchaser could not compel this, till 1748. A proprietor dying minor cannot alienate his estate, and the heir must succeed, and would succeed as heir of investiture; it may be in virtue of the deed of a remote ancestor, whose heir of line he may not be, yet collation would be necessary before such heir could claim a share in the moveable succession of the minor with the other next of kin.

¹ Vol. ii. p. 484.

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In the case where the proprietor might have altered the destination, but has not done so, it does not seem to be the ground why collation applies, because it may be held that the estate comes to the heir by the forbearance or implied will of the predecessor: no such reason is assigned in any of our law books, and the law has not said that the heir is to collate only what devolves upon him by the will or forbearance of his predecessor; but what comes to him by succession on the predecessor's death, and in which he was vested, what, in short, "he succeeds to as heir" to him.

Hence the heir claiming the moveables may not be the heir of line of the original vassal, or of the maker of the destination, or of the entail; it is enough that he is the heir of line of the person last vested with the estate, and succeeding to him as heir by service, claims to share his moveables with the other next of kin. For nothing but the entailing clauses prevent an heir of entail from being liable by representation for the debts of the preceding heir, and if the ceremony of recording be omitted, the entailing clauses will not protect him from this liability to the creditors of the preceding heirs—Earl of Rosebery, 22d June 1765—at least in valorem of the estate—Baird, 15th July, 1766—so that it seems of no consequence that he succeeds independent of the will of his predecessor. He takes in the character of his heir, and must be liable in that character as his representative, wherever the entailing clauses do not protect him.

It must not be supposed that any difficulty arises from the circumstance that the Court in the case of Baird, 16th July, 1766, did not hold the heir of entail liable universally, but only in valorem of the estate, adopting the doubt of Dirlston and opinion of Stewart, instead of the opinions of Craig, Mackenzie, Stair, and Erskine. For still the heir of tailzie, when effectually fettered, is considered as *eadem persona cum defuncto*, although not liable universally, proceeding on Stewart's view of his character, that it is similar to that of an heir entered *cum beneficio*, a privilege recently introduced in favour of heirs, the estate itself being held equivalent to the inventory. So that he still represents his predecessor as his heir, although the effect of the representation is limited; and the same reason exactly applies in this case, for making such an heir, who is also heir of line, collate, as if the representation were universal. His representation as heir still effects the estate which he is called upon to collate, although it does not go beyond it.

In truth, it arises from the view of this character of an heir of entail taken by our law that the clause as to making up titles, upon declaring an irritancy of the heir by contravention, was introduced into the act 1685. The heir pursuing an irritancy, or succeeding on an irritancy being declared by a substitution, although he succeeds, in the strictest sense of the word, in virtue of the entail, and neither by the will nor forbearance of his predecessor, yet, if he made up titles by service to the contravener, which, by feudal forms, he must have done, would have been liable for his debts and deeds as heir served to him, had not the statute authorized him to serve to the person last infeft, who did not contravene. There was no other mode of preventing that representation and its consequences incurred by an heir of entail serving heir to his predecessor in virtue of the original deed of entail, when he is not protected by the entailing clauses. Now what is the protection these clauses were either intended or can possibly be supposed to afford to the heir? they are to protect the estate from the claims of creditors, and purchasers or disponees; and how can they then be extended so

condition by contributing his share of the father's succession ; but cannot exempt him from collating as much as he can, if the law shall be sufficient. He can always contribute, I will not say his life interest, but the value of his succession, the yearly rents ; or, on the life annuities, the value of this may be computed at once ; and to call on him to collate this value is giving him all the advantage he can claim as to an entailed estate. And I know of no sufficient interest in the children to maintain that they will not be satisfied with this, but must have a heritable estate carved out into portions and given to them. In truth, it is seldom a very practical difficulty. The heir has as little occasion to alienate the estate itself to the younger children, provided he contributes as in ancient times the heir of a feudum or burgage tenement had ; he is always to benefit, otherwise he has no interest to collate. He is to collate the moveables, in addition to the heritage ; so the collation of moveables is in many, perhaps in most cases, effected by a simple arithmetical calculation ; and there can scarcely exist any interest in the executors to insist on a collateral transference of any portion of the real estate. That the heir will collate so much, or so little, is another matter ; but he will collate so much, or so little, as he can, and he will obtain the surplus of the moveable estate to make his share of the succession equal to that of the other children.

And it is true, that an heir of entail succeeds by the will and deed of the maker of the entail. But what is the entailor's will ? not to constitute a series of liferenters, whose interests expire at their death, and are then taken up and inherited by their successors—who are, in short, independent of him, and dependent solely on himself. The law of Scotland gives no remedy to a proprietor. Wherever there is a liferent, there must be a fee. But the law has allowed the entailor, and his will in the present has been, to constitute a series of heirs, each holding the fee of the pro-

No. 95. moveables, because he could make it a condition of the entail that no heir should do so; but how could he provide that the heir might share in the moveables without collating? These moveables are not his estate, and do in no respect belong to him, so as to entitle him to regulate the succession to them. They are the property of the deceasing heir, may have been the fruits of his industry or economy, and the entailer can have no power over them. It is of his own estate, the succession to which he can regulate by entailing clauses.

Jan. 20, 1836.
Anstruther v.
Anstruther.

It has been further argued, that, in this question, the Court attends more to substance than to form, and that in form only it can be said that an entailed estate is taken up as the estate of the predecessor by the succeeding heir; and in proof of this proposition, reference is made to the case of lands taken *præcognitione hæreditatis*, which must be collated, although they were given by disposition in the lifetime of the father, and not succeeded to as heir. But this instance seems insufficient to prove the point for which it is adduced. The very maxim shows that it is the inheritance of the father which the son takes; that he takes it because he is heir to it, and would succeed to it at his father's death. Had he been liable to his father's prior creditors for its value; and most justly it seems to have been thought as unreasonable, that the rights of the younger children should suffer by the anticipated right of the heir, as those of the creditors of the father; or that the eldest son should get quit of his obligation in the character of heir in affecting the interests of the younger children, while it is regarded with creditors. But can a stronger proof be given that form is, in this matter, at least as much attended to as substance, when it is founded on legal principle, that if the father never was infeft, although he may have possessed the estate twenty or thirty years, and his son makes up titles, as he must do, to the father's son last infeft, he may claim a share of his father's moveables, without collating the heritage which he did not take by feudal forms, as an inheritance from his father.¹

The application of the principles on which collation rests to the succession of an entailed estate did not demand the consideration of the Court till the case of *Little Gilmour*. It could only occur after the act 1685, and it obviously must happen but in rare instances that it can be for the interest of such a heir to collate. I conceive that, in that decision, the rules which had been observed in analogous cases with great consistency were correctly followed out, and I have already anticipated the grounds on which this opinion is founded.

The cases on collation are not numerous in our law books. We are now to look for them at first among the records of our civil courts, nor perhaps in the earliest institutes of our civil law; for this matter, at an early period, fell under the cognisance of the ecclesiastical courts. Without laying much stress on the passage quoted from the *Reg. Maj.* in the case of *Mrs Anstruther*, it appears, from the laws of William, c. 22, that the church had then a jurisdiction as to testamentary and intestate succession; and, in the canons of the Scottish Church, c. 50, enacted in 1242, among other delinquents directed to be excommunicated, are "impedientes ordinarios, quominus de bonis ipsorum decedentium ab intestato

¹ Spalding, Dec. 11, 1812, in 1 Bell, 102.

secundum consuetudinem ecclesiæ Scoticanæ, rite valeant ordinare."¹ And, in a provincial council, held at Perth in 1420, the clergy of each diocese were required to report on oath what was the practice as to the confirmation of testaments; when they unanimously reported, "that the bishops had been in the constant practice of confirming testaments, and of naming executors to those who died intestate," and then the order of procedure and distribution is set forth.² This uniformity shows a well-established practice proceeding from an authoritative source, and referring to ancient practice. The doctrine of collation was fully established in these ancient times; but the destruction of the records of our ecclesiastical courts, at the tumultuous period of the Reformation, leaves little hope for much information from that quarter. I know of one such record only, which has been preserved, the volume of decrees of the official of St Andrews for the Archdeaconry of Lothian, from 1500 to 1551, but I do not know if it throws any light on this question, whether the vassal ever objected to collate his feu, when the predecessor had as little power to alienate it as in the case of a strictly entailed estate, and when the heir succeeded in virtue of the grant of the superior, the original granter. It appears, however, by the case of *Law in Balfour*, that this doctrine was, at some early period, firmly fixed in our practice. It struck me as singular, that this question should have arisen and been decided at this time in the civil court, and it seemed as if collation only required the heirship moveables to be collated. But these points were cleared up on examining the decree itself. It appears that the parties interested in the succession of Steven Law, a burghess of Edinburgh—that is, the widow, two sons, and a daughter—had entered into a reference to arbiters, who pronounced an award, estimating the property at a certain amount, and assigning certain sums to the widow and each of the three children, as their portions of the succession. Some years afterwards, the younger son, Alexander, designed writer to the signet, raises a process of reduction of this award, citing as a defender Andrew, the son and heir of Robert, who was the eldest son and heir of Steven, complaining of the award on the head of minority and lesion, and craving to have it set aside, and that the defender should be decerned by the Court to pay the sum he claimed as his proper share of his father's succession. The reduction was of course raised in the civil court, the ecclesiastical court not being competent to reduce an award or decree-arbitral. The minority is stated to be, and is so found by the Court, that, at the time of the reference and award, "Alexander was a pupil proximus infantie of nine or ten years, and had na tutor or curator, whereby he had na persoun nor power to transact;" and the lesion is made out, because the arbiters had undervalued the property; and further, had given a portion of the moveables to the eldest son, who had succeeded as heir. The defender did not dispute the law of collation as here laid down—evidently holding it unquestionable—just as little as he did the plea of minority; but he pleaded this defence against the application of the doctrine in this particular case, that at the time of his father's death he was not the heir, as he had an elder brother at the time; but the answer was held satisfactory, that this eldest son died soon after his father, before he had entered heir

¹ Hailes, vol. iii. p. 192.

² Hailes, vol. iii. p. 249.

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to his father, or got sasine of his lands, or received heirship; and further, died before the goods were divided; so that Robert came to be heir to his father when the children took up the succession, and it was therefore held that he could not claim a share in the moveable succession without collating his father's lands. This is the subject of the decision reported by Maitland, then a judge on the bench, 18th July, 1553, and 24th April, 1554, M. P. 2365. The decree bears, accordingly, that the award was set aside on this ground, that the third part of the free funds should have been divided into two shares only, because for four years before Robert was heir and successor to his father, and "enterit to his landis, heritages, and airship guidis, and therefor, be the lauchfull consuetude and use of our said burgh of Edinburgh, lauchfullie and continuewallie observit and kept past memory of man, burges airis of the samen aucht nought to haif ony barnis part of geir nor falls them by (besides) thair airship guidis and heritage, without thai wald renounce the samen, and cast it in, and concur with the remanent of the barnis equalie thereintill." The award is set aside on these grounds; but the Court does not proceed with the adjustment of the pursuer's claims; that belonged to the ecclesiastical court, but "assoilzies the defender, and decerns her (the cause had been transferred against the sister of the original defender) quyte therfra, as it is not libellit, reserving to the pursuer his action for persute therof before quhatsumever judge he pleases, as accords of law."

The examination of this decree is valuable, because it shows that this matter was still within the province of the ecclesiastical court, and accounts for the few notices of this doctrine in our civil courts; and it is a declaration of the law from the memory of man, that in the case of the heir of a burghess, he was excluded from a share of the moveable succession, unless he collated not merely the heirship goods but the lands and heritage also "to the which he succeedit throu the deceis of the said umquhile Stevin, his father." (How Balfour has omitted to notice that the heir must collate lands as well as "airship guidis," I know not. Maitland includes both, in terms of the decree itself.) This description of the succession to the heritage, which infers the necessity of collation, is important, when it is considered, that the heir making up titles more *burgi* in fact takes the subject in virtue of the original grant, but still he succeeds through the decease of his father.

But the decision would be still more important in the present case if a burghess at that time had not the power of alienating his heritage, except of his own acquisition, unless of necessity for debt, after offering it to his nearest heirs, and when the necessity was proved before twelve of his neighbours. This was once the law even as remodelled in 1395 (Ll. Burg., c. 45, 125); but I will not take upon me to say, because I do not know the fact historically, that this continued to be observed down to 1520, the period of Steven Law's death.

As collation was originally consuetudinary, and introduced by no statute, and as the question occurred relative to the succession of a burghess of Edinburgh, the pleading of the successful party in the case of Law most correctly founds upon this doctrine as a consuetude of this burgh. This was all that was necessary. But the notice of this decision, both by Balfour and Maitland, contemporary lawyers of the highest character (the latter then a judge on the bench; the other eminently qualified for the task for which he was selected, of drawing up, or superintending the drawing up, the Practicks, or digest of our law; by having been official of Lothian before the Reformation, and one of the first commissaries

AND, MR. ERSKINE VIGILANTLY SURVEILS THE DOCTRINE OF COLLATION AS IT NOW
AND, in truth, we may safely rest the law of collation upon the authority
pinions, and the decisions of the Court pronounced in their time and
ch are singularly uniform and consistent—a very sufficient foundation
ctrine of our common law—without seeking the aid of any more ancient

. to the opinion of Mr Erskine,¹ where he says it is only the legal heir,
ir ab intestato, who is obliged to collate the heritage, I am inclined to
meaning has been misunderstood. It may not be very clearly express-
e work was posthumous, and did not receive the learned author's last
us ; but it seems to me that he means only that it is the heir alioqui suc-
who is bound to collate, which is quite true ; and he does not say that
it-law, or he who would be heir ab intestato if there were no destination,
relieved from the necessity of collating if he takes by virtue of a desti-
Indeed, if this passage is construed in the way attempted to be done, it
clude from collation all estates under an investiture, even to heirs what-
This certainly is not the law he lays down. He then contrasts the case
r with the case of heirs-portioners, who, in relation to the moveables, are
r in a different situation from an heir succeeding either at law or by des-
to the heritage, for the moveable estate, " by legal succession, descends
o all the daughters ;" and if the father settles his landed estate upon the
ughter, having full power so to do, she takes it in virtue of that settle-
itout affecting in the smallest degree her legal claim to share the move-
th her younger sisters. The case of the heir is quite different, because
o legal title to the moveables, if he takes the landed estate, unless he col-
admit, however, that Mr Erskine's opinion in the same section has not
pted by the Court, where he says that the son should have the same pri-
at his father would have had ; but it is there only that he seems to have

No. 95. ceding heir, can claim a share of the moveables with the other next of kin by collating that estate which would have devolved upon him, which he have taken as heir-at-law, and to which the deed providing it to him has only effectually secured his succession.

—
n. 20, 1836.
Anstruther v.
Anstruther.

I believe that in England there is something like this doctrine of collation among co-parceners at common law, and in the case of moveable succession by statute of distributions ; and that the succession to an estate-tail is not, in this matter, attended with the same consequences as with us.¹ There may be sufficient reasons in the varying circumstances of the two countries, why the law under which the heir is entitled to share in the moveable succession should be different in the same in both ; and in the different distribution of wealth in the two countries perhaps it may not be difficult to find a solid reason for this difference. Be this as it may, and even if the distinction were purely arbitrary, it is of much consequence that the rules of succession should be fixed, and steadily adhered to when once deliberately laid down, than that in all respects they should be equalized in the two countries : And, upon the whole, it appears to me that the introduction of the doctrine of collation in the case of an entailed estate was not made according to the principles of our law, when the question occurred in the case of the succession of Mr Little Gilmour ; and that it could not be done from now, without adopting a view of the character of a proprietor of an estate totally different from what is recognised by our law, and unnecessarily aggravating the inequality which the law of primogeniture has introduced upon us, against the interests of the younger children.

THE COURT, accordingly, in terms of their judgment of 28th Nov 1833, found “ that Sir Wyndham Carmichael Anstruther cannot take any share in the executry of the late Sir John Carmichael Anstruther without previously collating the heritage, to which, as heir of Sir John, he has succeeded.”

KERR and DICKSON, W.S.—JAMES ANSTRUTHER, W.S.—Agents.

¹ Blackstone, vol. ii. p. 191 and 517.

TRUSTEES OF THE LATE MARQUIS OF BREADALBANE, Raisers.—

D. F. Hope—Keay—H. J. Robertson.

MARQUIS OF BREADALBANE.—*More—Rutherford—Baillie.*

DOWAGER MARCHIONESS OF BREADALBANE.—*Anderson.*

MARCHIONESS OF CHANDOS and HUSBAND.—*Lord Advocate Murray—*

Sol.-Gen. Cuninghame—Ivory—Monteith.

LADY ELIZABETH PRINGLE and HUSBAND.—*M'Neill—Marshall.*

Competing.

Heir and Executor—Collation—Entail—Provisions to Children.—1. A party succeeding his father, as heir-male and of tailzie, in certain entailed estates in which the deceased had been infeft under a strict entail executed by his immediate predecessor in favour of heirs-male, held not entitled to legitim without collating his interest in the entailed estates. 2. Circumstances in which the legitim held not to be excluded by a child's acceptance from her father, under an English marriage-contract, of a provision declared to be her "portion or fortune;" and this provision not imputed in fixing the amount of the legitim.

THE late Marquis of Breadalbane succeeded to certain landed estates held under strict entail, with destinations to heirs-male, and was infeft as heir-male and of tailzie of John, third Earl of Breadalbane, the last entailer. He was also possessed of unentailed estates, yielding a yearly rent of about £5000, and of moveable property amounting nearly to £400,000.

In 1793 he married the present Dowager Marchioness. There was no antenuptial contract of marriage, nor was any postnuptial contract ever executed. Of this marriage were born one son, the present Marquis, and two daughters, Ladies Elizabeth and Mary Campbell.

In 1819, Lady Mary was married to the Marquis of Chandos. The marriage settlements were prepared and executed in the English form of an indenture, to which the Duke of Buckingham, father of Lord Chandos, and the late Lord Breadalbane, were parties. Lady Mary was thereby provided in an annuity out of the Buckingham estates, which was to vary from £2500 to £3500, and this provision was expressly declared to be in full of all her legal rights, as widow, by the law of England. She was to receive from her father, as her "portion or fortune," the sum of £30,000, of which one-third was payable at the marriage, another third fifteen months thereafter, and the remaining £10,000 was to be paid within six months after his decease. The deed contained no discharge of her right to legitim by the law of Scotland.

In 1821, the present Marquis of Breadalbane married Miss Baillie of Melgum, his father becoming bound, under the marriage-contract, to give him an annual allowance.

No. 96. In 1831, Lady Elizabeth Campbell was married to Sir John Pringle of Stitchell, and received certain provisions, which were declared in the marriage-contract to be in full of all her legal claims.

1. 20, 1836.
Marquis of
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Chandos.

In 1828, the late Marquis executed, in favour of certain trustees, a disposition and settlement (with reserved power to alter) of his unentailed heritable estate, and of his whole moveable property, with the exception of the furniture, jewels, &c., within the Castle of Taymouth, which were bequeathed to his son. The second of the trust-purposes was for payment, inter alia, to his widow and two daughters, of all "provisions, and obligations in their favour contained in any deed or deeds granted, or to be granted by me to them, or to which they may have right by law, in so far as the same may affect my said general estate or effects."

The trustees were directed to employ the whole free proceeds of the trust-estate, and the accumulations therefrom, in the purchase of lands in the counties of Perth or Argyle, which, at the end of twenty years, were to be entailed, and made over to the heir of entail of the Breadalbane estates in possession at the time.

In August, 1829, he executed the following codicil to the trust-settlement:—"In virtue of the power herein before reserved, to alter and innovate these presents, I hereby direct that my said trustees, instead of investing the free rents of my unentailed lands and estates in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell, and Mary Marchioness of Chandos, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive; but that always without prejudice to the obligations and provisions granted by me in favour of Mary Countess of Breadalbane, or to the obligations contained in the contract of marriage between John Viscount Glenorchy and Eliza Baillie, his spouse."

Besides the personal property in the house of Taymouth, certain leasehold property in London was provided to the present Lord Breadalbane.

In 1834, the late Marquis died, being survived by the Marchioness and the three children above mentioned. His son succeeded to the unentailed estate, and to the special legacies aforesaid, and was infeft as male and of tailzie to his father. Thereafter, various questions have arisen as to the disposal of the moveable succession and the rents of the unentailed lands, the trustees, in whom both were vested, raised the present process of multiplepoinding to settle the rights of parties.

Lady Chandos claimed a third of the free moveable succession as only child entitled to legitim, and without prejudice to this claim, was to be preferred over the rents of the unentailed lands. Lady Elizabeth Pringle claimed the sums provided by her marriage-contract, and also the annual proceeds of the unentailed lands.

Lord Breadalbane claimed a third part of the whole moveable su

is legitim ; or, if it should be found that Lady Chandos had right to legitim, then he offered to collate with her whatever he had taken, or he might be entitled to take as heir of line of his father, or whatever he might be entitled to as his father's heir, other than the entailed estate ; he also offered what was specially bequeathed to him by the late Marquis.

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Marchio
Chandos

The Marchioness Dowager claimed one-third of the personal estate, legitim ; and also, in right of her terce, to be put in possession of one-third of the unentailed lands in which her husband died infest.

The trustees claimed to be preferred to the trust-estate, or, at least, to the extent of it as should not be required to satisfy the claims of any of the creditors, who claiming adversely to the trust-deed, should be ultimately preferred.

Out of these competing claims three questions of law arose :—1st, Whether Lady Chandos had right to legitim ? 2d, Whether Lord Breadalbane was entitled to a share without collating ; and, 3d, Whether Lady Chandos, by taking to her legal provisions, had forfeited her right under the trust-deed to one-half of the rents of the unentailed lands ?

As to the first, Whether Lady Chandos had right to legitim ?

Lord Breadalbane and the trustees maintained, inter alia, that her husband's marriage, and the settlements then framed, implied or imported a discharge of her right of legitim ; that this was in some measure a question as to the intention of the late Lord Breadalbane ; that there was no discharge of the legitim having been discharged on the occasion of Lady Elizabeth Pringle's marriage, and the only difference between the two marriages was, that the phraseology of the one marriage-contract was English and that of the other Scotch ; that the expressions " portion " and " legitime," in the English contract, ought to be considered as sufficient to comprehend the same idea, which, in the language of Scotch conveyancing, would be conclusively ascertained by the terms " portion-natural," " legitim," or " bairn's part ; " or otherwise, that Lady Chandos's marriage formed a personal bar, by forisfiliation, to her demand.

To this it was answered, that Lady Chandos had done nothing, directly or indirectly, to discharge or bar, or otherwise exclude her right to legitim ; that the reasonable presumption was, since direct and positive words, such as by the law of Scotland were indispensable for effecting such a discharge, were not used, Lord Breadalbane being a party to the contract, that the understanding and intent of parties must have been, that the legal rights were to remain entire ; and that forisfiliation, to the effect of excluding the legitim, was not inferred by marriage, and the acceptance of a provision not expressly declared to be in full satisfaction thereof.

In regard to the claim of Lord Breadalbane, his Lordship con-

cluded that he was entitled to legitim without collating to any greater extent than what he might be entitled to take as heir of line,

No. 96. and especially without collating his interest in the entailed estate, or the special bequest, or the provisions or monies received from his father during the life of the latter. He and the trustees farther contended that Lady Chandos was bound to impute pro tanto in extinction of her claim the sum of £30,000, provided to her by her father in her marriage-contract.

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 . 20, 1836.
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 andos.

Lady Chandos, on the other hand, pleaded, that the Marquis of Breadalbane was in no view entitled to participate in the legitim, without first collating every benefit he had taken or succeeded to, or might take or succeed to, by or through his father, whether in his lifetime or in consequence of his death.

The question thus raised being substantially the same as that in the preceding case of *Anstruther v. Anstruther*, it is unnecessary to repeat the arguments at length.

3. The remaining question related to the right of the Marchioness Chandos, under the codicil to the deed of settlement, to one-half of the rents of the unentailed lands.

Lady Elizabeth Pringle and the trustees maintained, that Lady Chandos was not entitled to participate in these rents, in respect that having taken to her legal provision, and repudiated the settlements of the late Marquis, and frustrated the same to a great extent, she could claim no benefit in virtue of those settlements.¹

Lady Chandos answered, that, by claiming legitim, she was not repudiating or running counter to the deed of settlement, being just as much entitled, under the alternative words of the second of the purposes of the trust, to “those provisions to which she had right by law,” as to those contained in direct deeds of grant from the testator; that the subject of her present demand was a special provision out of the heritable estate conferred on herself individually, and, therefore, not inconsistent with her claim of legitim.²

The Lord Ordinary reported the cause on Cases.

LORD JUSTICE-CLERK.—Here we have, first, the claim of Lady Chandos, which she is opposed by the trustees of the late Marquis, and by her brother, the present Lord Breadalbane. She says she is entitled to the whole legitim, and as her mother is not precluded from her *jus relictæ*, this must be a third of the moveable succession. She has been met by the defence, that there are facts and circumstances showing that her claim is extinguished; but, on considering the whole matter, I have found nothing to support this defence. She has also been met by the plea of *forisfiliation*. Now in the marriage-contract, which was

¹ *Henderson v. Henderson*, July 26, 1782 (Mor. 8191); *Collier v. Collier*, July 1833 (ante, XL 912).

² *Howden v. Crichton*, May 18, 1821 (ante, I. No. 16).

ured by an able English solicitor, there is no abandonment of her legal claims No. 1
 ie part of Lady Chandos, direct or indirect. There is even a great deal in the Jan. 2
 es of the deed to raise the argument, that it was not the intention of Lord Marqu
 albane that her legal claim should be discharged by the provision in the Breada
 act of marriage. Before the doctrine of forisfiliation can come in, there March
 have been acceptance of a provision in full satisfaction of the legitim. Chand
 If,
 Lady Chandos be entitled to legitim, what is the extent of her claim?
 Breadalbane says he is entitled to an equal share; but this he can have
 by collation. As there is no difference, in point of principle, between this
 and that of Anstruther, we must give the same decision in both. Thus,
 y Chandos will be entitled to the whole legitim; and her provision of £30,000,
 a question with the trustees, will not fall to be imputed in the legitim. In
 and to the interest of the Dowager Lady Breadalbane,—in right of her jus
 ste, she is entitled to one-third of the whole moveable estate; and, as to her
 t to a third of the rents, we must look to the nature of the provisions of the
 cipal entail of Breadalbane.

learn of Faculty.—Her Ladyship repudiates the provisions of the entail.

ORD JUSTICE-CLERK.—Then she is entitled to be kenned to her terce out
 he unentailed lands. As to Lady Elizabeth Pringle's claim to the rents of
 unentailed estate, she is, at all events, entitled to a half of the free yearly
 needs. Whether she is entitled to more, involves a question as with Lady
 ndos, on which we must have farther argument.

The other Judges having concurred,

THE COURT pronounced the following interlocutor:—"Find that Mary
 Marchioness of Chandos, has not, by her contract of marriage or otherwise,
 renounced her legitim, and is therefore entitled to make her claim for the
 same accordingly; and in respect the said Marchioness of Chandos is the
 only younger child of the late Marquis of Breadalbane, who has not
 renounced the right of legitim, find that her claim extends over one-third
 part of the free moveable estate of her said father, and that it is not to
 be reduced in amount by imputing thereto any part of the sums provided
 to her by her said father in her contract of marriage, and which sums, in
 so far as not yet satisfied, must form a deduction from the trust funds in
 medio, reserving to the trustees any claim of relief for the same that may
 be found competent to them against the heirs of entail of the late Marquis
 of Breadalbane, and to all other parties their rights as accords, and decern
 accordingly: Find that the claimant, the present Marquis of Breadal-
 bane, is not entitled in name of legitim to any share of the funds in medio
 without collating his interest in the entailed estates to which, on the death
 of his father, he has succeeded, and in hoc statu repel his claim of legitim
 accordingly, and decern: Find that the claimant, the Marchioness-
 Dowager of Breadalbane, is entitled to a terce of the unentailed estates
 in which her husband, the late Marquis of Breadalbane, died infest, and
 to make her right to the same effectual in due course of law; and farther,
 find that the said Marchioness-Dowager of Breadalbane is entitled to her
 jus relictæ, extending over one-third part of the free moveable estate of
 her said deceased husband, and decern: Find that the claimants, the
 trustees under the contract of marriage between Sir John Pringle and

No. 96.

Jan. 21, 1836.
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Kerr.

Lady Elizabeth Maitland Campbell, daughter of the late Marquis of Breadalbane, are entitled to the sums therein provided by the said deceased Marquis, in terms of her claim for the same in this process: Further find that the said Lady Elizabeth Pringle is now entitled to one-half the free yearly proceeds of the unentailed estates of her said father conveyed by him to his trustees, raisers of the present process, in terms of his settlements referred to, and decern, and that without prejudice to any farther claims on her part, either on the predecease of her sister, the Marchioness of Chandos, or in the event of its being found that the claim of the said Marchioness, her sister, to the other half of the said rents, in terms of the said settlements, cannot be sustained—on the validity of the effect of which claim on the part of the said Marchioness of Chandos point counsel to be farther heard in their own presence: Find that the claimant, the present Marquis of Breadalbane, is entitled to the said legacies claimed by him as contained in the settlements of his father, the late Marquis of Breadalbane, but under the proviso that neither the said nor any other legacies contained in the settlements of the said deceased Marquis of Breadalbane, shall affect or diminish the claim of legitim of the said *jus relictæ* as found competent and sustained by this interlocutor; reserve for farther consideration all other points and questions arising in the present process which are not disposed of by the preceding findings.

DAVIDSONS & SYME, W.S.—W. BOWIE CAMPBELL, W.S.—GIBSON-CRAIGS, WARDLAW,
 DALZIEL, W.S.—J. & C. NAIRNE, W.S.—Agents.

No. 97.

JOHN M'GOWAN, Petitioner.—*D. F. Hope—Gordon.*
 ROBERT WIGHTMAN KERR and OTHERS, Respondents.—*Sol.—George*
Cunninghame—M' Dowall.

Cessio—Process.—1. The Court “found a pursuer entitled to the benefit of *cessio*, on his granting a disposition *omnium bonorum*, and becoming bound to the trustee in the disposition to make payment to him for the creditors of £100 per annum”—Held competent for the pursuer, before extract (on the allegation of such a change of circumstances as made it impossible for him to comply with the above condition of paying £100 per annum), to present a petition to the Court to resume consideration of his case, and to find him entitled to the benefit of *cessio*, on assigning a smaller sum. 2. Circumstances in which a pursuer is found entitled to the *cessio* (by agreement of parties) on assigning £70 per annum to his creditors.

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 —
 1st Division.
 D.

JOHN M'GOWAN, surveyor of taxes for the county of Peebles, raised a process of *cessio bonorum*. Appearance was made for the creditors, and, on 4th July, 1835, the Court pronounced this interlocutor: “Having considered the condescendence, and heard counsel for the pursuer and defenders, find the pursuer entitled to the benefit of *cessio*, on his granting a disposition *omnium bonorum*, and becoming bound to the trustee in the disposition to make payment to him for

sed to make the smallest allowance to him out of that income, had already set apart £81 a-year towards paying his creditors, otherwise involved on his account; that his whole income as of taxes for Peebles-shire was £120, but that the expenses of a full survey amounted to £30, leaving a free income of only £90; that if he could not be found entitled to the cessio, without some one of the conditions inserted in the above interlocutor, he was in the position of being absolutely excluded from the benefit of it, because it was impossible for him to fulfil these conditions. Moved the Court, "to resume consideration of his case, and, in the circumstances just detailed, to find him entitled to the benefit of it, upon his becoming bound to pay to the trustee named in the decree omnium bonorum, to be thereafter executed by him, for behoove of his creditors, such sum annually, out of his said salary, as to your Lordships shall seem just."

Arrangements were made for Robert Wightman Kerr, and others, the respondents, who contended, that it was incompetent to open up a final decree of the Court; and that, at least, there was no sufficient change of circumstances to warrant so unusual a proceeding.

PRESIDENT.—I doubt the competency of this application. Where a decree is refused, *hoc statu*, it is quite competent to apply again, and to get a new decree from the Court, so soon as there is any change of circumstances. Where an interlocutor has been pronounced which grants the cessio, the case is entirely different.

GILLIES.—I rather think the application competent. If a cessio be

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Hamilton.

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Bank of Scot-
land.

THE COURT held it competent for the pursuer to go into his case the merits, which was now done accordingly; but it proved to be necessary for the Court to give a judgment on the merits, as it appeared that the pursuer was likely to lose his office of surveyor of taxes, the only fund available to the creditors, unless some arrangement effected; and the creditors agreed that he should be found entitled to a cessio, on assigning £70 per annum to them, which was about 1 per cent on the amount of his debts.

BAXTER and MACDOUGALL, W.S.—J. and W. DYMCK, W.S.—Agents.

No. 98.

GEORGE BAILLIE, Pursuer.—*D. F. Hope—Anderson.*
SIR GEORGE BAILLIE HAMILTON, Defender.—*Patton.*

Jan. 21, 1836.

2D DIVISION.
Lord Jeffrey.
T.

Entail.—This was an action at the instance of Mr Baillie of J. woode, against the heirs of entail of the estates of Mellerstain, J. woode, and Langshaw, concluding to have it found and declared that the pursuer was entitled to sell, alienate, or burden the entail land on reasonable considerations. The question was, whether certain clauses against alienation and contraction of debt were directed against the pursuer, as heir-male of the second son of Lady Binning, daughter of the entailer.

The Lord Ordinary, upon a view of the whole deed, held that the clauses in question, being directed only against Lady Binning's "whatsoever," were not binding on the description of heirs to which the pursuer belonged, and decerned accordingly.

THE COURT adhered.

WARREN H. SANDS, W.S.—TODD and ROMANES, W.S.—Agents.

No. 99.

JOHN ANDERSON and MANDATARY, Pursuers.—*Robertson.*
BANK OF SCOTLAND, Defenders.—*Keay—Whigham.*

Title to Pursue—Mandatory—Expenses.—A pursuer, who had raised action with a mandatory, moved afterwards to withdraw him, and sist a new mandatory to whom no objection was stated by the defenders; the pursuer farther craved the Court, on caution for all the past expenses being found, to declare the first mandatory free of all liability, and stated, as a ground for this, that the mandatory related to a judge before whom the cause might come, and who would be disqualified, if the mandatory was not withdrawn; the defender refused to consent that the Court had power to declare the mandatory free of all liability, and the locutor to that effect pronounced accordingly.

in whose favour a mandate is herewith produced and lodged in

Hope wished to withdraw himself absolutely from process, and
ner made a motion to that effect. He contended, that a respon-
datary, who was undoubtedly sufficient for all the past and future
s, was all that a defender could require; and that if such man-
was sisted in room of the first mandatary, the defenders had no
and consequently no title, to object to the first being relieved.
defenders did not state any objection to Anthony Murray's suf-
, but they pleaded, that James Hope could not be relieved of
for the past expenses, by any form of process, unless they chose
mt; and they refused to consent.

Lord Ordinary " allowed Mr Murray to be sisted as mandatary
pursuer, in place of Mr James Hope, he consenting to be bound,
. the event of his withdrawing, to satisfy any claim which the
rs may have against Mr Hope; and held him sisted accord-
&c.

defenders reclaimed.

pursuer offered unexceptionable caution, to the amount of the
s already incurred, and he was allowed to put in a minute
this. He therefore lodged a minute, " that, in addition to the
of Mr Murray, now sisted as mandatary, the pursuer was ready
caution for any expenses which may have been incurred prior to
ng of Mr Murray, and craved that, on such caution being found,
es Hope, junior, should be declared free from all responsibility

No. 99. stated against the pursuer's motion, I think the Court have a right to declare Mr Hope free of all liability as mandatary, and to allow him to withdraw on that footing.

. 22, 1836. Cuaig v. Macaulay.
LORD MACKENZIE.—I am of the same opinion. Sufficient caution for all the past expenses is offered, and a mandatary is sisted, in regard to the future proceedings, to whom no objection is stated. In these circumstances, I apprehend that every right which is competent to the defenders is satisfied. Their right to exact caution is by no means of a very favourable sort, as it is hard enough on a party to be debarred from carrying on his action, unless he finds caution for expenses. But when he complies with that condition, and an equitable reason is stated for allowing him to withdraw his first mandatary, I think the opposition by the defenders ought to be repelled.

LORD BALGRAY.—I entirely concur. The defenders have no interest, and consequently no title, to resist Mr Hope's withdrawing.

The LORD PRESIDENT declined himself, in respect of his relationship to James Hope.

THE COURT accordingly found, that, on caution being found, James Hope junior, should be declared free from all responsibility to the defenders, and awarded to the pursuer the expense of this discussion.

J. HOPE, Junior, W.S.—DAVIDSONS and SYME, W.S.—Agents.

No. 100. DUNCAN M'CUAIG and REV. WILLIAM M'RAE, Pursuers.—*Maitland*
DONALD MACAULAY, Defender.—*Rutherford—Penney.*

Title to Pursue—Cautioner—Executor—Proof.—1. The son (Charles) and three daughters of a party deceased were confirmed executors-dative, and they appointed two factors and commissioners to recover and realize his whole estate, with power to invest it for their behoof. The commissioners raised an action for the price of articles bought by the defender at a roup of the effects of the deceased. During the action, Charles executed a trust-disposition of all his effects for behoof of his creditors, which contained a clause of revocation of the factory and commission. One of the trustees was the defender, but a majority of the trustees gave authority to the commissioners to recover, under their action, whatever might be due by the defender, and account to them for the share of Charles—Held, that the defender could not found on the trust-deed, as taking away from the commissioners the right to pursue, either as to the one-fourth belonging to Charles, or the three-fourths belonging to his sisters. 2. Terms of a missive letter, and of an admission on the record, which held sufficient to instruct a cautionary obligation which had been verbally interposed for one of the bidders at a roup.

. 22, 1836. THE late Rev. Alexander Simpson, minister of Lochs, in the Lowlands died intestate, and left one son, Charles, and three daughters. They were confirmed executors as next of kin, and, in 1831, granted a commission and factory, as executors-dative, "considering that it is necessary for them to appoint proper persons for expediting confirmation, and uplifting and recovering such debts and sums of money as are outstanding and due

aid deceased Alexander Simson, and such other sums as we may be led to in consequence of his death; and also for settling and discharging such accounts and debts as were then due by him." The fourutors therefore appointed Duncan M'Cuaig, and the Rev. William Rae, their factors and commissioners, with power to give up inventory, &c.; "as also, for us, and in our names, to ask, demand, and receive, intromit with, uplift, and receive, all and sundry debts and sums of money resting and owing to the said deceased Alexander Simson, by bills, decreets, tacks, agreements, accounts, or any other way, by every person or persons: As also, all and every sum or sums to which, or either of us, have, or could have, right, as his executors; in particular, the ann and sums due from ministers' widows fund; to call and sue therefor before any judge competent." Power was also given to the commissioners to settle all accounts due by the deceased, and "to set the money to be recovered in virtue hereof on suitable investments for our behoof,"—"and we hereby declare, that every thing relating to the premises, done or transacted by our said factors, shall be as valid and effectual as if done by ourselves, promising to hold the same firm and stable without revocation."

A roup of the effects of the deceased took place at Keose, at which Donald Macaulay, surgeon, made a variety of purchases. A person named M'Lellan having appeared as a bidder at the roup, his solvency was objected to, on which occasion Macaulay interfered on his behalf. M'Lellan was then allowed to make some purchases, and, having become bankrupt, Macaulay addressed the following letter to Simpson's representatives:—"Stornoway, 28th March, 1831. I have promised, at Keose, in October last, to guarantee the purchases made by Mr Duncan M'Lellan, tacksman of Habost, at that sale. My motives having been to benefit the sale, and none other, and the said D. M'Lellan being since declared insolvent, partly by proceedings at the instance of the same parties, I claim relief at their hands."

In April 1832, M'Cuaig and the Rev. William M'Rae raised a summons against Macaulay, in which they designed themselves "factors and commissioners for Mrs Unie Simpson or Bethune, &c., and Charles Simpson, children and executors-dative" of the deceased Rev. Alexander Simpson. They concluded for payment of £199, 3s. as the price of the goods bought at the roup, and £17, as being the value of purchases made at the roup by M'Lellan, under the guarantee of Macaulay.

In June following, Charles Simpson, on the narrative of his being about to proceed to America, and wishing to do justice to his creditors, executed a trust disposition of his whole estate and effects, including his "share in the country, &c. and all other claims competent to me against my father's trustees, or representatives, and all sums of money due by said trustees to me," &c. The conveyance was in favour of three persons, the major number accepting." At the close of the deed,

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 Macaulay.

and after the registration clause, it was declared that the deed "subscribed with this addition before subscription, that the factory formerly granted by me, and my sisters and husbands, to the Reverend William Macrae and Duncan M'Cuaig, is hereby recalled, so far regards me."

Macaulay lodged defences to the action within a few days after the deed was signed, in which he denied that the amount sued for was due and set up claims of compensation. He obtained leave to lodge additional defences in December following, in which he stated an objection to the pursuer's title as having fallen in consequence of Charles Simpson's trust-deed. The pursuers then produced a minute by the two co-trustees of Macaulay, bearing that they had seen Macaulay's additional defence and disapproved "of his pleading a revocation of the factory"—"and to the contrary, we authorize the pursuers to proceed in the said action to recover, for the benefit of Charles Simpson's creditors, the sums found due by Dr Macaulay in said action, and when recovered, to account to us, as trustees for Charles Simpson's creditors, for whatever sums they may recover under the said factory, as due or owing to the share of the said Charles Simpson."

In making up the record, Macaulay stated as to his interference on behalf of M'Lellan at the roup, that M'Lellan's offers were objected to by the auctioneer "on account of some scruples as to his solvency"—that he (Macaulay) "remonstrated against this, &c. and added that he would not himself hesitate to accept M'Lellan's bill in any transaction, and that he would not be afraid to guarantee his purchases. But although this was publicly stated by the defender, there was no acceptance of the offer made at the time."

Macaulay also alleged that he was the holder of a bill for £75 drawn by Charles Simpson in his favour upon the pursuers. He produced evidence of forgoing and caption on such a bill at his instance against Simpson, but he failed to produce the bill itself, though he was allowed diligence, which he only partially executed, to recover it.

In these circumstances, Macaulay pleaded in defence—

1. That in virtue of the revocation of the factory in Charles Simpson's trust-deed, the whole commission and factory in favour of the pursuers fell, and they had no title to pursue.
2. That at least, in regard to the share belonging to Charles Simpson, the pursuers had no title to insist, as it was his own trustees who were in right of any sum belonging to him.
3. That in regard to M'Lellan's purchases, he had never bound himself, nor been accepted as cautioner.
4. That he ought to have credit in accounting with the pursuers for the £75 contained in the bill drawn in his favour by Charles Simpson, and the pursuers. And,
5. That various articles had not been delivered to him, and that

That the alleged revocation was contained in a trust-deed for behoof of the pursuers; and a majority of the trustees, by special minute, had enjoined the pursuers to prosecute this claim against Macaulay, and to sue him for what they recovered, so that, even if the factory was dissolved, the pursuers were entitled to insist under this mandate from the trustees of Simpson's estate. But that the revocation was ineffectual, being inconsistent with the obligations of Charles Simpson to his co-executors, especially in regard to its effect upon any action then in dependence thereon.

That both the letter of 28th March, 1831, and the admission of liability on the record, instructed his liability to guarantee M'Lellan's losses.

That the bill for £75 was not produced, nor its absence accounted for, and that no credit could be allowed for it, especially as the whole estate of Macaulay was open to pregnant suspicion. And,

That every article was truly delivered, and no true or relevant particulars of damages were stated.

The Lord Ordinary "repelled the objection to the title of the pursuers, also repelled the defences, and found the defender liable, in regard to the whole sums libelled, with the exception of the price of the articles, the delivery of which is denied in the fourth and fifth heads of the defender's 'statement,' reserving to the defender to establish, in competent legal proceedings, his claim of damages averred in the ninth article of that statement; appointed the case to be enrolled, that parties may be heard on the merits of ascertaining the disputed question of fact, as to the delivery of the articles above referred to." *

No. 100. Macaulay reclaimed, and stated that he was now able to produce the £75 bill of Charles Simpson.

Jan. 22, 1836.

Quaig v.
Macaulay.

THE COURT adhered, under the qualification of remitting to the Lord Ordinary, to consider the effect due to the £75 bill, now recovered.

MACKENZIE and MACFARLANE, W.S.—R. ROY, W.S., Agents.

Simpson's own interest in the succession, two of his trustees (the defender himself being the only other trustee) have, by letter, expressed their disclamation of the plea now set up by the defender, and their approbation of the present action, so that the defender stands in the very unfavourable position of a party pleading Charles Simpson's own trust-deed, in bar of a claim of debt due by himself, the defender, to his constituent. In these circumstances, the Lord Ordinary thinks the objection to the title must be repelled, and the defender will be perfectly secured, even as to Charles Simpson's share, by obtaining the concurrence of the other two trustees of Charles Simpson, in the discharge to be granted to him, on payment of the sum decerned for.

"On the merits, the Lord Ordinary is of opinion, 1st, That as the bill for £75, said to have been granted by Charles Simpson, has not been produced; and as the defender, after being allowed a diligence, which he only partially executed, has failed to recover it, that article cannot, even in regard to Charles Simpson's share of the executry, be allowed. 2dly, That there is ground for claiming deduction on account of the alleged failure on the part of the pursuers to give possession of the winter pasturage of Swordale, being one of the purchases made by the defender at the roup. The fact, as stated by the defender, being only, that his possession was encroached upon by another party who had acquired the adjoining winter pasturage, and there having been no attempt on the part of the defender to assert his rights in the usual way, by an application to the Judge Ordinary, the defender cannot be allowed now to enter into this as a ground of deduction against the pursuers. 3d, That the vague and illiquid claim of damages founded on alleged trespasses on the defender's farm, the greater part of them of a date years before the death of the late Alexander Simpson, the testator, are inadmissible as grounds of compensation against the claims of the pursuers for articles admitted to have been purchased by the defender at the public sale. 4th and Lastly, That the obligation and guarantee for M'Lellan is sufficiently established by the defender's admission of the conversation which took place at the public sale, coupled with his letter of the 26th of March, 1831."

JAMES HAMILTON, Pursuer and Suspender.—*Rutherford—Tait.*
JOHN WRIGHT and OTHERS (Wright's Trustees), Defenders and
 Chargers.—*D. F. Hope.—Bruce.*

Writ—Rei Interventus—Cautioner.—1. A bond of annuity bore the sum of £2000 to have been advanced to three parties, who were taken jointly and severally bound in payment of the annuity: the bond was signed by one of the parties (A), whose signature was duly attested: the signatures of the other two parties (B and C) were attested by two witnesses, of whom only one was duly designed in the testing clause: thereafter, on the faith of the bond, the sum was paid over by the lender to A, through the hands of B, as A's agent, or at least in B's presence, and with his knowledge: several terms' annuities were also paid to the lender through the hands of B:—Held, that B was barred by rei interventus from objecting to the error in the testing clause. 2. This plea of rei interventus not affected by the circumstance that C had died in the interim, and was alleged to be freed in consequence of the informality of the bond, and the rei interventus not extending to him.

On the 10th December, 1817, a bond of annuity was granted in these terms:—“ We, the Honourable Thomas Bowes, John Buchan, writer to the signet, and James Hamilton, Esq. of Kames, in consideration of £2000 instantly advanced and paid to us, by John Telford, Esq., whereof we hereby acknowledge the receipt, renouncing all objections to the contrary, do hereby bind and oblige ourselves, conjunctly and severally, our heirs, executors, and successors, whatsoever, to content and pay to the said John Telford, Esq., his heirs and assignees, a free yearly annuity of £221, 13s. 4d. sterling, during all the days of the natural life of me, the said Thomas Bowes, and that at two terms of the year.” The annuity was declared redeemable “ by me, the said Thomas Bowes, or by either of us, the said John Buchan or James Hamilton,” on repayment of the £2000. The testing clause was in these terms:—Subscribed by “ the said Thomas Bowes at Edinburgh, &c., before these witnesses, Alexander Anderson, print-seller in Edinburgh, and George Nelson, tenant in the county of Bute, and by us, the said John Buchan and James Hamilton at Edinburgh, the said 10th day of December, and year foresaid, before these witnesses, George Simson, junior, writer in Edinburgh, and the said Alexander Anderson.

(Signed) “ THOMAS BOWES.
 “ JOHN BUCHAN.
 “ JAS. HAMILTON.

(Signed) “ Alexr. Anderson, witness.
 “ Geo. Nelson, witness.
 “ William Simson, junr., witness.
 “ Alexr. Anderson, witness.”

One of the two witnesses to the subscriptions of Hamilton and Buchan, named “ William Simson,” while the testing clause took notice only of

No. 101. "George Simson." This bond was written by the agent of Telford, the creditor.

Jan. 22, 1836.
Hamilton v.
Telford.

On the faith of this bond of annuity, Telford advanced the sum of £2000. It appeared that this advance was truly for behoof of the Honourable Thomas Bowes, who afterwards became Earl of Strathmore; but it was made with the knowledge of Hamilton, who negotiated the transaction as agent of Lord Strathmore; and the money either passed through his hands as agent, or was paid over in his presence, for his lordship's behoof. Through Hamilton, also, the termly annuities continued for a considerable time to be paid to Telford.

In 1832, the bond was registered, by the trustees of the late John Wright of Glenlyon, to whom Telford had conveyed it, and a charge was given to Hamilton for the arrears of annuity, at and since Martinmas 1822. Buchan in the mean time was dead, and it was said that no *rei interventus* affected him. Hamilton presented a bill of suspension, alleging that the bond was a nullity as to him, because his signature was unattested, there being no such witness as the subscriber William Simpson, designed in the testing clause.

The bill of suspension was passed, and Hamilton repeated a reduction of the bond, which was conjoined with the suspension. Wright's trustees raised an ordinary action against Hamilton, concluding for payment of the arrears on the bond of annuity, and this was also conjoined with the other two processes at Hamilton's instance. These actions involved various questions between the parties, independently of the validity of the bond; but Cases were ordered, in which the effect of the irregular testing clause formed the chief subject argued by the parties.

Pleaded by Hamilton in support of the reduction—

1. The bond, quoad him, was in the same situation as if he never signed it. The only evidence of his signature, to which the Court could look, was that required, *de solennitate*, by the act 1681, c. 5, and such evidence was wanting, as there were not two witnesses subscribing, who were designed in the testing clause.¹

2. No money was advanced to him, but only to Lord Strathmore. As the agent of his Lordship, he was necessarily cognizant of the transaction, and passed the money through his hands. But, as he must be held by law to have never subscribed the bond, this advance to Lord Strathmore could be viewed as a *rei interventus* only between his Lordship and the

¹ Abercromby, July 15, 1707 (17022); Douglas, Heron and Co., Nov. 28, 1698 (16908); Gordon, Jan. 1686 (16181); Logie, Jan. 14, 1710 (17026); Sheil, July 1739 (17032); Park, Nov. 29, 1764 (8449); Rolland, July 1, 1767 (16851); Macfarlane, Feb. 16, 1770 (8547); Crichton, July 21, 1772 Bro. Syn. V. 639; Maidland, July 1799 (17054); Wallace, Nov. 25, 1782 (17056); Macfarlane, March 22, 1790 (8449); Caddell, June 3, 1749 (12416); Edmonstone, June 23, 1786 (17058).

from the bond itself, if originally regular and complete.

aided by Wright's Trustees—

It was admitted that the signature of Hamilton, attested by only himself, was invalid, whether he was co-obligant or cautioner, unless rei interventus had followed. But if rei interventus followed, it was upheld by a series of decisions, that this bound him effectually.¹

There were three co-obligants, jointly and severally bound. The advance to one of them was a rei interventus, as to all who were aware of that advance having been made on the faith of their being obligants. Hamilton, a professional man, was in that position, as he attested his subscription, on the footing of being a co-obligant, and passed through his own hands the £2000 advanced on the faith of his subscription. He at least saw it advanced for Lord Strathmore, on that faith. Even if the money was truly for behoof of Lord Strathmore, and if Hamilton touched it as his Lordship's agent, that could only affect questions of trust. It could not affect the right of the creditor in the bond who advanced the money on the faith of Hamilton's subscription.²

The effect of the rei interventus against Hamilton rendered him bound by the bond, just as if no irregularity had occurred in the testing. Buchan's representatives would be equally bound if a rei interventus could be established against Buchan; and if Hamilton thought it proper for his interest to have Buchan bound, he should have taken care that this was the case before allowing a rei interventus to affect the bond.

No. 101.

Jan. 22, 1836.
Hamilton v.
The Right.

The Lord Ordinary found, "that James Hamilton, pursuer of the reduction, is barred *rei interventu*, from objecting to the error in the testing clause of the bond of annuity libelled on; repelled the reasons of reduction, assolizied the defenders from the conclusions of that action, and decerned; and, in the ordinary action and suspension, appointed counsel to be further heard." *

Hamilton reclaimed.

LORD BALGRAY.—I have no difficulty whatever in adhering. The *rei interventus* is most completely established, and we should be departing from important precedents if we failed to give effect to it, and to hold Hamilton bound.

LORD PRESIDENT.—I am of the same opinion. The money was paid up on the faith of Hamilton's adhibiting his subscription, and he cannot afterwards plead that he is not bound. Even in a case where the subscription was entirely wanting, to a contract of marriage, it was held that the contract was binding in its provisions, so soon as it was established that marriage had followed on the faith of it.

LORD MACKENZIE.—I am also for adhering. The grounds of my opinion are contained in the Lord Ordinary's Note, in every word of which I concur, under

* "NOTE.—It is clear that the bond of annuity, in so far as Mr Hamilton was obligant, was originally improbativ, in consequence of the mistake as to the witnesses names in the testing clause, and he would have been entitled to avail himself of that mistake, even although he acknowledged his own subscription, if the bond had remained entire. But the price of the annuity was paid to Lord Strathmore on the faith of Mr Hamilton's engagement, and Mr Hamilton was aware of that fact, as appears from his books, as well as his admissions in the record. As agent for Lord Strathmore, he negotiated the transaction, and if he did not receive the price in his own hands, was present when it was paid over to Lord Strathmore, or to others for his Lordship's behoof. Further, for a long period he was the person from whom the annuitant received the termly payments of the annuity. Being jointly bound with Lord Strathmore, it is of no consequence whether the money was applied to his use, or to that of his co-obligant; for to constitute a *rei interventus* it is not necessary that the party against whom it is pleaded should derive benefit from what has been done. It is enough, if the party who pleads it, is placed in circumstances, on the faith of the agreement, by which his interest would suffer if it was not implemented. Neither is a *rei interventus* pleadable merely to supply a defect in written evidence; it also bars *locus pœnitentiæ*, in cases in which a party may otherwise competently resile. The distinction, so much dwelt upon in Mr Hamilton's case, between a contract for a loan, and for the purchase of an annuity, does not appear to the Lord Ordinary to affect the question in any respect. Both contracts are legal, and, when regularly entered into, may be enforced; for it is settled that usury cannot be pleaded against a contract for an annuity, although the purchaser, for his farther security, should insure the seller's life. It may further be remarked, that there can be no dispute here as to the terms of the bargain, because the bond which Mr Hamilton subscribed, as a co-obligant, is confessedly binding upon Lord Strathmore, the testing clause, as it applies to his Lordship's subscription, being perfectly correct."

THE COURT accordingly adhered, and found Hamilton liable in expenses since the date of the Lord Ordinary's interlocutor.

WETHERSPOON and MACK, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

MARGARET CUBBISON, Pursuer.—D. F. Hope—Milae.
WILLIAM HISLOP, Defender.—Keay.

No. 102

1833—Record—Title to Pursue.—In a reduction, the defender, before satisfying reduction, gave in defences, stating, inter alia, a title to exclude, but not stating any that the pursuer had no title to insist: the Lord Ordinary afterwards, of considered the production to be satisfied, "reserving all the preliminary defences 1:" defences on the merits were subsequently ordered, the first of which was, he pursuer had no title to insist: a record was made up and closed without ~~the~~ being inserted in it, but, at the debate before the Lord Ordinary, the ~~de~~ was allowed, without the pursuer's consent, to superinduce the plea, de plano, the record: the Lord Ordinary then sustained the objection to the pursuer's and dismissed the action—Held, that this interlocutor was incompetently pronounced, and should be recalled, "in respect the objection to the pursuer's title a part of the record."

MARGARET CUBBISON raised a reduction of the titles of William **Jan. 22, 1830**
up to the lands of Banks and others, libelling herself as heir served **1st Division**
stoured to her uncle, the deceased John Cubbison, heritable pro- **Ld. Cockburn**
or of the lands. Hislop, before satisfying the production, lodged **D.**

No. 102. under a precept of clare constat, and brought a process of reduction-improbation, for setting aside the decree of certification pronounced in the process of ranking and sale: That William Cubbison died during the dependence of this action, and the process was transferred against the present pursuer, Margaret Cubbison, and her sister Mary; and that Aird was finally assoilzied from the reduction: That the process of ranking and sale then proceeded, and decree of sale, in 1787, was pronounced in favour of Aird; and that a balance of the price of the lands which remained over was divided between Margaret and Mary Cubbison. Hislop pleaded, as a title to exclude, 1. The decree of sale of 1787; and, 2. The decree absolvitor in the reduction. The defender, at the same time, pleaded these farther defences—That the decree of sale could not be challenged by one who had appeared in the process of sale itself, or in the above-mentioned process of reduction, especially after forty years from the date of the decree; and that the pursuer's acceptance of a share of the price was a homologation of the decree of sale, and moreover inferred a representation of William Cubbison, the original defender in the process of sale.

The Lord Ordinary found, “ that the defences so proponed, founded on the decret of sale and the decret of absolvitor produced, resolve into and constitute objections to the title of the pursuer, either to insist for production of the other writs called for in the summons, or to enquire into the general merits of the said decret of sale, in respect of its grounds and warrants, or otherwise: That until those defences shall have been discussed, and in some manner disposed of, the defender having produced the said decret of sale, is not bound to make any farther production: Therefore, that the pursuer is not in hoc statu entitled to require the defender to take a day for satisfying the production, under the usual certification: But, in respect that some of the defences so stated may not be of such a nature that the discussion of them ought to be separated from that of the merits of the reduction of the said decret of sale, and farther, in respect that the reasons of reduction libelled in regard to the decret of adjudication, and other grounds and warrants of the said decret of sale, appear to constitute the chief grounds on which the said decret of sale itself is challenged: Before farther answer, appointed the parties to be further heard on the merits of the said defences, in so far as they may be found to be properly preliminary, in order that judgment may be pronounced thereon, or such other order or deliverance given, as the justice of the cause may require; and appointed the cause to be enrolled for that purpose.” *

* “ NOTE.—If the productions were to be held satisfied as to the decret of sale and a condescendence by the pursuer were ordered, the whole merits would be opened to the effect that, in preparing the cause at least, the pursuer would be entitled and bound to state all her averments affecting the validity of the decret.

Afterwards, the Lord Ordinary, "of consent, reserved all the preliminary defences stated for the defender, and appointed him to produce the writings called for in the reduction libelled for satisfying the production in the said process, and that within eight days, with certification."

No.
Jan. 27
Cubbison
Hilop

The Lord Ordinary afterwards pronounced an interlocutor, holding the production satisfied, and appointing "the defenders to give in defences on the merits."

Defences were then lodged, pleading—

"1. The pursuer has no title to insist in this process in the character of sister to her uncle John Cubbison, in respect John was divested of all share in the property in question, by the disposition granted by him on 1st January, 1769, in favour of his brother David.

"2. The only character in which the pursuer can appear is that of sister of her brother William Cubbison; but as a decree of sale cannot be challenged by any party who appeared in the course of the process, either as defender or as pursuer of a recissory action for setting aside any of the proceedings which took place in that action; so neither can it be challenged by the representative of such defender.

"3. Still less can the pursuer maintain this action, since she herself appeared after the death of her brother, attempting to reduce the decree of certification, and a judgment was pronounced against her in foro condictorio.

"4. Least of all can such challenge be maintained, after the lapse of many years from the date of the decree.

"5. Minority affords no ground for a challenge of a decree of sale, in pursuance of the statute 1695, cap. 6.

"6. The pursuer, by accepting of the balance of the price, and giving a discharge thereof to the purchaser (more than forty years ago), must effectually acquiesced in and homologated all the previous judicial proceedings.

"7. By receiving that balance, the pursuer has incurred a general representation of her brother, William Cubbison, and is thereby barred, independently of all other reasons, from challenging the decree of sale to which William Cubbison was a party."

The remaining pleas in defence were a repetition in substance of those in the first set of defences.

It could not do this without going into the nature and circumstances of the process of constitution and adjudication, and calling for production of the writings connected with them. There is therefore great difficulty in this course; and the Lord of Maule evidently does not reach such a state of the case. But some of the defences, especially the two first, are in their nature preliminary; and though in any case such defences may be more conveniently reserved till the record is taken, it will not follow that this ought to be done, if it should appear that it is a fair course of justice."

No. 102. A record was then made up, in which the defender stated in law—

m. 22, 1836.

Cubbison v.

Islip.

“ 1. The decree of sale which was pronounced in foro con- the pursuer herself being a party to the proceedings, cannot be opened up on grounds competent and omitted.”

2 and 3. The pursuer's right of challenge was cut off by the prescription, and, at all events, the process of sale was regular and challengeable.

The disposition by John to David Cubbison on 12th January was not admitted by the pursuer to have ever existed, and it was produced. At the debate before the Lord Ordinary, however, the pursuer alleging that the existence of that deed had been judicially recognised and that the state of possession was irreconcilable with the existence of any right of property in John, pleaded that the pursuer, who had libelled herself to be the heir of John, was without a title to interest. The Lord Ordinary allowed the defender, whilst at the bar, to supply a plea to this effect, *de plano*, upon the closed record, though the pursuer did not consent, and then his Lordship pronounced this interlocutor.

“ Sustains the objections to the pursuer's title, and therefore dismisses the action, and decerns, and finds the pursuer liable in expense of the process.”

The pursuer reclaimed. Before the note was advised the pursuer stated to the Court that the missing disposition had been recalled on 14th January, 1785, and he obtained warrant on the clerk re- producing the deed itself in process, reserving all questions as to the validity of the deed. The deed was produced from the records, after which parties were advised to come under the reclaiming note.

The pursuer pleaded, that, whatever might be the ultimate result of the action, the interlocutor of the Lord Ordinary had been inco- rectly pronounced, and must be recalled. The defence sustained by

* **NOTE.**—The action is brought by the pursuer as heir of her father, David Cubbison. The objection to this title is, that this uncle was divested of the lands in question by a disposition in favour of his brother David Cubbison in 1769. If this be the fact, there is no doubt the title is bad. The point in dispute is, whether the deed, on which no infestment followed, has been lost. In the pleadings the pursuer makes averments in the 27th article of her condescendence amounting to a denial of its ever having existed.

“ The defender, on the other hand, avers (articles 9 and 16 of his state) that the granting of that deed by John, and its acceptance by William, has been recognised by the Court—and assumed in various proceedings by all parties interested—and that there has been a state of actual possession irreconcilable with the idea of any right being still remaining in John.

“ Both parties have declined adducing any proof beyond the writings and the process.

“ The absence of the deed creates a difficulty. But it is not conclusive against a defender, and the Lord Ordinary is of opinion that the fact on which the objection rests is sufficiently established.”

was the want of a title to insist. But it was essential that a defence No. 22
 of this preliminary nature should either be discussed before satisfying the Jan. 22
 the Court and lodging defences on the merits, or should at least be re- Cubbin
 considered. (Act of Sederunt, 11th July, 1828, sec. 36; 6 Geo. IV. c. 120, Hislop.
 5, 6). The only defences of a preliminary nature at that stage of
 proceedings had been the statement of an alleged title to exclude—
 there was no statement of the pursuer's want of title to insist—and the
 Lord Ordinary, in ordering defences on the merits, had done so under
 reservation only of "all the preliminary defences stated." After this
 statement of an objection to the title to insist was incompetent, and
 there was no such plea set forth in the closed record. The mere super-
 addition of the plea upon the record, after that record was closed and
 the cause debated, was irregular, and was besides incompetent under the
 Act and Act of Sederunt. The interlocutor sustaining the defence,
 which was founded on that plea, ought therefore to be recalled and the
 cause remitted to the Lord Ordinary.

The defender pleaded, that, as there was an interlocutor reserving all
 preliminary defences stated, and as the defences which were lodged
 on the merits set forth in limine an objection to the title to insist, and no
 objection had been taken to the competency of such a defence being then
 made, it was too late now to do so. Besides, if the deed now produced
 failed to instruct the want of title to insist, it was *pars judicis* to allow
 next to this. And the judgment of the Lord Ordinary was in general
 terms sustaining an objection to the pursuer's title, so that if the Court
 were satisfied that this judgment could be sustained upon any of the pleas
 which were regularly set forth it was in their power to adhere, even
 though they differed from the Lord Ordinary as to the regularity of
 depending on the special ground on which it appeared, from his Lordship's
 title, that his judgment had rested.

LORD PRESIDENT.—I think the Lord Ordinary's interlocutor was incompe-
 tently pronounced and ought to be recalled.

LORD MACKENZIE.—The objection now taken by the pursuer is very narrow.
 It is as narrow as I ever heard stated.

THE COURT pronounced this interlocutor:—"Recal the Lord Ordinary's
 interlocutor reclaimed against, in respect the objection to the pursuer's
 title was no part of the record; and remit to the Lord Ordinary to pro-
 ceed as shall be just, reserving all questions of expenses."

R. MACKAY, W.S.—J. & A. SMITH, W.S.—Agents.

No. 103.

Jan. 22, 1836.
Leith Bank v.
Walker's
Trustees.

LEITH BANKING COMPANY.—*Anderson.*
WALKER'S TRUSTEES.—*Keay—Marshall.*
JOHN IRVING (Henderson's Trustee).—*Whigham.*
Competing.

Bankrupt—Heritable Creditor—Sasine—Stamp—Bill—Protest.—1. A trustee, under a disposition *omnium bonorum*, held preferable to prior creditors on the proceeds of an heritable property, for expenses necessarily incurred by him in relieving the title-deeds from hypothec, completing titles, managing the property, and bringing it to sale, but not for other expenses of commission. 2. An allegation, that at the time of taking infestment the clause in a disposition was not filled up, not a relevant objection to a sasine. No objection under the stamp laws, to a bill payable on demand written on a 6s. stamp for such bill, that it was not presented for six months. 4. Circumstances in which a promissory note, payable on demand, was held to have been duly presented, although not presented for payment until about five months and a half after its date. 5. The notary taking the protest on a bill of exchange, being the drawer and indorser of the bill,—Held that the protest and the diligence following thereon were invalid.

Jan. 22, 1836.

2D DIVISION.
Ed. Moncreiff.
F.

ON the 15th September, 1826, Archibald Scott granted to Henderson, writer in Langholm, a promissory note for £500, payable on demand, written on a 6s. stamp. It was soon after endorsed by Henderson to the Managers of the Leith Banking Company, by whom it was presented for payment on the 28th February, 1827, and on the same day it was protested for non-payment. In October, 1826, Scott accepted a bill of exchange on Henderson for £380, payable at two months, which was likewise endorsed to the Leith Banking Company; and, when it fell due, was protested for non-payment by Henderson, the drawer, who himself acted as notary on the occasion. At the time it was noted for non-payment, Henderson wrote the following acknowledgment:—"I hold myself liable in respect of Mr Archibald Scott's bill to me, 14th October last, for £380, dated 14th October last, endorsed to Leith Bank.—GEO. HENDERSON." In March, 1827, the Banking Company raised letters of inhibition against Henderson on the protests thus taken on the promissory-note and bill.

In April, 1827, Henderson granted a bond for £500 to the Leith Banking Company, by R. W. Niven, over certain heritable subjects in Langholm, on which infestment was immediately taken. The bond was *ex facie* regular and duly executed; the party who acted as notary at the taking of the sasine was one of the witnesses, the other witness having acted as procurator for the grantor. The instrument of seisin was also apparently regular, and duly recorded. Thereafter Niven conveyed this bond, with the title-deeds contained in it, to Professor Walker of Glasgow, in security of a £734, subsequently restricted to £500.

In 1829, Henderson became bankrupt, and brought a process of sequestration in which he obtained decree, after having executed a disposition of

lodged a claim for the contents of the promissory-note and bill mentioned.

Mr Walker's trustees, as representing him, claimed the amount of the bond to Niven, to which Walker had acquired

g claimed to be preferably ranked as trustee for the expenses of and executing diligence and of the process of cessio, and for the m incurred and to be incurred by him as trustee under the dispo-
mnium bonorum; and besides, for such commission as he should d entitled to, for his administration of the judicial trust; and he claimed to be ranked in his proper place, as an individual credi-
he common debtor.

regard to the claim by the Leith Banking Company, the other as stated various grounds of objection to the validity of the of £500 and £380, depending on matter of fact which was dis-
by the company; and they also maintained that the promiss-
te was null, being written on a stamp for a bill payable on de-
but not presented for payment within two months; * that it had
n presented within a reasonable time, and therefore was not duly
ted; † that in questions as to negotiation, promissory notes and
re upon the same footing, and that there was nothing to imply
e note was not intended to be immediately enforced; that the pro-
the £380 bill was null, and the inhibition proceeding on it inept,
notary who took the protest was the drawer and indorser of the

he plea of undue negotiation it was answered, that as to bills and

No. 103.

m. 22, 1836.

Leith Bank v.

Walker's
trustees.

In reference to the claim by Irving, the trustee, it was contended Walker's trustees that the proceeds of the subjects of their security could not be applied to their prejudice, in paying the expenses of the trust management.

The Lord Ordinary pronounced the following interlocutor, adding note subjoined:—“ Finds, 1mo, That the claimant, John Irving, is preferable, *primo loco*, over the fund in medio, for such sums as were just due, and were paid or engaged for by him to the agents who held title-deeds of the property in question under hypothec for business accounts, reserving all questions as to the amount or correctness of the accounts: Finds, 2do, That the said John Irving is also preferable *primo loco*, for such expenses as have been necessarily or profitably incurred by him as disponent in completing the titles of the common debt and in managing the property and bringing the same to sale: Finds, 3tio, That the said John Irving has no right of preference or of ranking in competition with heritable creditors holding valid and completed securities prior to the date of the disposition in his favour, for expenses incurred in the process of *cessio bonorum*, in the execution of the disposition *omni bonorum*, or any other expenses beyond those expressed in the previous findings, or for commission as trustee: Finds, 4to, That the title of the claimants, Walker's trustees, is a good and valid title in their persons and singular successors by heritable disposition and seisin; repels the objection taken thereto, and finds that the said title affords a good and preferable claim over the fund in medio, beyond the sums for which Mr Irving is found preferable, except in so far as it may be excluded by the claim of the Leith Banking Company in virtue of their inhibitions founded thereon: Finds, 5to, That the claim of preference made by the Leith Banking Company depends essentially on the validity of the diligence used by them on the two alleged debts of £500 and £380, and separately on the legality and validity of these debts themselves: Finds, 6to, That neither the debt of £500 itself, nor the diligence proceeding thereon, is liable to any good objection, on the ground of the stamp on the promise note having become insufficient to sustain the said note as a legal instrument at the time when the demand of payment thereof was made, on account of any failure in the due negotiation of the said note; repels the objections raised on these heads: Finds, 7mo, That the objection stated to the notarial protest of the bill for £380, on which subsequent diligence proceeds, that the said protest appears, *ex facie* of the instrument, to be the act of George Henderson, who is the drawer and indorser of the said bill, is a well-founded objection; sustains the same accordingly; and finds, that the diligence proceeding on the protest is invalid, and can afford no right of preference to the Leith Banking Company in this competition: Finds, 8vo, That the question as to the validity of the said two debts of £500 and £380, on the grounds of objection stated on the record, depends on matters of fact

ceeds on the principles laid down in the cases of Campbell and Clason v. Levenberg, 15, 1822, and Russell v. Goldie, March 1, 1823; and the distinction or implied in those decisions, as well as in the later cases of Brock v. Trustees, March 8, 1825; Maclean v. Robertson, November 29, 1825; Stevenson, June 26, 1822; and Globe Insurance Company v. Turner, 835.

is point determined by the Fourth finding, the Lord Ordinary is of opinion objection to the validity of Mr Niven's seisin is not good. Both the disposal seisin, as exhibited to Professor Walker, or those acting for him, are not have been regular and complete instruments; and as a singular successor, not possibly discover the supposed defect in them now alleged: The ob- ow taken, is not an objection to the validity of the disposition; for it is cannot be disputed, that, according to the long-established usage, it was competent (even assuming the fact to be as averred) to fill up the testing- any time, and by any hand, if the writer were specified; and it could form tion to the deed, though it could be assumed that it was so filled up at gh by the person mentioned, who was also the writer of the deed. Neither objection to the seisin in itself, for it is regular in all respects. But the assumes, as matter of fact, that the testing clause was not filled up at the on the act of seisin took place, and then infers that there could be no seisin sed while in that state. The Lord Ordinary thinks that this admits of solid . The delivery of the deed to the grantor was a warrant to him to get ng clause filled up. When filled up, it is probatio probata of the fact of ; being completed by subscription, and of the date of it; and unless it be ed on the distinct ground of falsehood in an improbation, it cannot be ob- . There is no allegation of falsehood; and it could not possibly be alleged, s persons having officiated in the act of seisin who were witnesses to the m of the deed. Is it competent, then, without any such averment or form eding, to enquire at all into the time and place, when and where the testing was filled up, and to go into a proof by parole on that subject? The Lord e thinks that it is not, and that it would be very dangerous to admit such a

No. 103. Reclaiming notes were presented by all the claimants.

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nion on *Durie and Doig v. Dury*, 11th March, 1773); the names of the v are affixed to the deed, and their designations may be perfectly well known. The name of the writer may be known by the hand-writing, or otherwise. In the present case, the notary was himself a witness to the execution of the deed, and another witness acted as procurator for the granter, and is expressly designated in the instrument, 'Servant to Robert William Niven,' as in the testing clause of the instrument. Further, the notary, by his instrument, has expressly certified that the deed was written and signed in the manner stated in the testing clause. The question therefore is, whether, without impeaching either the disposition or the instrument of seisin as false in any one point, the objectors can challenge the title of an onerous purchaser from the grantee, transacting on the faith of a recorded instrument. The Lord Ordinary is not convinced that they could do so, and there were any legal mode in which they could establish the fact averred.

"In the Sixth finding, the Lord Ordinary proceeds simply on this ground, that the statute has provided a specific stamp-duty in general terms for all promissory-notes, 'either on demand or otherwise, not exceeding two months after date, or sixty days after sight;' and that the stamp-duty upon the promissory-note in question having been in conformity to this rule, no penal consequence of nullity can be drawn out of the manner in which such a note, once legally stamped, might be used. The Lord Ordinary is also of opinion, that no ground has been shown for the plea of undue negotiation. This was a promissory-note, and not a bill. It was evidently not intended to be immediately cashed, and, assuming every thing else to be correct, neither Henderson nor any of his creditors can be allowed to object, that there was any unreasonable delay in presenting for payment. Besides, the acknowledgment of it by Henderson is a sufficient answer in this point.

"In the Seventh finding, the Lord Ordinary proceeds on the doctrine laid down in the cases of *Farries v. Smith*, June 9th, 1818, and *Russell v. Kirk*, Nov. 1827. The question is not, whether this bill has been lost as a ground of objection. The written obligation of Henderson may to this effect be sufficient to exclude objection on the want of protest. But the question of competition here is not one of diligence or inhibition; and as the inhibition proceeds expressly on the want of protest, it cannot stand if the protest is a nullity. Now, the notary who made the protest is the drawer and indorser of the bill, the very person on whom recourse is to be had in respect of the protest, but the very person whose estate, recourse is to be had in respect of the protest, but the very person also who, if there were funds in the acceptor's hands, would be entitled to sue against him, in respect of the presentment verified by the protest. The Lord Ordinary cannot see how it is possible that this should be sustained.

"The record evidently embraces matter which could not be disposed of by the interlocutor. Mr Irving and Walker's trustees object to both the debt of the Leith Bank on more general grounds, alleging that they were bills illegally or at least illegally discounted, with reference to the judgment of the Court of the House of Lords, in the case of *Ker v. Bell*, 12th May, 1830, and 1st Nov. 1831. The question involved in this must be otherwise discussed. If the objectors should succeed, the effect will be, that Walker's trustees would be preferred absolutely, and the residue would go to Mr Irving. If they fail, the Leith Bank would be preferable, according to the interlocutor, upon the £500. Walker's trustees would be preferable in the next place, which would probably exhaust the fund; but if there were any residue, the Leith Bank rank with Mr Irving and the other creditors for the debt of £380."

LORD MEDWYN.—I see no ground for the objection to the negotiation of the promissory-note, in point of time, although, no doubt, in the ordinary case, if the payment is to be on demand, it is the duty of the party to present timeously. The Lord Ordinary is correct in noticing the distinction between a promissory-note and a bill. The proper object of the bill is to be instead of a remittance of money, when a payment is to be made from one part of the country to another; the promissory-note is rather intended to be evidence of a debt, when money is to lie for some time in the hands of the granter. Then the question is, when one grants a promissory-note, is it meant to be a remittance of money or to imply a loan? Now, this note was sent by Henderson to the Leith Bank, and deposited in an account; so that it was intended as a remittance, and not as a loan, though worded as a note on demand. In this case, it was not necessary to present it for payment within a day or two, though the party was bound to do so within a reasonable time; and I agree with the Lord Ordinary in thinking that, after the note was lodged in the bank, the company were not required to make an immediate demand on this party. On the other points I also agree with his Lordship.

The other Judges having concurred,

THE COURT refused all the reclaiming notes, and remitted to the Lord Ordinary.

HUNTER, CAMPBELL, and CATHCART, W.S.—**JOHN BISSET, S.S.C.**—**WILLIAM STEWART, W.S.**—**WILLIAM MARTIN, S.S.C.**—Agent

LAURENCE TWEEDIE, Pursuer.—*More.*
EBENEZER BEATTIE, Defender.—*A. M'Neill.*

Poining of the Ground.—1. An assignee and disponee to an heritable bond on which sasine had been taken, though not himself infeft on the conveyance in his favour, entitled to pursue a poinding of the ground. 2. It being stated in defence that the bond had been granted without value, diligence for the recovery of writings to establish this allegation, refused.

TWEEDIE brought an action of poinding the ground as disponee and assignee of Brown in an heritable bond for £3000 granted by the defender Beattie to Brown, on which the latter had been infeft. Tweedie was not infeft on the conveyance in his favour. Beattie alleged in defence that the consideration mentioned in the bond had never been advanced, and insisted for a diligence to recover writings generally to establish this allegation, maintaining likewise that the action was incompetent at the instance of a party who had a mere personal conveyance to the security. Tweedie resisted the demand for a diligence, and, on the point of competency, he argued—

It is not necessary to entitle a creditor to pursue a process of poinding the ground that he should in every case be infeft. It is sufficient that the author be so, and in this case the pursuer has not only an express

o. 104. assignation to his author's infestment, but is specially empowered as his
 22, 1836. assignee to sue all real diligence against the lands. It has been decided,
 edie v. as Lord Kilkerran observes,¹ that "where a disposition is granted with
 tie. the burden of this or that particular debt, although the creditor in that
 debt has no infestment, yet the practice is, for poinding of the ground to
 proceed on such debts." And it has also been held that executors who
 have right to the bygone interest of an heritable debt are entitled to make
 their right effectual by the diligence of poinding the ground. Accord-
 ingly, in Lord Stair's report of *Waugh v. Jamieson*,² it is stated in the
 argument as "clear in the case of infestment of annualrent, the bygones
 whereof belong to executors," that they "have real action for poinding
 ground upon the infestment."

The Lord Ordinary, without causing a record to be made up, pro-
 nounced the following interlocutor:—"Finds it unnecessary and inex-
 pedient in this case to have a record made up in terms of the Judicature
 Act: And in respect that the pursuer judicially avers that the whole sum
 contained in the heritable bond libelled was truly advanced at or before
 granting the same, and is still wholly due: And, in respect that the de-
 fender does not propose instantly to verify the contrary allegations, that
 the said bond was granted without value, and that nothing is now due
 thereon, by the writ or oath of the pursuer, but merely insists for a dili-
 gence to recover writings, generally, with a view thereby, or with the
 addition of other evidence, to establish those allegations: Finds that the
 real diligence of poinding the ground at the instance of an heritable cre-
 ditor duly infest, cannot be suspended by the offer of such evidence, nor
 made to abide the result of a count and reckoning between the parties;
 and therefore refuses the claim of the defender for such diligence: Repels
 the defences, and decerns in terms of the libel."

Beattie reclaimed, and prayed the Court "to remit to the Lord Ord-
 nary, with instructions to order a record to be made up in the cause in
 common form, and, in particular, to grant the defender a diligence for
 recovery of all the writings necessary for supporting his defences, and,
 thereafter, to hear parties on the whole cause."

THE COURT pronounced as follows:—"Adhere to the interlocutor
 complained of, in so far as it refuses the diligence craved for re-
 covery of writings, and allows the poinding to proceed, and to that
 effect allow the decree to go out and be extracted ad interim.
 Quoad ultra, remit to the Lord Ordinary to hear parties farther,
 and to proceed therein as to his lordship shall seem just, reserving
 all questions of expenses."

JOHN BROWN, S.S.C.—MACKINTOSH and GEMMELL, S.S.C.—Agents.

¹ A v. B (10550).

² Feb. 18, 1676 (5526).

person to be chosen trustee for their behoof, the Court remitted
the sheriff of the county where the pursuer resided to name the
2.

WILLIAM RAE M'PHUN, Advocate.—*Rutherford—Robertson—
Paterson.*

No. 106.

JOHN REID and COMPANY, Respondents.—*D. F. Hope—Steele.*

of—Summons.—1. A proof in an inferior court was led by the pursuer, and
was attended by both parties, but several of the depositions were un-
authenticated by the commissioner's signature—Held, in an advocacy by the de-
fence, that the advocator was not barred from objecting to the regularity of the
proof; that it was pars judicis to enforce the objection which appeared ex facie of
the record; that the judgment proceeding on such proof must be recalled, and remit
to the inferior court "with instructions to recal the interlocutors complained
of, and grant commission, and allow a proof of new, if so required." 2. Observed,
after the remit, the error might be cured by the Commissioner calling the
witnesses before him in presence of both parties, causing their depositions to be
sworn to by them, and, on their adhering thereto on oath, authenticating the de-
positions with his signature. 3. Observed that a general commission to lead proofs,
giving reference to the proof in any individual cause, will not authorize the
advocator to act as such in any individual cause, but that there must be a com-
mission or remit in his favour made in any cause in which he is to lead and report
on. 4. Circumstances in which, Objections to a summons, as not being rele-
vant or not sufficiently specific in time and place, repelled.

JOHN REID and Company, booksellers in Glasgow, raised an action Jan. 23, 183—
the Magistrates of Glasgow, against William Rae M'Phun, book-

No. 106. instructed by him, on the morning and forenoon, or, at all events, on
 23, 1836. some part of the said first day of May, and within an hour, or within a
 Phun v. few hours, of the posting of the pursuers' bills, did most maliciously and
 id. injuriously cover and conceal the bills or placards posted up by the pur-
 suers, by posting or sticking above and on them another placard or bill,
 of which a copy is herewith produced, announcing the publication and
 contents of the rival magazine, entitled 'The Church of Scotland Maga-
 zine,' published by the defender;" and that this "malicious and inju-
 rious conduct" of M'Phun and his servant had occasioned damage to
 the pursuers, in making their bills useless and in hurting the sale of their
 magazine. They concluded, that M'Phun should be decreed to pay
 £2, 3s., as the cost of the bills destroyed, and £10, 10s., by way of repa-
 ration for the injury to the sale of Number XV. of their magazine, besides
 expenses of process.

M'Phun gave in defences, denying the libel, and pleading, moreover,
 that it was irrelevant.

1. An important part of the libel, as to the alleged instructions of
 Brunton, was stated, not as matter of fact, but merely as being according
 to the pursuers' "information;" and, as their information might either
 be accurate, or the reverse, such a statement could not relevantly sustain
 any conclusions against the defender.

2. There was no due specification of time or place as to any one of the
 instances in which it was alleged that the bills had been covered.

The defender also pleaded, on the merits, that the bills of the pursuers
 were without dates, and did not indicate, on inspection, how long they
 had been posted up, before new bills were placed over them by any bill-
 sticker; and that a reasonable time had elapsed before the bills of the
 pursuers were covered over by any bills which had been stuck up by the
 defender's servant, and with his knowledge.

The pursuers answered, as to the relevancy—

1. Supposing that the objectionable words, and the whole of the libel
 which was affected by them, were omitted, still a relevant libel remained,
 as there was the substantive averment in point of fact, that the defender,
 following up a previous malicious threat, employed Brunton to cover up
 the bills maliciously and injuriously, and that Brunton did this.

2. Where two hundred bills were alleged to have been maliciously
 covered over by a particular person in the defender's employment, in the
 course of a few hours after being put up, and these bills were described
 as having been posted up "in various parts of the city and suburbs of
 Glasgow," on the afternoon of 30th April last, and forenoon of 1st May
 current, there was a sufficient specification of time and place to serve
 every legitimate purpose for which such details are required.

The facts were denied upon which the defences on the merits were
 rested.

The Magistrates repelled the objection to the relevancy, and, af

closing a record, “allowed the pursuers and defender a proof; &c., and to each party a conjunct proof.”

A proof was led by the pursuers, at which the defender attended. The greater number of the depositions were not authenticated by the signature of any commissioner; but some of the depositions were subscribed by a party who added “commissioner” to his subscription. Two persons officiated, at separate times, in this manner. No commission or remit had been granted in this process, or respecting this proof, to either of them; and, apparently, no report of the proof was made by either. The pursuers merely made a minute, renouncing farther probation, and one of the commissioners, who was also “extractor,” then minuted an interlocutor, or act of circumduction, against the defender.

The Magistrates thereafter “having considered the proof for the pursuers, and that the term has been circumduced against the defender,” ordered certain excerpts from the pursuers’ books, after which they “found it sufficiently instructed, that the pursuers’ announcement-bills of their magazine were, on the occasion libelled, covered over with the defender’s announcement-bills of his magazine, by the person employed by the defender; therefore, decerned against the defender for £5, as loss proved to have been sustained by, and as modified damages due to the pursuers, in consequence of the said illegal act on the part of the defender, and remitted to the auditor to tax the pursuers’ expenses.”

M’Phun brought an advocacy, in which he stated an additional plea in law, objecting to the proof, as being, in great part, unauthenticated by the signature of the commissioner, and pleading that this defect could not now be remedied.¹

John Reid and Company answered, that the advocator was barred, *personali exceptione*, from taking such an objection, at this stage; but that it was at least competent to make a remit to the inferior court, to have the subscription of the commissioner adhibited to the proof.

The Lord Ordinary pronounced this interlocutor:—“Finds that the greater part of the proof on which the judgment of the inferior court was pronounced is unauthenticated by the signature of any commissioner; that this defect cannot competently be supplied by the signature of the commissioner *ex intervallo*; therefore, refuses the respondents’ motion for a remit for that purpose; but remits the case to the Magistrates of Glasgow, with instructions to recal the interlocutors complained of, to grant commission, and allow a proof anew, if so required; and to proceed farther in the cause as to them shall seem just; reserves the question of expenses, and remits the same to the Magistrates to be determined at the final disposal of the cause.”

M’Phun reclaimed; and, in farther support of his objection to the proof, alleged, that the parties who had officiated as commissioners

¹ *Robb, Nov. 19, 1824 (ante, III. 301; or 212, New Ed.)*

No. 106. merely held a general commission to lead proofs in all cases in the burgh court, and that they had led a proof in this case, acting alternately, according to circumstances.

—
23, 1836.
Phun v.
1.

LORD BALGRAY.—I think the libel is quite relevant and sufficient. It is impossible that it could be any mere accident, by which about two hundred bills, which were stuck up in the city and suburbs of Glasgow on the days mentioned in the libel, were covered over with a particular set of other bills within a few hours. In regard to the mode in which this proof has been led, it is certainly irregular. I believe a general commission is often granted and recorded in the sheriff court books; but then there should have been a remit made in this process to such commissioner to lead the proof. But the error which has been committed is not beyond remedy, where all the parties are alive. I recollect a case in which I was appointed commissioner by this Court, and when I made up the report of the proof, I omitted to sign certain parts of it. I made an application to the Court, and obtained authority to call the witnesses before me, whose depositions were unsigned. I then had their depositions read over, in presence of both parties, and asked them, on oath, whether this was their deposition, and adhered to by them. The depositions were then duly signed, and the defect was cured. And this course I adopted on the recommendation of Lord Braxfield or Lord Eskgrove, who was Lord Ordinary in the cause. A similar course should be followed here.

LORD GILLIES.—The objections to the form of the libel are too critical. There is one, however, though it is of minor importance, which seems to be well-founded in principle. The libel bears that M'Phun threatened to cover up the pursuer's bills, "and, following up this malicious threat, a person named Brunton, employed by the defender, and, *as the pursuers are informed*, specially instructed by him," went and covered up the bills maliciously and injuriously, &c. Certainly it is not enough to libel that a person acted in a particular way, "*as the pursuers are informed*," for that is merely an averment that the pursuer has received such or such information. It is not enough to libel that a defender subscribed a bond, "*as the pursuers are informed*;" such libelling will not warrant a conclusion for payment of the bond. To warrant this, the fact of subscription must be unqualifiedly averred, as a fact, and not as a matter of belief or information. And, therefore, I should not object to strike out the words "*as the pursuers are informed*" from this libel, or to read the libel as if no such words were there. But, as this only affects the immediately following clause, regarding the alleged special instructions, the libel would be perfectly relevant still. It would then run thus,—"*following up this malicious threat, a person named Brunton, employed by the defender,*" went and covered up the bills maliciously and injuriously. The defender has really no interest to press an objection of this kind, which does not affect the substance and relevancy of the libel. In regard to the proof, it is clearly irregular, and I concur in the judgment of the Lord Ordinary.

LORD MACKENZIE.—I think the words now referred to might be read as if in parenthesis, and the libel would remain perfectly relevant. I concur in the judgment pronounced by the Lord Ordinary, which is just following up the precedent of the case of Robb. I formerly conceived that a party, by leading a proof, or attending diets of proof without objecting to the want of the commissioner's signature, might be barred personally from afterwards stating that objection.

But I now consider, since the judgment in that case, that if the proof be not duly authenticated, it is *pars judicis* to notice this, and to refuse effect to such proof.

LORD PRESIDENT.—I think the interlocutor well-founded. The objections to the libel for the want of specification of time and place, are by far too critical. All the precision of a criminal indictment is not to be looked for in a summons of this sort.

THE COURT “adhered, reserving all questions of expenses to both parties to be disposed of on the final decision of the cause.”

J. CULLEN, W.S.—J. PATTEN, W.S.—Agents.

JAMES MASON, Pursuer.—*Brodie.*
SCOTT'S TRUSTEES, Defenders.—*Whigham.*

School.—1. The situation of schoolmaster in a school on a private foundation, in connexion with a dissenting chapel, held not to fall under the rules which regulate the cases of parochial schools and public chartered academies. 2. Terms of an agreement with a teacher which held not to import an appointment *ad vitam aut culpam*.

THE late Colonel Scott was a member of the Episcopal congregation of St James's Chapel, Edinburgh, and maintained at his own expense a school, under the superintendence of the minister of the chapel, in which about twelve boys and girls were supported, clothed, and educated, and which was taught by one Keane, who had been a sergeant in Colonel Scott's regiment, and by Mrs Keane, the sergeant's wife.

In 1822, Colonel Scott died, having, by a codicil to his will, left to the minister of the chapel, and certain other parties, as trustees, the sum of £2000, for the “maintenance of an Episcopal school or schools, in inseparable connexion with the Episcopal Chapel, commonly called, or to be called, St James's Chapel, Broughton Place, Edinburgh, and it is my wish that it shall be under such regulations as to the number of boys and girls, and as to all the general arrangement of the school or schools, as to the said trustees, or a majority of them, shall seem best.”

By a note added to this codicil, Colonel Scott requested that, so long as Mr and Mrs Keane should be fit to superintend the new school, his trustees should employ them, paying them £20 each a-year each; and they were accordingly employed to teach the school established by the trustees till March, 1824, when they resigned. With a view to supply the vacancy, the trustees instructed the Reverend Mr Craig, minister of the chapel, to make the necessary enquiries; and the minutes bear, that the emolument for the present may be stated at £40 yearly, of fixed salary, and such very small school-fees as shall afterwards be fixed upon,

107. with the farther prospect of the salary being increased as the trust-fund improves, and if the master give satisfaction."

3, 1836.
v.
Trus- The pursuer, Mason, who was then teacher under the National School Society of one of their schools at Warfield, Berks, having been recommended to Mr Craig by a gentleman in London, to whom he had applied, Mr Craig addressed to Mason a letter (June 29, 1824), in which, after mentioning some of the circumstances regarding the St James's School, and that "the children will be at present about forty or fifty, with a gradual increase probably," he states, "we offer at present £50 a-year, and a house free from taxes, and twopence per week to be collected by the master from the children."

To this letter, Mason returned an answer (July 16), wherein he says, "permit me to say, that grateful as I feel for the unexpected offer you have been pleased to make me, yet I must beg to remark, that the salary is rather too small. Could it be made up to £70, or at least £60 permanent, I think I should be inclined to go to Edinburgh. With this understanding, that I should be entitled to have twopence per week from each child, and the necessary expenses occasioned by our removal to Edinburgh allowed."

Shortly thereafter, Mr Craig having occasion to be in London, wrote to Mason from thence (July 24), expressing a wish to have an opportunity of seeing him on the subject, but mentioning—"in the first instance, there is a difficulty about terms, and, if that cannot be overcome, it is useless to trouble you farther. Since I last wrote to you, the trustees of the school held a meeting, and authorized me, as the ultimatum, to offer to any man whom I approved £60 per annum and the house. There are no other allowances. The twopence per week from the children may, or may not, be joined, and the number of the children will depend on the activity of the master; so that we do not wish to lay any stress upon such a casualty, but to specify the salary at £60, with a free house. If you think it right to accept such a salary, I would be glad to see you on Saturday the 31st of July, and would pay your expenses up to town and back again."

Mason thereupon came to town, and had an interview with Mr Craig, the result of which was, on his return to Edinburgh, reported by Mr Craig to the trustees, whose minutes (August 26) bear, that he stated to them—

"That, when in England lately, he made enquiry about a suitable teacher for the late Colonel Scott's school, and that a Mr Mason had been strongly recommended to him. He had met and conversed with Mr Mason, and he was strongly convinced he would prove a suitable person. His wife also (they having no children) was fitted to take charge of the female scholars. The salary mentioned to Mr Mason was £60 per annum in full; but if any small exaction was ever made from the school-

these terms:—"I have the pleasure to inform you, that our
et to-day, and on my representation, they have unanimously
elect you as the teacher of our chapel school, at the salary of
yourself and your wife, with a free house. If you still continue
in mind, it will then only remain to specify distinctly between
the terms on which we mutually agree, in order to prevent
misunderstandings in future, and then the sooner you come down to us
—your expenses down will be paid. Let me hear from you at
the earliest convenience whether you accept the situation, and specify
likely you could leave your present situation, in order that we
may do every thing in order as much as possible."

After (September 16) the offer was accepted by Mason by a
writing as follows:—"We have the pleasure of returning our
acknowledgments for the good opinion yourself and the trustees
expressed respecting us, in appointing us teachers of your chapel
and the duties of which we shall now consider ourselves as bound to
discharge and will always endeavour faithfully to discharge at the salary
mentioned in your letter of the 26th ult., in the hope and expectation of an
improvement in our circumstances will permit."

He arrived in Edinburgh in the month of October, and undertook
the management of the school, which prospered very rapidly under his manage-
ment, the number of scholars having increased in a short time to about

On 15th November succeeding Mason's arrival the trustees had a
meeting, the minutes of which are as follows:—

Mr Mason's entry to his duties as teacher to be held as having
commenced at 1st November, 1824, and his salary of £60 per annum to
be paid in three instalments of £20 each, viz. on the 1st, 15th and 29th of

No. 107. making in whole sixpence per month, to be collected by the master, and accounted for to the trustees, as, in the present limited state of the funds of the charity, the said fees cannot be allowed to the master, but must be applied to the other necessary purposes of the establishment.

Jan. 23, 1836.
Mason v.
Scott's Trustees.

" 5th, The former school committee continued, with power to them to appoint a sub-committee of ladies, the Miss Scotts being always of the number.

" 6th, The repairs wanted on the house being more properly the concern of the chapel trustees, it was recommended to Mr Craig to apply to them on the subject.

" 7th, Mr Mason, the new teacher, being called in, and such of the preceding resolutions as concerned him being read to him, he acquiesced therein."

Thereafter Mason levied these fees from the scholars and paid them over to the trustees, but on the 26th May, 1825, he addressed a letter to the secretary of a committee of the congregation, to whom the trustees had intrusted the superintendence of the school, claiming the fees, on ground that it was part of the agreement with him, that, if exacted all, he should have right to them. The committee, on considering the letter, came to the following resolution:—"The meeting, while they expressed themselves perfectly satisfied with the manner in which Mason had hitherto conducted the school, were of opinion, that both the committee and Mr Mason were bound to the trustees of the school for one year, from November last, in terms of the agreement that had been entered into, and consequently declined to interfere in the matter, that period should have expired. It was unanimously agreed, that the committee shall, in November next, have as good reason to be satisfied with Mr Mason's conduct as they have at present, they will feel themselves bound not only to represent to the trustees the propriety of increasing the allowance in such manner as they shall think most conducive to the interest of the school, and most consistent with the nature of the trust, but also to recommend that he should receive some allowance for his past services."

At the end of the first year, the trustees, in accordance with the recommendation, augmented Mason's salary from £60 to £80.

For some time Mason gave great satisfaction to the trustees, besides the question of the school fees, other causes of difference. The number of the scholars also fell off, and finally, in December, the trustees, on the report of a committee of the congregation, who had a superintendence of the school, that Mason's exertions and manner of conducting it had now become very unsatisfactory, came to the following resolution:—"That the meeting having attentively considered Mason's letter, and the school's sub-committee's minutes, as well as the whole facts of the case, they are unanimously of opinion, that in the circumstances, the recommendation of the sub-committee to shut

his Mason, upon the ground that his appointment was *ad vitam*, presented a bill of suspension and interdict, which was refused Moncreiff, Ordinary, his Lordship adding to his interlocutor signed note.*

The Lord Ordinary entertained any doubt as to the merits of the case he might pass the bill. But, having a decided opinion that the suspender's case should be sustained, he thinks that, to pass the bill, besides occasioning much anxiety to all the parties, would only have the effect of involving the suspender in ruinous expense.

It is altogether impossible to place the appointment of the complainer on the same footing as an appointment to a public office. In the case of public offices, such as schoolmaster, the common clerks of royal burghs, and some others, it is clear that an indefinite appointment is to be considered as an appointment *ad vitam*. The present case is certainly not within that rule. In some cases of this kind, such as that of the Inverness and Ayr academies, where the establishments are of an extensive and public nature, it has been held that, though a schoolmaster may not hold his place strictly *ad vitam aut culpam*, some reasonable cause must be assigned before removing him. But the principle of these cases cannot be applied to such a case as the present. The school in question is altogether of a private nature, dependent on a private trust, by the terms of which it was put in the discretion of the trustees in what manner 'they may choose to employ it.' If it could be made out, that, in contracting with the complainer, the trustees had, either expressly or by fair meaning of the contract, given a guarantee that the complainer should enjoy any fixed emoluments during his life, such a guarantee might be the ground of a claim of damages, if he were removed arbitrarily, and no reasonable excuse could be assigned. But, even though such a case were made out it would not sustain the demand of an interdict which is here made. The trustees must still have power to manage the private school put under their

No. 107.
 —
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 Scott's Trustees.

Mason accordingly removed from the school at Whitsunday, 18 immediately raised the present action, concluding for payment salary, and for house-rent, during his life, and also of a certain the amount of the fees levied while he taught the school, and an sum as the estimated value of these fees in future. The sum contained a conclusion as to house-rent during a period when he the house provided, on account of dampness, to which, however unnecessary particularly to refer.

In support of his action Mason contended—

1. That the school in question being permanently endowed, a public object, the education of youth, it was in the same situation academies of Ayr and Inverness, the masters in which, it had been could not be dismissed without reasonable cause substantiated satisfaction of the Court.

2. That at any rate, from the terms of the agreement, this must to have been the nature of the appointment.

3. As to the fees, that whether or not he had any right to have ed that these should be levied, yet if they were exacted, he was to them.

On the other hand, the trustees maintained, in defence—

1. That the school here was merely an endowed school on a foundation, under the control of trustees according to the terms deed, and had no resemblance whatever either to parochial sch such chartered public academies as those referred to.

2. That there was nothing in the letters whereby the contr entered into with Mason, implying that the appointment was t vitam aut culpam, or otherwise than during the pleasure of the t and

3. That the salary was expressly declared to be the only thing, with the house, to which the trustees would bind themselves, & Mason had truly acquiesced in the footing on which the levying fees had been placed by the trustees.

“ Whether the trustees have power literally to shut up the school or no might be the consequence of their doing so, are questions which can on tated by those who have a legal interest in the trust, or in the trust-funds, & Scott.

“ In finding no expenses due, the Lord Ordinary does not mean to f opinion that the trustees have done wrong in the exercise of their discret matter not having been entered upon, he cannot judge of it. He only th in the particular relation in which the complainer stands to them, he entitled to take the opinion of the Lord Ordinary on the point; and, at that as the respondents would probably not exact expenses from him, it is their exoneration that none should be found due.”

¹ Directors of Ayr Academy, June 3, 1825 (ante, IV. 63).

verness and Ayr. It is a private school, which it was provided should be under the control of trustees; and I cannot discover any thing in the terms of the deed to make us suppose otherwise. I have looked back to the opinions in the case of Inverness, where the circumstances were different, and

the material question is, whether, from the nature and terms of the appointment, the pursuer was removed from the situation of damages is competent to the pursuer, simply on account of that. The summons, and substantially the pleas in law, also assume that this is a jointment for life, and that the pursuer could not be removed unless he should state and prove such a cause of removal as the Court should find sufficient; and the damages concluded for are qualified accordingly as if of a life office. The Lord Ordinary has already had occasion, on advising suspension and answers, to express the opinion which he deliberately formed on this question, so far as it relates to the power of the defenders to remove; and as his interlocutor was not brought under the review of the Court, he thinks it expedient that the cause should now be reported for the opinion of the Court, without any judgment which might embarrass it on a point so fundamentally involved in it.

It is sensible that the question in this action of damages may be materially different from that which occurred in the application for an interdict. There is power to remove, and yet the power might be so exercised as to raise no damages. But still the Lord Ordinary is decidedly of opinion, 1st, That this is an office for life; and, 2d, That the managers of a trust like this cannot be compelled to state, or to prove in a court of law, the grounds or reasons on which they acted in the exercise of the discretionary power which he thinks was lawfully exercised. The Court, however, may possibly take a different view, even of this; and as, apparently at least, the pursuer may be thought to have been fairly treated (though there may have been very good reasons which could not be stated), the Lord Ordinary wishes to leave the case to the consideration of

No. 107. in which the Court were called to give judgment, on grounds of great public expediency. As to the second point, Is there any agreement to show that the man was assured of his appointment being for life? On the contrary, after the first half year of his appointment, he applied to the committee, for the fees, and there was then intimation made to him and his wife that they had the appointment for one year, and this was received in silence, and no step taken by them to show that their understanding was different. This was a clear manifestation of the intention of the trustees, and it was not contradicted by any thing in the conduct of these parties. On the whole, I think there is no evidence that this was permanent appointment; so it is unnecessary to go into the question whether the cause should be assigned for the schoolmaster's removal. The only point in which I have doubt is in reference to the small collections of pence from the scholars. Why was he under the necessity of collecting these sums if he was to pay them over to the trustees? The Lord Ordinary also had difficulty on this point.

LORD GLENLEE concurred.

LORD MEADOWBANK.—I agree with the Lord Justice-Clerk in the first point, that this is not a public school, so that neither the decision in the case of the Inverness nor of the Ayr academy applies. But, in regard to the endurance of the appointment, there is nothing express in the agreement entered into with Craig, by which it can be regulated. This was an implied contract, the nature of which is to be gathered from the whole circumstances. Looking to the letters, there is no precise period pointed out; and, considering the position which this individual stood when he left his situation in England, and also the expressions in the correspondence, I am inclined to think there was an understanding that the appointment was to be permanent. The party comes to Scotland, having what was a permanent situation, and writes the letter of the 5th May, in the answer to which by the trustees, the expression "in terms of agreement," relates to the salary, not to the endurance of the appointment. The advertisement bears that the school was to be in perpetual connexion with the chapel, so it was not unnatural for this party to look to the constitution of the chapel, and to consider his living in the same situation as that of the clerk of the man. This is a hard case, Mason being brought down from England, and removed without cause shown; and perhaps, viewing it in this light, I may have been more inclined to look to the circumstances, as showing the situation to be permanent.

LORD MEDWYN.—This is a case of a private trust; and the terms of the trust are to be considered, and the powers given to the trustees. I do not see what connexion this private trust has with the constitution of the chapel, or that the circumstance of the school being in connexion with the chapel should have given the schoolmaster the idea that he was to be in permanent connexion with the school. There is no evidence that his situation in England was permanent. I think he came to Scotland to remain as long in his situation as he should find satisfaction; and, on the whole, I do not hold his appointment to have been permanent.

With reference to certain minor matters, the cause was allowed to go.

the view of the parties coming to some arrangement as to an
to be made to Mason, and the trustees having offered a certain
he accepted, it was again put out this day, when

No. 107.
Jan. 23, 1836.
Pollock Com-
pany v. Clyde
Trustees.

THE COURT, of consent, assailed.

ROBERT HATTON, W.S.—TOD and ROMANES, W.S.—Agents.

King v.
Greenock
Bank.

and GOVAN RAILWAY COMPANY, Pursuers.—*Keay—Patten.* No. 108.
CLYDE TRUSTEES, Defenders.—*A. M'Neil.*

a case depending entirely on specialties, in which the Lord
sustained the defences; and

Jan. 23, 1836.
2d Division.
Ld Jeffrey.
R.

THE COURT adhered.

TOD and ROMANES, W.S.—CAMPBELL and M'DOWALL.—Agents.

JEAN KING and OTHERS, Pursuers.—*Morr.* No. 109.
GREENOCK BANK COMPANY, Defenders.—*Marshall.*

Inhibition—Erasure—1. An essential part of the will in letters of inhibi-
written in a marginal note, signed by the writer to the signet, but not
signed.—Circumstances in which held that the diligence was not thereby
lost. 2. Erasures which held not to be in essentialibus.

Pursuers, Jean King and others, children of the deceased Robert Jan. 23, 1836.
I raised an action of count and reckoning against John King
William King, his son, and one Morris, for their intromissions
of their father, on the dependence of which action they
executed letters of inhibition. These letters proceeded on a
the summons, and that "the said John King, William Morris,
King, knowing perfectly that they, the complainers, will
be against them in the said action for payment of the above
debt, and are to suit all manner of execution against them for
proof, they, in manifest defraud, hurt, and prejudice of the
intend, as the complainers are informed, to sell, alienate,
replead be provided thereagainst, as is alleged;" and the
follows, having the marginal note, as here represented,
as in italics being written on erasures:—"Our will is here-
to charge you, that on sight hereof ye pass, and in our name
we inhibit and discharge the said John King, William Mor-
ris King, personally, or at their respective dwelling-places,
sell, alienate, wadset, dispone, resign, renounce,

2d Division.
Ld. Cockburn.
T.

No. 109.
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Greenock
Bank.

ROBERT

At the imple-
menting and
fulfilling to the
complainers the
decree to be ob-
tained at their
instance on the
said depending
process,

SPRID.

dilapidate, or put away any of their lands, heritages, annualrents, liferent reversions, mills, woods, fishings, tacks, steadings, rooms, possessions others, pertaining and belonging to them, nor make any public nor private alienations, dispositions, wadsets, assignations, resignations, renunciations or other rights or securities thereof, to any person or persons, nor contract or take on debts, nor grant bonds or other rights or securities therefor, nor do any other act or deed, directly or indirectly, whereby the said lands and others, pertaining to them, may be any ways enfeoffed or adjudged from them, or they denuded thereof, in defraud, and to the hurt and prejudice of the complainers, and payment making to the said of the whole sums to be therein contained; and also that ye, in our name and authority, inhibit and discharge all and sundry our lieges, and of whom it effects, by open proclamation at the market cross of Glasgow and other places needful, that they nor none of them purchase nor take upon hand, under any colour or pretext, to buy, block, take, receive in wadset-maill, mail-free, or otherwise, from the said John Morris, William Morris, or William King, any of their lands, heritages, annualrents, liferents, or others foresaid, pertaining to them, nor receive from them any dispositions, assignations, wadsets, or other rights and securities thereof, nor lend them any sums of money, nor receive any bond or right or security therefor, nor do any other act or deed, directly or indirectly, in defraud and to the hurt and prejudice of the complainer, as is; certifying those that do on the contrary, that all such alienations, wadsets, dispositions, bonds, or other rights, shall be null, and of no force, strength, or effect, with all that has followed or may follow hereupon, and shall make no faith in judgment, or outwith the same coming; and that ye cause register these our letters and execute the same follow hereupon, within forty days, conform to act of parliament in that behalf. According to justice.—Because the Lords have seen the dependence mentioned, as ye will answer to us thereupon; which to do we have given you and each of you, full power by these our letters, delivering the same to you, duly executed and indorsed again to the bearer. Given under our signet at Edinburgh, the seventeenth day of October, in the second year of our reign, 1821.

“ *Ex deliberatione Dom. Concilii.* ”

(Signed)

“ ROBERT SPRID.”

“ For Mr Wm. CAMPBELL.”

“ 18th October, 1821.—Written by Wm. Walker, his clerk, on twenty-two pages.”

The marginal note, as above represented, was signed by the writer under his signet, but not otherwise noticed. The letters were executed on the 23rd of October, six days after the date of signeting, and in the execution were recited as bearing in gremio the part in the marginal note, as written on erasures, as it now stands. In the depending action,

made to an accountant, who returned a report, bringing out a certain balance as due by William King, his father John King having in the mean time died. Before this report was approved of, King's estates were sequestrated, and the trustee having declined to give in objections to it, was allowed to object, and was found entitled to do so on finding caution for expenses; but having failed so to find caution, the report was approved, and decree pronounced in favour of the pursuers accordingly, on the 15th November, 1832. In the mean time, in the years 1826 and 1830, King, alongst with his brother Robert, had granted to the Greenock Bank two heritable bonds and dispositions in security, over their heritable property belonging to them, for money borrowed from the bank; for setting aside which, *ex capite inhibitionis*, the pursuers brought the present process of reduction. The summons was signeted on the 13th March, 1833, of which date the pursuers had not obtained decree of adjudication against King and his trustee, but such decree was pronounced on the 11th July thereafter. In defence, the Greenock Bank pleaded mainly, that the inhibition was inept, in respect of the words written on erasures, and of the marginal addition not noticed in any document, which, however, was essential to the validity of the diligence, and which, for aught that appeared might have been added after the letters had passed the signet.

To this it was answered, that the words on erasures were immaterial, that the subscription of the writer to the signet, acting in this matter as a public officer, was of itself a sufficient authentication of the marginal addition, which was not required, as in the case of private deeds, to be noticed by testing clause or docquet; while, further, being in perfect accordance with the bill or warrant, as recited in the letters, and being contained in the execution so recently after the signeting of the letters, there could be no ground to suspect that the note was a subsequent addition.

The Lord Ordinary pronounced this interlocutor, adding the subjoined—“ Finds that the two dispositions and two seisins in favour of these defenders, are liable to reduction *ex capite inhibitionis*; Therefore reduces the same, in terms of the reductive conclusions of the libel applicable to the case, and decerns: Finds the pursuers entitled to the expenses of this process, and of the discussion; appoints an account thereof to be given in, and lodged, remits the same to the auditor to tax and report; and quoad the inhibition, appoints the cause to be enrolled.” *

The objection of want of interest, though in the defenders' pleas, is not within the scope of the present discussion. In this situation, the Lord Ordinary does not put his rejection of the objection to the inhibition are, that certain words and letters are written on erasures, and that a marginal note is not noticed in what has been termed the docquet. These statements are both correct in point of fact. But there is no proof of any fraud. The defenders, in their third statement, say, that what was

No. 109. The Bank reclaimed, but

Jan. 23, 1836.
 King v.
 Greenock
 Bank.

THE COURT adhered.

CAMPBELL and MACK, W.S — M'MILLAN and GRANT, W.S.—Agents.

done, was meant to correct a mistake ; but at the debate, both parties intimating they had no proof to adduce, beyond what was implied in the admitted stances of the case. The pursuers, in their counter-statement aver, that no erasure was made on the diligence after it passed the signet. The defenders merely aver that they do not admit this, as they do not know the fact. But the pursuer sustains it sufficiently by referring to the bill, and especially to the executions, which are placed within a very few days after the signeting, and contain the marginal notes on the erased passage, so that the question as to the effect of the note and the erasure arises quite purely.

“ The Lord Ordinary thinks that the diligence cannot be set aside on the ground of the erasure, because it is not in substantialibus, and the writ is effectual, and the erased words and letters be held as not written. The defenders argue that the erasure and the note must be taken together. The Lord Ordinary does not think that this is necessary, or how, except as explaining in what way the correction was found expedient, it is of any importance. The case of Elliot, 26th June, 1824, has no application to this one. The erasure there was most essential, and there was a disconformity between the bill and the letters.

“ The note is essential to the validity of the diligence ; but the Lord Ordinary is of opinion, that its not being noticed at the end of the letters, forms no ground for reduction. The principles which regulate deeds, where marginal notes are mentioned in the testing clauses, in order to connect the parties' signature with the witnesses' attestation, have no application to writs like this, where there are no witnesses ; but the law gives credit to the subscription of a public officer. His power to subscribe a marginal note is not disputed. But it is maintained that the validity of a note depends on its being set forth in the docquet. The Lord Ordinary has been unable to discover any authority, of any description, which he thinks is against principle, as applicable to such an instance. The Court, upon 7th July, 1824, authorized the keeper to withhold the signet from the letters which did not contain the name of the clerk by whom they were signed, and to this extent there is a judicial authority for a memorandum at the end of the writ. But neither this interlocutor, nor any thing else, makes the mention of marginal notes, or the numeration of pages, either necessary or proper.

“ No doubt, agreeably to a practice, which, though common, the Lord Ordinary does not understand to be by any means invariable, the pages here are numbered ; and if that numbering had been signed, it might have been maintained on the authority of the reversal in the case of Hare v. Nasmyths, that the letters, having chosen to authenticate the letters by counting the pages, nothing but the numbered pages can be received. But the notandum is not signed ; and the Lord Ordinary understands such notanda very rarely are. So that the Court cannot see an object not at all connected with authentication, has sanctioned the specification of one particular at the close of the letters, and the defence here is founded on an attempt to extend this to a different purpose, so as to include a precaution required on common deeds.”

as aware that her husband had been carefully kept ignorant of the matter ; but the indorsee had obtained no valid conveyance to the bill, and charge at once against the acceptor suspended simpliciter. 2. A bill of suspension was which alleged no ground of suspension but that of forgery ; reasons and reasons of suspension were lodged, which alleged no other ground,—Held it, in re-revised reasons, to state other facts and pleas, such as the charger's valid right to the bill, even if genuine—in respect that the record was good, and the charger had not been called on to abide by the bill, nor the bill to consign.

May, 1892, Mrs Ann Gib, wife of Mr Colin Gib of Edinburgh, purchased a set of jewels from Edmund and Walter Smith, jewellers in London, for the price £1155. She gave Messrs Smith an acceptance for that sum, payable by a Mr Rainsford, payable at twelve months. In June there-
Jan. 26, 1896.
1st Division.
Ld. Chamberlain.
B.

lessers Smith wrote to William Bell, W.S., of Edinburgh, inclosing Mrs Gib's acceptance, and stating that they were much alarmed by recent information respecting their transaction with Mrs Gib ; they understood she had got hold of the diamonds merely for the purpose of raising money on them ; and they requested Mr Bell instant-ly to demand the diamonds back, under a threat of public exposure. Mr Bell added,—“ We are inclined to believe Mr Gib is not aware of the facts going on now in London, and perhaps a threat to lay it before the public, and also an exposé in the Edinburgh papers, may be the means of getting the things returned. There are various transactions they have been carrying on in the same way.”

Mr Bell immediately wrote to Mrs Gib, requesting the return of the jewels, stating that if this was not instantly done, he must communicate the facts to Mr Gib. In subsequent correspondence and negotiation.

No. 110. concurrence. On 6th May, 1833, notice of the maturity of the bill sent by the holders to Binny, who immediately replied that he knew nothing of the bill and had never signed it. Messrs Smith gave him a bill of exchange on the bill, and he presented a bill of suspension on the ground of forgery.

Jan. 26, 1836.
Binny v.
Smith.

The bill was passed, and reasons of suspension, and revised reasons were lodged, which stated no other ground of suspension but forgery. The allegation of forgery was met by a denial, and also by a statement that, even if the signature was forged, the suspender had acted in a manner as to accredit the signature, and make himself liable for the bill as genuine. In re-revised reasons of suspension, however, and with the chargers having been called upon to abide by the bill, or the suspender to consign, Binny stated those facts which have been already noticed, and now pleaded, besides the exception of forgery, that the indorsement of the bill by Mrs Gibb, even if the bill had been genuine, was altogether invalid, as it was done not only without the concurrence of her husband, but in circumstances which showed the chargers' consciousness that it was a transaction which must be kept secret from him. Mrs Gibb was not engaged in trade, and had not indorsed the bill, the consequence of any transaction falling under her *præpositura*, so that indorsation was inept. It was not too late to state this plea at any time before closing the record, and the only effect of the late stage process at which it had been stated, was to raise a question as to the validity of the indorsement.

The chargers answered, that, by the rule, *exceptio falsi est omnium ultima*, the suspender was precluded from going back upon other grounds after having passed his bill of suspension solely upon the ground of forgery, and adhered to it alone, in his reasons and revised reasons of suspension. But if the plea of the invalidity of the indorsement be listened to, it must be assumed *hoc statu*, that the suspender's signature was genuine; and, in that case, he, who had granted the favour of a married woman, could not be heard to allege that her indorsement was invalid.

The Lord Ordinary pronounced this interlocutor:—"Finds that the suspender's plea, that the chargers had no right to the bill in question, because it could not be validly indorsed by the drawer, being a married woman, might be stated either as a preliminary defence or objection to the chargers' title, or as a peremptory defence on the merits; and therefore finds, that it is not to be held as passed from, by the suspender, allowing the record to be closed without argument on the subject, in respect the record was not closed on the allegation of forgery, and the chargers been called upon to abide by the bill, nor the suspender to consign, before the objection to the indorsation was stated: Finds that the maxim, *exceptio falsi est omnium ultima*, does not apply to this case, and that it is competent for the suspender to object to the validity of the indorsement."

ion without passing from the defence of forgery: And, in re- No. 116
is not alleged that the drawer was engaged in trade, or that the Jan. 26, 1861
granted in consequence of any transaction falling under her pre- Binney v.
, or that her husband was made acquainted with and sanctioned Smith.
sation, while, on the contrary, it appears, from the correspond-
duced, that he was carefully kept ignorant of the matter, and
chargers were aware of this circumstance: Finds that the
obtained no valid conveyance to the bill, and are not now in
it, therefore suspends the letters simpliciter, and decerns: And
chargers liable in the expenses incurred since the time that the
to the indorsement was stated in re-revised reasons of suspension,
no other expenses." *
chargers reclaimed on the merits, and the suspender on the point
mes.

PRESIDENT.—I think the interlocutor well founded. This case is
different from those of Churnside¹ and Mackenzie,² where the woman
engaged in business, and lived separately from her husband. As to the
the money coming from the father of Mrs Gib, as it must be held to do,
as the plea of forgery is not gone into, and the subscription is assumed
genuine, that circumstance does not affect the question. From whatever
a married woman got the money, it became her husband's money by the
of her acquiring it; and her assigning it away, as by indorsing a bill,
her husband's concurrence, is invalid.

NOTE.—The maxim, *exceptio falsi est omnium ultima*, even according to the
form of process, was subject to various limitations; and, in particular, it
was not to have been admitted, unless an act of liti's contestation had been pro-
duced. It is doubtful how far it can be received at all under the present
rule. The rule is, that all defences shall be stated simul et semel, and, con-
sequently, that any one may be proposed without passing from another. If it be
held, to the effect of excluding any statement in fact, or plea in law, this can
open if the record has been closed on the plea of falsehood, before the other
has been stated.

The nature of the transaction in this case, and the whole correspondence pro-
duced, are conclusive, on the point that Gib, the drawer's husband, was studious-
ly ignorant of his wife's transaction in purchasing the jewels, and giving a bill
thereon, and there is no averment on the record to the contrary. The case
of *Binney v. Smith* is not parallel; for there the husband and wife, the drawers, were
in an ordinary action along with the acceptor, and as the husband allowed
to go against him, it was presumed that he had authorized the indorsement.
He has not been made a party here, and there is neither presumption nor
evidence that he was in any way cognizant of the matter.
The suspender having neglected to state the plea which has now been sustain-
ed, his reasons of suspension were re-revised, he has been found entitled to
only from that period."

July 11, 1789 (6082).

* May 18, 1827 (*ante*, V. 679).

¹ May 16, 1827 (*ante*, V. 679).

No. 110. LORD BALGRAY.—I am of the same opinion. Assuming this bill to bear a genuine signature of the suspender (which I do not believe it does), he would still be perfectly well entitled to insist that there should be a valid indorsation of the bill before he could be called on to pay its contents to the indorsee. I would be perfectly entitled to object that this indorsation was invalid without the husband's concurrence.

n. 26, 1836.
Mitchell v.
Smith.

LORD GILLIES.—I think the interlocutor well founded. If a married woman chose to assign away a bond, without her husband's concurrence, that would be an inept assignation; and her indorsation of a bill is equally ineffectual.

LORD MACKENZIE concurred.

The suspender, under his counter-note, now moved for expenses of process, as these had been occasioned by a charge on a forged bill.

LORD MACKENZIE.—The ground on which the Court have decided this case must negative that claim. The decision has gone solely upon the invalidity of the indorsation, even assuming, *hoc statu*, that the signature was genuine. The only plea, on which our decision is rested, was not put on record till the revised reasons of suspension were lodged, the Lord Ordinary has rightly disposed of the question of expenses.

The other Judges concurred, and

The counter-note was refused.

PEARSON AND ROBERTSON, W.S.—BELLS AND RUTHERFORD, W.S.—Agents.

No. 111.

WILLIAM MITCHELL, Pursuer.—*Rutherford—Whigham.*
DONALD SMITH, for Western Bank, Defender.—*Robertson—W. Bell.*

Master and Servant—Bank.—The directors of a bank having dismissed the manager, not bound to justify their dismissal, and an issue on that point refused.

n. 26, 1836.
D. DIVISION.
l. Moncreiff.
T.

THE pursuer, Mitchell, who had been appointed manager of the Western Bank of Scotland on its establishment at Glasgow in 1834, having been dismissed in October, 1834, raised the present action against the directors of the bank, concluding to have it declared that their proceedings in the matter were illegal and unwarrantable, and to have them ordained to re-install him in his office, or at least to pay him the emoluments thereof, or otherwise, for damages. The parties differed in their statements in regard to the conduct on the part of Mitchell, in respect of which the directors had dismissed him; but the following circumstances were admitted on the record.

By the contract it was provided, that the affairs of the bank should be managed by a governor, deputy-governor, six extraordinary and six ordinary directors; the power of appointing the manager, &c.

; and accountant, being vested in the ordinary directors; and it No. 111.
 ally stipulated, that "it shall be in the power of the said or-
 and of directors to dismiss any one or more of the said officers, Jan. 26, 1834
 ry see occasion, provided that two-thirds, at least, of the said Mitchell v.
 shall concur in such dismissal; and they are hereby authorized Smith.
 at a successor or successors to the party or parties so dis-

arsuer, Mitchell, on his appointment, granted, amongst with cau-
 bond of caution for his intromissions to the extent of £8000,
 and contained, inter alia, the following clause:—"And, farther,
 said William Mitchell, only hold the foresaid office of manager
 re pleasure of the ordinary board of directors of the said Western
 Scotland, and their successors in office, for the time being, or at
 two-thirds of their number, in terms of the foresaid 26th clause
 mpany's contract, I hereby bind and oblige myself, at any time,
 quired so to do, by two-thirds at least of the said ordinary board
 re, to deliver up to them, or their successors in office, for the
 ag, all sums of money, in specie, bank notes, and notes of the
 king company itself, &c. &c., with the keys of the repositories
 id banking company, and other property belonging thereto, that
 in my possession at the time, and the books, accounts, and
 of the said banking company, without any manner of exception
 ation whatever."

e meeting which dismissed Mitchell all the ordinary directors
 ment, and they unanimously concurred in the resolution to dis-

standing these admitted facts, Mitchell craved an issue on the
 how far the directors were justified in their dismissal of him.
 s opposed by the bank, on the ground that Mitchell undoubtedly
 appointment during pleasure, and that they would have been
 to have dismissed him without any cause had they seen fit,
 quently were not bound, in an action founded exclusively on
 dismissal, to go into any investigation of the sufficiency of the
 which they had proceeded.

case had been remitted to the jury roll, but was afterwards
 ed to hear parties on the plea of the bank for excluding a trial,
 and Ordinary (the record not being yet closed) pronounced this
 ex, adding the subjoined note:—"Finds that sufficient

recise meaning of this interlocutor will, it is presumed, be easily under-
 Lord Ordinary has fully made up his mind that the action cannot be
 on the summons, and the facts admitted in the record, and is prepared
 a decree of absolvitor. But he cannot do so according to the statute,
 closed, in consequence of the contemplated possibility
 ted for trial. This form of the interlocutor, however,

No. 111. grounds have been assigned why the cause should be decided without a
 remitt for trial by a jury; therefore appoints the cause to be enrolled,
 in order that the record may be closed, and ordains the parties to be prepared
 to close the record accordingly."

26, 1836.
 Mitchell v.
 Smith.

Mitchell having reclaimed—

LORD JUSTICE-CLERK.—I am for adhering to the interlocutor. There are many things which, in the idea of the bank directors, might amount to mismanagement which do not amount to moral blame. They are entitled to say you have mismanaged yourself, we are not satisfied with your management, and we dismiss you, unless there be produced a solemn covenant, providing that he should remain notwithstanding of mismanagement. It is in the nature of such institutions that this that the directors should be so entitled.

LORD MEDWYN.—There is nothing in this contrary to the minute of the directors or the contract with the party himself. Mr Mitchell's conduct in the

with the explanatory note, will enable the party, if so advised, to take the opinion of the Court on the present state of the cause, without closing the record, and waiting for a direct judgment on the merits of the action. If they prefer the latter course it will be equally safe for them.

"It is not necessary to go much into detail. The nature of the conclusions in the summons must be attended to. They all depend expressly and essentially on the assumption that the defenders had not power to dismiss the pursuer from office without assigning special causes, which the Court might hold to be sufficient, and accordingly the leading conclusion throughout is, that they should be ordered to 'restore and reinstate' the pursuer in the office, the conclusion for damages being only alternative in case this shall not be done. There is no case of damages raised by the summons on the independent ground of injury arising from any thing in any particular time, mode, or terms in which the dismissal took place, supposing that there was otherwise power to do the act: And, indeed, it is plain, that if the power existed, the defenders might comply with the first alternative, to the effect of restoring the pursuer, and so put an end to the action, and then immediately dismiss him in some more formal and simple manner, according to his own view of the matter.

"The case, therefore, must depend on the question of power. And the Lord Ordinary can only say, that when he considers, 1. The terms of the constitution of the company; 2. The terms of the pursuer's appointment; and, 3dly, And, altogether, the explicit terms of his bond and obligation to the bank, he finds it altogether impossible for him to hold that the bank or the directors had not an absolute power of removal, which entirely excluded the idea of their ever being called on to justify the act in a court of law. This is the case of a private society, who were entitled to make their own laws and their own contracts, to bind all the officers appointed by them; and if any words could be contrived more strongly to express the pursuer's obligation to submit implicitly to the will of the directors in removing him from office, than those employed in his bond to them, the Lord Ordinary does not know where they are to be found.

"The case of Pollock v. the Commercial Bank, as decided in the House of Lords, 3 Wilson and Shaw, p. 365 and 430, seems at any rate decisive of the principle which must govern this case."

ES BLAIN OF DRANE, and OTHERS, Pursuers.—Keay—Penney.

No. 112.

DUNCAN PATERSON and JOHN BELL, Defenders.

GEORGE CAMPBELL, Defender.—Rutherford—G. G. Bell.

JAMES LEITCH, Defender.—Rutherford—Marshall.

ALEXANDER DUNLOP, Defender.—Rutherford—Cowan.

Accounting—Reparation.—1. A party by his trust settlement declared, for the encouragement of my trustees to accept the trust hereby conceived, I declare that they shall not be liable for neglect, omissions, or diligence kind, nor shall they be liable singuli in solidum, but each only for his part omissions"—Held, that where money was uplifted by a trustee (Paterson) as of a receipt signed by himself and two co-trustees, being a quorum, such was an act of personal intromission against the co-trustees who signed the ; and thereby enabled Paterson to uplift the money.

he money so uplifted was allowed to lie for several years in the hands of Paterson his promissory-note, without the slightest inquiry after it by the co-trustees, who had taken an obligation from him at uplifting it, to grant a security for his heritage "as soon as possible;" he eventually proved insolvent:—but the co-trustees were liable, singuli in solidum, to the beneficiaries under it.

the liability held to attach to the co-trustees who signed receipts in regard to money similarly uplifted and retained by Paterson, but without any promissory-note being granted for it, or any obligation to give heritable security.

the liability held to attach to the representative of one of the co-trustees, who, within a year after the money was uplifted, that co-trustee had fallen into debt, so as to be unable to attend to business, and had continued in bad health and death, which happened several years before the insolvency of Paterson.

No. 112. **THE** late John Blain, collector of the customs at Rothesay, executed trust-disposition of his whole estate in favour of “ Andrew Blane Blane-
 n. 28, 1836. field, Duncan Paterson, writer in Inveraray, George Campbell
 Division. tacksman of Ardtarig, Andrew Anderson and Quintin Leitch, merchant
 Fullerton. in Greenock, Alexander Dunlop, banker there, the Rev. Dr Archibald
 S. M’Lea, minister of Rothesay, or the minister of that parish for the time
 being; and to such other person or persons as I shall hereafter appoint
 to be trustees along with them, and to such person or persons as they
 shall assume, by virtue of the powers committed to them, and to their
 survivors or survivor of my said trustees, any three of whom alive
 accepting being always a quorum.”

Blain v.
 Paterson.

A power of assuming new trustees was given “ to my said trustees their quorum, or to the survivor of them, to add and assume such other person or persons, one or more, as they shall think fit, to be trustees, the better management of the premises, which trustees to be named assumed shall have the same power as if they had been appointed myself,” &c.

A clause of protection to the trustees was inserted in the following terms:—“ For the encouragement of my said trustees to accept of trust hereby conceived to them, I declare that they shall not be liable for neglect, omissions, or diligence of any kind, nor shall they be liable singuli in solidum, but each only for his own personal intromissions; they shall be no farther liable for any factors to be appointed by them (which they are hereby authorized to appoint) than that they are held and reputed responsible at the time of entering upon their office.”

The purpose of the trust, after payment of debts, &c. was declared to be “ that my said trustees may hold and manage the remaining effects for and to the use of the said Janet Blain, my now only surviving daughter and to the children of her body.” The following clause also occurred “ It is my intention that my whole effects and property, of whatever nature herein before settled for behoof of my daughter and her children, shall be secured for their proper use and benefit in all events, I hereby declare that the same are alimentary, and shall be nowise affected by their debts or deeds, or by any diligence to be used by their respective creditors, and, for the same reason, I hereby exclude the jus mariti and all right of administration competent by law to the husband of my daughter.”

Blain died in February, 1820, leaving one child, Mrs Janet Blain Deane, who lived with her husband, and a family of minor children, in England.

The Rev. Dr M’Lea, and Messrs Paterson, Leitch, and Campbell accepted as trustees. Paterson was procurator-fiscal for the county of Argyll—he was a relation of Mrs Deane, and had been employed by her father Blain, as his agent. He was reputed to be in excellent circumstances. Campbell was a farmer in Argyllshire. Dunlop was requested to accept, but declined.

as also passed, enjoining Irvine to take the necessary steps for in-
; the sum in the bank, under certain deductions, on heritable
y.

erson was the only trustee with whom Mr and Mrs Deane corres-
l in relation to the affairs of the trust. In autumn, 1824, Paterson
to Mr and Mrs Deane, proposing to uplift the money in the bank,
y interest at five per cent to Mrs Deane so long as the money
ed in his hands. He stated that he would give heritable security
ertain subjects in Inveraray, alleged to be worth £2000; and he
held out that his son, then a minor, with a near prospect of suc-
to a landed estate, would come under an obligation for the debt
he came of age.

and Mrs Deane wrote Paterson that the proposal was perfectly
ble to them, and, on 13th October, 1824, they added this docquet
paper containing Paterson's proposal:—"As the above proposal,
carried into effect, will be advantageous to us, by a higher rate of
t than is allowed by the bank, and that we approve of the security
, we consent to and recommend the same."

2d December, 1824, Paterson wrote to Campbell, intimating that
d Mrs Deane wished to uplift the bank money and place it in his
for the sake of drawing a larger amount of annual interest on it.
ded, "I propose that, in the mean time, and while the sum remain-
h me, it should be only on the footing of real security on my pro-
over and above my personal obligation," &c., and that the tran-
should be completed in terms of the proposal approved of by Mr
rs Deane, who had written a letter to the bank in reference to the

No. 112. Leitch, on 17th January following, addressed a letter to Irvine, the authorizing him "to receive from the Renfrewshire Banking Co £500 of the money lodged with them to the credit of Mr Blain's and to transmit said sum to Duncan Paterson, Esq., Inveraray, on his giving security to your satisfaction on his heritable property amount, and agreeing to pay five per cent per annum of interest. Subsequently to this, and without any heritable security having been seen or approved of by Irvine, a bank order for £500, in favour of Duncan Paterson, was signed in these terms by Leitch, Campbell, and Paterson: "We, Messrs Quintin Leitch, George Campbell, and Duncan Paterson, being three, and a quorum of the trustees and executors of the late John Blain, do hereby authorize you to make payment to the said Duncan Paterson, or to his order, of the sum of £500, and to discharge the account of the said trustees and executors with the Renfrewshire Banking Company with that sum; for which purpose this shall be sufficient authority, without any farther advice or mandate from us." The order was dated in February, 1825. Paterson at the same time gave a promissory-note for £500 in favour of the trustees, payable to bearer after date, together with an obligation to place in Irvine's hand as soon as possible, "a disposition in security over the heritable subjects in Inveraray. These documents were delivered to the factor.

Paterson uplifted £500 from the bank, but he never gave any security, nor did any of the trustees call on him to give it. Leitch fell in bad health, and on April 17, 1826, he addressed a letter to Irvine, stating that his health "for the last four months had been so bad as to prevent him in a great measure from attending to business," and thereupon resigning his office of trustee. This letter was intimated to the trustees. Leitch continued in bad health, and died in September, 1827, having no connexion with the trust affairs after his letter of resignation.

Within a few weeks after Leitch's resignation, Irvine ceased to be factor under the trust, and Paterson, who had been the more active of the trustees, offered to Mr and Mrs Deane to transact the business of the trust gratuitously. They approved of this proposal. No new trustee was appointed, and the factorial management of the trust fell entirely into the hands of Paterson.

About the period of Irvine's resignation of the factorship, Dr. Bell died, and Paterson wrote to Campbell, that, as Leitch had withdrawn, they two were now left the only acting trustees, and he proposed to John Bell, writer in Inveraray, who had been a clerk of his, to be assumed into the trust under the powers conferred on the trustees, as he was habite and repute responsible, and Campbell adopted Paterson's suggestion. A deed of assumption of Bell was executed on 28th June, 1826. On 29th and 30th June, these three parties gave receipt for the balance of the money in the bank in these terms:-

any, as appears from the deed assuming company, and
doubt afterwards occurred whether the deed of assumption, being
signed by two trustees only, was valid. Paterson therefore asked
us, who had previously declined the trust, to remove this diffi-
culty by accepting the office of trustee-nominate, and concurring with
Bell and himself in the assumption of Bell as a co-trustee.
We agreed to do this, and, in November, 1826, a deed of as-
sumption was executed, proceeding on the narrative that Paterson,
Bell, Leitch, and M'Lea, as accepting trustees, had made up titles
to the personal estate; that Paterson and Campbell had assumed
into the trust from a confidence in his integrity and ability; "and
as some doubts have arisen as to the validity of the said deed of
assumption and nomination of the said John Bell, junior, as trustee, in
fact the same had only been executed by us, the said Duncan Pater-
son and George Campbell; therefore wit ye us, the said Duncan Pater-
son, George Campbell, and Alexander Dunlop, being three and a quorum
of the original trustees named by the said deceased John Blain in the
said trust-disposition and assignation executed by him, and in virtue
of the powers thereby given, not only to have ratified, &c. likewise we do
hereby ratify, &c. the said assumption and nomination of the said John
Bell, junior, as trustee under the foresaid trust-disposition (of Blain), and
the said deed of assumption and appointment itself, in all the conditions,
terms, and provisions thereof, which are all here held as repeated: But
we have of new assumed, nominated, and appointed, as we do here-
by anew assume, nominate, and appoint, the said John Bell, junior,
trustee under the foresaid trust-disposition, for following out the
terms of the said trust, declaring that the said John Bell, junior,

No. 112. of Midascog, was uplifted on a receipt and discharge signed by Paterson, Bell, and Campbell.* Paterson alone obtained the custody of the money, and none of the other trustees ever made any inquiry regarding it. During this whole period Mr and Mrs Deane had continued to place an unqualified confidence in Paterson, and to correspond with him. This confidence continued unabated for some years afterwards, when it appeared that, though in 1829 they were certified of the £500 still on Paterson's promissory-note, he had misled them as to the debt, and the £1060 secured on Midascog, by stating these investments still remaining. In answer to inquiries by Mrs Deane, he mentioned in 1830, that all these sums were in his hands; and, in 1832, an account and reckoning was raised by Mrs Deane and her children, in the course of which Paterson proved insolvent. Mr Deane died, and the dependence of the action, which was directed against Paterson, Bell, and Campbell, Bell, and Dunlop, and also against James Leitch, merchant of Greenock, the representative of the deceased Quintin Leitch.

The summons concluded, that the defenders should be ordained to hold just count and reckoning with the pursuers for the whole estate, and effects, falling under the management of the said trustees, and for that effect to exhibit and produce before Our said Lords an account of charge and discharge of their management of the said means, and effects, stating on the one side the goods, debts, sums of money, rents, annualrents, interests, and other property which belonged to the said deceased John Blain, and which the said trustees have intended with, and also those which they have omitted to recover; and state on the other side, the debts due by the said deceased John Blain, and the sums which they have properly and warrantably expended for the pursuers' behoof, to be seen and considered by Our said Lords: And Our said Lords ought and should be decerned and ordained, by decree of Our said Lords, to make payment to the pursuers, for their respective interests, as aforesaid, of such sum as shall appear to be the balance due by them on the foresaid accounts," &c.

A record was made up, in which no plea was stated against the sufficiency of the summons, to cover all the questions raised by the averments and pleas in the record. But cases were ordered, in which, in the summons was objected to.

No case was lodged for Paterson, the only question regarding him being the amount of funds at his debit.

No case was lodged for Bell, apparently either because he was considered to be so much identified with Paterson, or because there was

* Parties were at issue whether this sum, and that in the bond by the trustees, were spontaneously uplifted or were tendered by the debtors, and signed at a low rate of bank interest till uplifted by the trustees.

Each question might be decided, the balance, as resulting from the
of accounting thereby fixed, was competently concluded for.—And,
tely, any objection to the form of the summons, as not covering all
as in the record, was too late, after the record was closed.

In regard to the defender, Campbell:—(1.) The protecting clause
to exempt any trustee from liability for his own actual intromis-
and the defender was liable as an actual intromitter, in regard to
as which were uplifted upon receipts and discharges signed by him
aterson. The testator had made three trustees a quorum, for the
s purpose of providing that three should charge themselves with
sponsibility of actual intromitters, in every change of the invest-
which they made. It was true, that only one person might be the
which, physically speaking, uplifted the sums; but it was by the
act and mandate of those who signed the receipt, that he got the
; and they uplifted it through him. Being thus charged with the
, qua trustees, they were bound to discharge themselves, by show-
ey had performed the reasonable duty of trustees in regard to it.
could not discharge themselves, by merely saying they had uplifted
mey, and put it all into the hands of one of their number, without
equiring security from him, or asking what trust purpose was to be
by such proceeding. They still remained charged with the trust-
; which they had uplifted.¹ (2.) The negligence of this defender was
as, as to amount to culpa lata; and was, therefore, equivalent, in a
sense, to fraud. This sufficed to exclude him from the protecting
, and make him liable in solidum. (3.) As the fiars in the trust-
were minor children, no consent by Mr and Mrs Deane could

No. 112. man had signed the bank-order, in favour of Paterson, for £500, and he never performed the slightest act of duty as a trustee, in regard to the sum, such as endeavouring to have it secured, or even inquiring after it at all, he must be liable, to that extent, on the principles which were applicable to the case of Campbell, in regard to their similar intrusions. And, separately, it was incompetent for any private trustee under a mortis causa trust, to resign his office at pleasure,¹ especially where the beneficiaries under the trust were minors; and, therefore Leitch must be dealt with as if he continued an acting trustee till his death.

28, 1836.
Paterson.

4. In regard to Dunlop:—He was a partner of the Renfrewshire Bank, which had paid up above £700 on a receipt by Campbell, Paterson, and Bell. Doubts had occurred as to the validity of the deed of assumption of Bell, and, consequently, of the validity of all acts done by him and the other two parties. In these circumstances, Dunlop accepted, to the effect of executing a valid deed of assumption of Bell, for the express purpose of removing all doubts as to the validity of the acts by Bell, and Campbell, and Paterson. But as the purpose and effect of this step was to validate all the trust-actings, and, therefore, inter alia, to make a good discharge to the bank, for the sum previously uplifted, it placed Dunlop precisely in the position of being a concurring party to that discharge. But for his deed, recourse would have lain against the bank for having given up the money on an invalid discharge; and so the trust-funds would have been, pro tanto, recovered from the bank; but as the act of Dunlop prevented this, by making a valid discharge, he must be liable, equally with the other trustees who directly signed the discharge to the bank. And, separately, he ought to be subjected generally for the losses to the trust, because he performed no act whatsoever of a trustee, except that of substituting a person in his place, and then per aversionem, devolving the entire trust on him. This was not a bona fide exercise of the important power of assumption; and it inferred liability generally for the acts of the party so assumed and substituted.

Pleaded by the Defenders—

1. The summons was not sufficient to cover a decree for any sum except such balance of trust-money as might be found in the hands of the trustee. In so far as it was now meant to extend it to other funds, which trustees could not be liable unless they had forfeited the benefit of the protecting clause in the trust-deed, the summons was inept. It ought to have specially set forth the alleged laches, or misconduct amounting to culpa lata, from which such penal liability was to be de-

¹ Carstairs, &c., Jan. 20, 1776, Hailes, 678; Ouchterlony (ante, V. 358, and XL. 4 W. & S., App. 148).

the trust;" he had full confidence in each and all of them; and stated intention, founded on that exuberant confidence, was, that trust-money got into the hands of them, or either of them, still, he was liable only for so much as he actually and personally received and paid. This was the true meaning of the words "personal intromission." In this reliance the defender had accepted the trust. It was therefore to discharge a trustee, as to any money uplifted by another in joint receipt, if he showed that he honestly paid it away, or in its passing into the hands of one of the co-trustees; such course being of course a party in whom the testator had testified that his confidence was unbounded, by naming him co-trustee, and conferring on him all the privileges. There was no gain, of any sort, to the defender, in the money to get into Paterson's hands. He had violated no intention of the truster, for the trust had not directed in any way how the money should be dealt with or secured; and if the defender omitted to secure by Paterson, this was precisely one of the class of acts, under the denomination of "neglects, omissions, or diligence of the trustee," which were within the clause of protection. Unless the clause was directed against the defender, it would be difficult hereafter to induce any acceptance of the gratuitous and burdensome office of a testamentary trustee.

As regards the late Quintin Leitch:—The whole of the considerations mentioned, applied in his defence, with this addition, that he had accepted the trust as early as 1826, while Irvine continued factor; and in 1827. He was in bad health for some months prior even to his death, so as not to be able to look after his own affairs. In

No. 112. to the security of the £500, for so many years as elapsed prior to Paterson's insolvency. And his previous letters to Irvine the factor, together with the obligation taken from Paterson to grant heritable security, confirmed the legal presumption in his favour.¹ In regard to the competency of resigning the office, even from the necessary cause of bad health it was not *hujus loci* to discuss the question, as it was certain that Leitch had had no intromissions with trust-funds after his letter of resignation and that was enough for his defence.

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Blain v.
Paterson.

4. In regard to the defender Dunlop:—The single act performed by him was that of concurring in a deed of assumption of a new trustee, as to enable the trust to go on, according to the testator's wishes, and without the actings of the trustees being liable to challenge. The defender had done this act in *optima fide*, as an act for behoof of the beneficiaries under the trust. He was not connected with any other transaction whatsoever, and did not know any thing either of the trustee's dealings with the Renfrewshire Bank, or with any other party. Independently of any clause of protection, he could not be subjected to liability, for the bona fide act of assumption performed by him; and less could he be so, when he acted under that clause. He had had no intromissions, either actual or constructive; and he had not even omitted any trust duty, for he never undertook any, except that of assuming a new trustee, in order to enable the trust to work, without being liable to challenge.²—Separately, though the defender had executed the deed of assumption on the belief that it was necessary, this was erroneous, as a previous deed of assumption by Paterson and Campbell was valid in itself, under the terms of the trust-deed; and thus the act performed by the defender was merely supererogatory, and had not produced any effect whatever upon the trust-management.

The Lord Ordinary reported the cause.

LORD BALGRAY.—I have formed a decided opinion in this case. In the place, it will be observed that the clause of protection is as ample and complete as any one which I ever saw. The truster has most expressly and anxiously provided, for the safety of the trustees, that they shall not be liable for neglect or omissions, but only each for his own personal intromissions. And the truster is entitled to confer as extensive powers on his trustees as he chose, and to surround them with as strong protections and immunities as he thought right for encouraging them to undertake the gratuitous office which he imposed on them. Of this, the parties who take up the trust-estate have no right whatever to complain, and of all this, the trustees must have the most ample benefit. But after allowing for all this, the trustees must still be liable for *culpa lata*, or conduct amounting to fraud.

¹ Knight v. Earl of Plymouth, 2 Brown's Chan. Ca.; Leigh, 3 Atk. 582.

² 2 Williams, 1124; Willis on Trust, 146.

intrusion. And especially after it was expressly pointed out to them, out to them, that security should be given, they should have locked the safe up, until the security for it was obtained. But so far from doing never so much as inquired what became of the money which was uplifted, and placed in Paterson's hands. These principles involve the liability of the late Quintin Leitch to the extent of the £500, under the bank order which he signed along with Paterson and Campbell they involve Campbell and Bell to the extent of the whole money uplifted by them. As to Paterson's liability, there is, of course, no doubt. But there is another defender who stands in a very different position—Alexander Dunlop. I can see no ground, not even the slightest, for suing him. He merely concurred in an act of assumption of a new trustee on the trust. But, in regard to the other defenders, though their case is a hardship, they must, I apprehend be subjected to the extent now

THE PRESIDENT.—I am of the same opinion. Though the parties who accepted did not all go and get the money paid over the counter to them, they are in the same position as if this had been done, and the money then handed by them to Paterson. It was a *brevi manu* proceeding, more to sign the receipt and give the receipt to Paterson, leaving him to do the rest for himself. The act of intrusion by the whole parties to the receipt was of the same nature. When they thus performed an act of direct intrusion in uplifting the funds, I conceive they were charged with the duty of seeing to the security of the funds; or at least of not being grossly negligent, as they were, regarding the safety of the funds. But I am not quite free of doubt as to the case of Dunlop. He may have been a little negligent in not making due inquiry whether the money was found for the £500 uplifted from the bank by Paterson. But there is no respectable factor for the trustees then acting, to whom Leitch wrote not to

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ain v.
terson.

LORD GILLIES.—I consider this case to be attended with very considerable difficulty, in respect to some of the questions involved in it. There is no liability except for personal intromissions. But where there is a joint receipt signed by several parties, that appears to be neither more nor less than an act of intromission by them all. In the authorities quoted from the law of England, it appears to be laid down, that if a joint receipt “be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge.” In short, where the money uplifted by the receipt was under the control of all the parties signing it, they see all to incur liability as intromitters, according to the English authorities referred to. And undoubtedly in this case, the money which was uplifted by the receipt or bank orders was subject to the control of all the parties who signed the documents. This, however, does not appear to be, in itself, conclusive against them; for the protecting clause of the trust-deed is so strongly framed as to create a difficulty still. Suppose that after allowing the uplifted money to pass into the hands of Paterson, they had inquired of him if he had secured the money as he was bound to do, and he had positively said that the security was duly given, that would have been a fraud on his part, being contrary to the fact, but I doubt whether it would not have sufficed to exonerate the co-trustees by the force of the protecting clause in their favour. But, in this case, the co-trustees never made so much as one inquiry. They allowed Paterson to act in a manner that was ruinous to the trust; and more than that, the receipts for money enabled him to act in that manner, which he could not otherwise have done. All the parties who signed the bank-order for £500 are liable for it, just as the parties who signed other receipts are liable to the extent of the contents of these receipts. In regard to the defender, Dunlop, who had no intromissions, and who accepted merely for the purpose of assuming a new trustee to enable the trust to go on, I see no ground for subjecting him in liability to the amount.

LORD MACKENZIE.—I am of the same opinion. I think there is nothing in the objection which has been taken, in point of form, to the action of count and reckoning. That action is quite enough for determining all questions raised by this record. And in considering what these questions are, I shall take up the several defenders separately.

In regard to Campbell, I regret that I must agree with all the Court in holding him liable for the whole money uplifted by Paterson upon receipts signed by them both. On the one hand, Campbell's office of trustee was altogether gratuitous, and he has the benefit of a strong protecting clause; but, on the other hand, the accepting, acting, and intromitting as a trustee, necessarily and inevitably implied some duty and some responsibility. The trust was of such a nature that the beneficiary interest belonged partly to a liferenter, and partly to the children the heirs. In regard to such a trust, it was the plain and obvious duty of an acting trustee to see the funds safely and permanently invested. In the circumstances, Campbell intromitted with the whole estate, uplifting it from the investments, and putting it into the hands of Paterson. This was done by an act, along with his co-trustees, and this was an act of the most unquestionable intromission by him. It was therefore one of those acts which are excepted out of the protecting clause. I have no doubt that the acting of Campbell was no other more nor less than positive intromission. And when he has intromitted

uplifted money, he does not take care that it is again securely invested, but immediately sanctions its being all handed over to Paterson, his co-trustee ; he does this without any real knowledge of Paterson's circumstances, and without even the slightest inquiry regarding them ; and not only so, but after communications had been made to him by Paterson of a most suspicious nature, and which ought to have alarmed him and put him fully on his guard. Had this been his own money, would Campbell have allowed it thus to get into Paterson's hands ? But the matter does not stop here ; for, after Paterson gets the money, without giving security or caution of any kind, Campbell never once looks after it. He lets the whole be irrecoverably lost, and what is the only apology which he is now able to make ?—merely that he put implicit trust in Paterson and left every thing to him. I am afraid that this makes his case the worse, or, at least, is quite inadequate to form any legal defence for him. He signed the receipts which were sent to him by Paterson ; he enabled Paterson to uplift the money ; and then he never inquired after the trust funds which were confided to him, but allowed Paterson his co-trustee to spend the whole money at his pleasure. After all this, can it be held that he has incurred no liability ? It seems to me to be impossible. The protecting clause is a strong one, but it cannot cover conduct like this. Though he is not liable for diligence, or omissions, surely that could not have entitled him to go to the bank and uplift the trust-money, and then let it lie in the street. Now it appears that Campbell after uplifting this trust-money, did not do whatever, implying even the least care regarding it, but utterly abandoned all notice of it. I hold that his conduct amounted to culpa lata. He was most grossly negligent, and he must be answerable.

It has been pleaded that Mrs Blain approved of the proceeding of placing this money in Paterson's hands, and that therefore she can have no claim of reparation, against the trustees, so far as concerns the liferent belonging to her. But it does not appear to me to be proved that she ever sanctioned what was actually done. It was on the condition of security being taken, that she approved of Paterson's having the money, and not otherwise. In regard to the fee of the estate, which belonged to minors, no such consent can ever be stated ; had it been taken it would only have made matters so much the worse.

In regard to the late Quintin Leitch, I hold him liable for the £500 which was uplifted under the bank receipt signed by him. I have no doubt of his liability extending thus far, and no farther. His signature at the bank receipt was just a warrant to Paterson to draw the money. In short, as to this sum, he is in the same situation with Campbell. But he is liable for nothing more, as he did not intromit with more of the estate. It has been pleaded that his resignation was an inept proceeding, and that he could not divest himself of the trust by that step. That is a question which does not require to be decided, and I shall not enter into it. Leitch had no intromissions after the resignation, and his liability cannot extend to what afterwards occurred.

In regard to the remaining defender, Alexander Dunlop, I think it impossible to make him liable to any extent at all. His act of concurrence in assuming a co-trustee was not an act of intromission at all. I see no legal grounds for subjecting him.

THE COURT pronounced this interlocutor :—" Find the defenders, Duncan Paterson, George Campbell, and James Leitch, liable, conjunctly and se-

No. 112.

Jan. 28, 1836.
 Lynedoch v.
 Liston.

verally, for the sum of £500 drawn from the Renfrewshire Bank, on 17th February, 1825, and paid to the said Duncan Paterson, on his promissory note, and decern against the said defenders in favour of the pursuers, and their mandatary accordingly, for the said sum of £500, with interest from the date hereof till payment: Quoad ultra, assoilzie the said James Leitch from the conclusions of the action, with the exception of his partial liability for expenses, as hereafter mentioned: Find the defenders Duncan Paterson, George Campbell, and John Bell, jointly and severally liable for the sum of £2310, 2s. 10d. as the balance, unaccounted for, of the sum of £704, 14s. 8d., drawn from the Renfrewshire Bank, £816, 15s. 4d., contained in the bond by Lamont of Lamont, and £1060, 13s. 8d. contained in the bond over Ascog, and decern in favour of the pursuers, and their mandatary, against the said defenders, for the said sum of £2310, 2s. 10d., with interest from the date hereof till payment; reserving to the pursuers all their claims for past interest, so far as not paid against the said Duncan Paterson: Farther, find and declare, that the whole of the said sums when received, will fall to be invested and secured so as to give the liferent thereof to the pursuer Mrs Deane, and the fee thereof to the children, in terms of the said deed libelled: Find the above mentioned defenders jointly and severally liable to the pursuers in the expenses of process, but declaring that the said James Leitch's share of the said expenses, shall be restricted to the proportion which the said sum of £500 bears to the sum of £2810, 2s. 10d.: Assoilzie the defender, Alexander Dunlop, from the conclusions of the libel, but find him not entitled to expenses, and decern: Remit the account of expenses, when lodged, to the auditor of the Court to tax the same, and to settle the proportion which the said defenders Duncan Paterson, George Campbell, James Leitch and John Bell shall be held liable, and to report."

LEVEN and ALISON, W.S.—GORDON and MACKAY, W.S.—MACKENZIE and MACFARLANE, W.S.—A. CLASON, W. S.—GRAHAM and ANDERSON, W.S.—Agents.

No. 113.

LORD LYNEDOCH, Objector.—*A. Murray.*REV. WILLIAM LISTON, Respondent.—*Rutherford—Patton.*

Teinds—Valuation—Proving of the Tenor.—In a process of locality, the Court is bound to no evidence that lands have been valued, unless a decree of valuation be produced: but where strong adminicles were founded upon by an heritor, the Court is bound to assist the process of locality for a reasonable time, to allow him to bring a proving of the tenor.

Jan. 28, 1836.

1st Division.
 Ld. Cockburn.

IN a process of locality of the parish of Redgorton, Lord Lynedoch objected to the interim scheme of locality, inasmuch as it assumed that lands of Balmblair and Pitmurthly to be unvalued, although he averred that a decree of valuation had been pronounced as to the one in 1635 and the other in 1635. The principal decrees had been lost or destroyed, but his lordship alleged that extracts of them had formerly been made and judicially produced, and that they had received effect in all local

of another decree of valuation, the teinds parsonage of his lands of
air are valued to sixteen bolls victual, two part meal and third bear,
the 5th February 1634. By decree in 1178, * finding letters or-
roceeded, it appears y^e dec^t of modification in 1650 was produced,
Pitmurthly by it paid of stipend £26, 13s. 4d., and that Balmblair
e chalder victual, and of vicarage £4. So that there remains of
is in the parish, to the teinds of which he has produced no heritable
or decreets of valuation thereof as follows:—Nether-Benchill," &c.
another minute in the same process, dated 24th February, 1769, it
ted that " Henry Erskine, for the pursuer (the minister), repre-
that Mr Græme had produced two decreets of valuation, one of
sted the 5th of February, 1634, valuing the teinds of the lands of
lair, and the other dated the 10th of February the same year,
; the teinds of the lands of Pitmurthly; and, as Mr Græme's ren-
in cumulo, it became necessary to distinguish what part of that
rental, these lands bore, and therefore he produced a rental of the
and craved that Balgowan might be ordained to confess or deny
r that rental be just, that he may have a deduction thereof from
aulo rental, and these lands taken upon the footing of the valua-
so that the locality may be settled, which has so long depended,"
A rental of Balmblair and Pitmurthly was at the same time pro-
and Mr Græme was allowed to see it, after which the minister's
stor lodged a minute on 23d June 1769, stating, inter alia, that
some " was allowed to see and object to a rental given in by the
r, of his lands of Balmblair and Pitmurthly, with the pertinents of
lands Mr Græme had produced decreets of valuation of the teinds

No. 113. 22d July, 1772. Borrowed decret of valuation of the lands of P
 murthly in 1634; decret of valuation of the lands of Balmblair 1634.
 28, 1836. Robert Arnot's decret," &c. This receipt was signed by John Græne
 nedoch v. W.S., the agent of Balgowan.
 ton.

Lord Lynedoch alleged that the decreets so borrowed from proce had gone amissing, and as John Græme, W.S., was dead, no trace of the could now be recovered. But as the existence and tenor of the decre sufficiently appeared by these judicial proceedings, and had been alrea recognised by the minister in a former process of locality as to this sa parish, his Lordship was entitled now to receive the full benefit of the decrees in this locality, without being obliged to bring a proving of t tenor.¹

The minister lodged answers, and in support of the interim scheme r ferred to various facts and writings as warranting the inference that t lands in question had never been valued. But he contended, separatel that it was irrelevant in this process to refer to any evidence of the exi tence of a decree of valuation, except the production of the principal d cree itself, or a regular extract thereof. The adminicles founded on l the objector, would be available to him, in an action of proving the ten and if the Court, on due consideration, held that they afforded sufficie evidence of the existence, the tenor, and the disappearance of a previo decree, they would then pronounce a decree of proving of the tenor. B the rearing up of an alleged missing deed or decree, was an act of t most important and delicate jurisdiction, and it was not to be exercis incidentally by merely perusing some productions in a totally differe process.

The Lord Ordinary found, " that the objector has not instructed th his lands are valued, in the only way competent in a process of localit Therefore repelled the objections, and decerned; and found the objec liable to the respondent in the expenses of discussing the objections,"* &

Lord Lynedoch reclaimed, and pleaded that it was truly, as in a d fence, that these adminicles were founded on; and that a defender w

¹ Moderator of Synod of Merse, Nov. 21, 1753 (15823) Darling's Proc., 513.

* " NOTE.—The Lord Ordinary is of opinion, that as no decree of valuation produced or extant, the objector's lands must be held unvalued, and that howe available the adminicles and circumstances referred to by them may be in a proc of proving the tenor, they are not sufficient to establish a valuation in this local The case of the Moderator of the Synod of Merse, 21st November, 1753 (Morris p. 15823), is plainly inapplicable. All that was allowed to be proven there by ad nicles and circumstances, was the fact, that a parish had been suppressed, and t only in defence. Here the objectors are the pursuers or claimers of an exempt or privilege, of which there can be no proof but a decree; and they wish to sub tute the evidence of the former existence of this decree for the instrument in and for the action of proving the tenor, which is the legitimate remedy for the *leged loss of the original.*"

not under the same obligation to have recourse to a proving of the tenor No. 1
which might be incumbent on a pursuer.

The Court, without calling on counsel to support the judgment, ad- Jan. 2
Fraser
Sander
ced.

LORD PRESIDENT.—The statements made by the objector are not properly of the nature of a defence. I think he is to be viewed as being in petitorio, precisely as much as if all these statements were made in a process of proving the tenor at the instance. A decree of valuation is the only proper evidence that a valuation has been made, and Lord Lynedoch must produce that evidence in this process, or his lands will be localised on as unvalued.

LORD BALGHEY.—I have no doubt in the case. It is very true that there must have been a valuation of the lands in question, but the precise tenor of the decree must be proved in the appropriate process. I look on a decree of valuation as being a title to teinds, just as much as a charter is a title to lands. In the charter of a proprietor's teinds, and, in order to get the benefit of it in reality, he must not attempt to rear it up incidentally, or by inference, or by bringing some adminicles in place of the decree itself. He must either produce the decree or an extract of it; or he may get this process sisted for a reasonable time to allow a proving of the tenor to be brought.

THE COURT then adhered, and awarded additional expenses against the objector: but their Lordships, on the motion of the objector, remitted to the Lord Ordinary to sist process for a reasonable time to allow a proving of the tenor to be brought.

DUNDEE and WILSON, W.S.—G. RUTHERFORD.—A. GRIEVE, W.S., Agents.

JAMES JOHN FRASER, W.S., Pursuer.—*Buchanan—Maidment.* No. 2
E. SANDEMAN, T. PATON, and OTHERS, Defenders.—*Russell.*

Process—Production of Writs.—Under a diligence for examination of havers, circumstances in which commissioner instructed to report specially upon the appearance of a ledger exhibited by one of the parties.

THE pursuer, Fraser, W.S., having acted for some time as trustee Jan. 2
under a private trust-deed for George Pentland, coachmaker in Perth, 2d D
entered into an agreement with the defenders, Sandeman and Paton, Ld. M
whereby he denuded in their favour, they becoming personally bound to
pay his advances to a certain amount, should he be able to instruct such
creditors; he, on the other hand, being obliged to account for his manage-
ment and intromissions in a submission which was entered into for that
purpose. The submission having fallen, from not being timeously pro-
duced, Fraser raised an action against Sandeman and Paton, to which he
added certain other parties as their cautioners and attestors, concluding
the demand of a sum of nearly £18,000 as the amount of his alleged
share of Pentland's estate. In defence it was, inter alia,
pleaded that he was truly greatly indebted to the estate, having

No. 114. realized a large amount of funds for which he had not accounted, and a diligence was granted at the instance of the defenders for recovery of "all books, accounts, correspondence, and writings" having reference to Pentland's affairs. Under this diligence Fraser, being called upon as a haver to produce the books kept by him with reference to these affairs, exhibited a ledger, which he deponed was made up exclusively from jottings on separate and loose pieces of paper put down from time to time, having no cash-book or other book containing entries as to the transactions therein posted. The following procedure then took place:—
 "The commissioner being specially requested by the agent for the defender to inspect the ledger exhibited, with a view to its being an authentic record of the deponent's transactions, the haver exhibited the ledger to the commissioner. The commissioner examined it, but the haver objected to the commissioner making any report with regard to the manner in which the ledger appeared to be kept, as not being within the commission. The commissioner humbly reports the matter for the directions of the Lord Ordinary."

n. 29, 1836.
 Boswell v.
 Montgomerie.

On considering the report, the Lord Ordinary pronounced this interlocutor:—"Appoints him (the haver) to re-produce the ledger mentioned in his deposition to the commissioner, and appoints him (the commissioner) to make a special report upon the state and appearance of the said ledger, and upon all facts and circumstances connected therewith which may appear to him to be material for the consideration of the Lord Ordinary, and appoints to-morrow, at twelve o'clock noon, for that purpose."

Fraser reclaimed, but

THE COURT adhered, and found him liable in expenses.

ALEX. MILLER, S.S.C.—W. ALEXANDER, W.S.—Agents.

No. 115. SIR JAMES BOSWELL, Nominal Raiser.—*D. F. Hope—Maconochie.*
 MATTHEW MONTGOMERIE, and OTHERS, Claimants.—*Keay—Penney.*

Process—Jury Trial.—Circumstances in which the Court held it inexpedient to remit to a jury, a cause which involved disputed questions of fact, raising the plea of vitious intromission: and directed a diligence to be granted, and a proof on commission to be allowed, if found necessary.

n. 29, 1836. IN a multiplepinding, raised in name of Sir James Boswell of Auchinleck, Baronet, by Matthew Montgomerie and others, creditors of the late Sir Alexander Boswell, they made a claim against his son, Sir James, on the footing that he had intromitted generally with the moveable effects and with the unentailed heritage of Sir Alexander, and had incurred a general representation both at common law and under the statute 1695, c. 24. Sir James Boswell denied the facts upon which the pleas were founded, and stated that he merely represented his father's

at Division.
 Fullerton.

entail, and that all intromissions with moveable or unentailed No. 115
 had been held, not for his behoof, but for behoof of his father's
 Jan. 29, 1881

creditors moved the Lord Ordinary to remit the cause to the Boswell v. Montgomery
 as the proper mode of disposing of disputed questions of fact.
 James objected to this, and contended, that it was not expedient,
 just extrication of the case, that it should go before a jury. The
 evidence of intromission, and of the character in which intromis-
 sions made, would consist of writings, such as receipts for rent, &c.;
 any parole evidence was required, in supplement of the writings,
 to be led under a commission.

Lord Ordinary found "that the question mainly in dispute be-
 tween the parties is the question of fact, whether or not the nominal
 creditor of the multiplepoinding, and defender in the furthcoming, Sir
 Boswell, intromitted with the unentailed property and effects of
 his father, Sir Alexander Boswell: that Mr Montgomerie, the real
 creditor and the pursuer of the furthcoming, declines to confine himself to
 the evidence in support of his case already recovered under the diligence
 granted: that no sufficient ground has been stated for depart-
 ing from his case from the usual course for ascertaining disputed questions
 and therefore, remitted the case to the jury roll."

James reclaimed.

PRESIDENT.—I think it clear that a case of this kind should not be
 remitted to a jury. It is chiefly written evidence, apparently, that
 is to be considered: and, in applying the law to the facts of intromis-
 sion which may thereby appear, I think there is no need for the intervention of

GILLIES.—I am not sure but that a general question, whether there
 is a vicious intromission or not, may not be quite proper for a jury to try.
 In this special case I disapprove of the general remit which has been

MACKENZIE.—I think it would be following an inexpedient course to
 remit this case as it stands to a jury. I think it would be inconvenient for a jury
 to be asked to try a case which would be better to allow a proof on commission in supplement of the
 evidence if this should be necessary.

BALGRAY concurred.

COURT recalled the interlocutor and remitted to the Lord Ordinary,
 to grant diligences to the parties, or to grant a commission for proof,
 or to proceed otherwise in the cause, as to his Lordship shall seem just."

W. B. CAMPBELL, W.S.—J. COURT, S.S.C.—Agents.

also used arrestments and pursued a forthcoming against Sir
 John 10, Montgomerie Petitioner.

No. 116.

ALEXANDER FORBES, Petitioner.—*H. J. Robertson.*THOMAS GRAY, Respondent.—*Moir.*

Jan. 29, 1836.

Forbes v.
Gray.Johnstone v.
Peddie.

Process—Expenses—Sequestration.—A party whose estates were sequestrated in June, offered a composition in October, and in November, with the concurrence of the requisite proportion of creditors then ranked, he applied for approval of composition and discharge: thereafter, an additional creditor appeared and opposed the application, his claim rendering the concurrence obtained no longer sufficient—Held, that the creditor was not bound to pay the expenses previously incurred in the application as a condition of his being allowed to oppose it.

Jan. 29, 1836.

2D DIVISION.
T.

ON the 26th June, 1835, the estates of the petitioner, Forbes, were sequestrated under the Bankrupt Statute. On the 1st October there after he offered a composition of one shilling in the pound, which was entertained by a meeting of creditors then held, and was agreed to be accepted by a subsequent meeting held on the 29th. The requisite proportion of the creditors who had then claimed having acceded, Forbes presented a petition for approval of the composition and for discharge on the 17th November. Thereafter, the respondent, Gray, a creditor who had not previously ranked, gave in a claim, and refusing to accede to the offer of composition, he opposed the application, on the ground that, taking his claim into view, there was not the requisite concurrence. This was admitted on the part of Forbes, who, however, contended, that Gray ought not to be allowed now to come forward and oppose his application without payment of the expenses already incurred in it.

LORD MEDWYN.—There is no ground for this demand. The sequestration was only granted in June, and the composition offered in October.

The other Judges concurring—

THE COURT simply refused the petition in hoc statu.

A. NICOLL—C. F. DAVIDSON, W.S.—Agents.

No. 117.

THOMAS JOHNSTONE, Complainer.—*D. F. Hope—E. S. Gordon.*D. S. PEDDIE and J. M'CRACKEN, Respondents.—*M'Neill.*

Act of Grace.—A debtor, incarcerated by one party and arrested in prison by another, presented an application for aliment under the Act of Grace, which he intimated to the latter only, in whose favour he executed a disposition omnium bonorum, on which the detainer was withdrawn: thereupon he presented an incidental petition for an award of aliment as against the original incarcerator, but refused to execute a second disposition omnium bonorum in his favour: aliment having been in consequence refused, he presented a bill of suspension and liberation—The Court refused letters of liberation, but on the understanding that the trustee under the new deed was to be a third party.

arrested in jail at the instance respectively of two parties, Willis Jamieson, holders of bills granted by him to them. These bills, as and M'Craken alleged, had been granted by him while in prison, been antedated; but he declined on his examinations in the course proceedings to be immediately mentioned, to answer any questions by them. On the same day on which the last of the detainers by parties was lodged (21st October), Johnstone presented to the magistrates of Dumfries an application for aliment under the Act of 1845 in which he took no notice of the incarceration and arrestment at instance of Peddie and M'Craken, and prayed for intimation to them and Willis only. The magistrates awarded an aliment of one pound per week, ordaining him to execute a disposition omnium bonorum in favour of Jamieson and Willis, which he immediately did, whereupon, on the 27th October, withdrew their detainers. Johnstone presented an incidental petition, narrating, for the first time, the facts of Peddie and M'Craken, and praying for intimation to them and the renewal of the award of aliment. Besides some procedure as to the aliment, which it is unnecessary to notice, Peddie and M'Craken obliged Johnstone to execute in their favour a disposition omnium bonorum. Johnstone objected that he had already executed such a disposition for behoof of all his creditors in favour of Jamieson and Willis, and should not be required to execute a second. The magistrates, however, ordained him to execute a disposition, which was prepared at the instance of the clerk, and which, besides a general conveyance, contained a disposition to particular subjects belonging to him. This Johnstone declined to subscribe, but ultimately he declared that he would do so if there were inserted a reservation to him, "or to Messrs Willis Jamieson. all actions of repetition against the said John M'Craken

No. 117. sign, and the magistrates thereupon withdrew the aliment which they had in the mean time again awarded.

1. 29, 1836.

rot v.
tir.

Johnstone thereupon presented a bill of suspension and liberation, chiefly on the ground that, having granted one disposition omnium bonorum for behoof of his creditors, he could not be required to execute another, or, at all events, that he was entitled to have inserted therein the reservation craved by him.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having advised this bill and answers, and whole proceedings, passes the bill, but refuses to grant the letters of liberation prayed for, or to find the complainer entitled to the aliment prayed for hoc statu, but reserving to the complainer to apply to the Lord Ordinary, when the letters come to be advised, for an aliment ad interim, and to the respondents their objections thereto."

Johnstone having reclaimed—

THE COURT refused his reclaiming note, "it being understood that the trustee, under the disposition omnium bonorum to be executed by him, was to be a third party, bank-agent in Dumfries.

GARDINER & WOOD, W.S.—J. M'CRACKEN.—Agents.

No. 118.

THOMAS SPROT, Pursuer.—*M'Neill—Anderson.*

WILLIAM MUIR and OTHERS, Defenders.—*D. F. Hope—More—Monro.*

Trust.—A party having executed a trust-deed for payment, in the first place, of heritable debts, and, secondly, of finishing certain houses forming part of the subject of the trust, and, after these purposes, for payment of the personal creditors; Circumstances in which held that the personal creditors acceding were not liable for money borrowed and advances made by one of the trustees for finishing these houses.

1. 29, 1836.

D DIVISION.
Lord Jeffrey.
F.

IN 1826, Messrs Bell and Stevenson, builders in Edinburgh, became embarrassed in their circumstances, having, besides personal obligations, contracted to Mr Boyd of Milton an heritable debt of £3000, secured over a building-feu and the tenements erected thereon. In August of that year they executed a trust-deed for behoof of their creditors in favour of two of the personal creditors, and of the pursuer Sprot, who was the private agent of the heritable creditor. The deed proceeded on the narrative that the buildings disposed were not completely finished, and that the completion of them, although at some expense, was necessary to their being sold or let on lease for a fair value, and conveyed the subjects

to the trustees, with directions that they should apply the rents and proceeds thereof, after deduction of the public burdens and all necessary charges, expenses, and disbursements to factors and lawyers, 1st, In liquidating the heritable debt; 2dly, In payment of whatever sums should be expended by the trustees in finishing the subjects; and, 3dly, In payment of the personal creditors.

Of the same date with the trust-deed, Bell and Stevenson addressed a circular to each of their creditors, which, after stating that it would require about £250 to complete the buildings, and mentioning the execution of the deed, and showing the amount of debts and funds, proceeded:—"There is thus almost a certainty (provided the heritable creditor does not force an immediate sale, which, if his interest is regularly paid, he has no intention of doing) of the personal creditors being paid in full, and a prospect of our having a reversion. As the trust-deed requires the accession of all the creditors before the trustees can enter on the management, the same to save time shall be sent round the creditors (who are few in number) for signature, as it is most desirable, as soon as possible, that the unfinished part of the property be got ready for winter tenants."

A deed of accession was thereafter prepared, setting forth the whole creditors, sixteen in number, as parties thereto, and bearing that they agreed to ratify and approve of the trust-disposition, and bound themselves to conform thereto, and to the proceedings to be had in pursuance thereof. Out of the sixteen creditors only five acceded, the heritable creditor not being one. No power was given to the trustees, either by the trust-deed or by the deed of accession, to borrow money or to make advances for any purpose on the personal responsibility of the acceding creditors.

The trustees having accepted and entered on the management of the trust-estate, proceeded to complete the buildings, and paid the interest on the heritable bond, and the feu-duties, and public burdens. With the view of meeting the disbursements required for these purposes they obtained a loan of £350 from the Commercial Bank, granting, on the 19th September, 1826, the following obligatory letter:—"Messrs J. Bell and R. Stevenson, builders in Edinburgh, having executed a trust-disposition in our favour for behoof of their creditors, and an advance of money being required to finish and put into a tenantable state part of their house property, and the Commercial Bank having agreed to accommodate us to the extent of £350 for the purposes of the said trust, we hereby oblige ourselves, as trustees and individually, to repay whatever sums may be advanced by the said bank to the above extent, the orders to be drawn by Thomas Sprot, W.S., one of and acting for the other trustees. We are, &c. (Signed) Tho. Ritchie, Jno. Hutchinson, Thomas Sprot."

The trustees held various meetings, and Sprot received authority to take the chief management, and when the loan from the bank was ex-

No. 118. hausted, and the receipts from the property insufficient, he made advances from his own funds for behoof of the trust-estate.

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The first meeting of creditors after the execution of the trust took place in August, 1827, when a small number attended, and on this, as well as on several subsequent occasions, the creditors who did attend the meetings approved of Sprot's intromissions, and authorized him to make advances, apparently on the understanding that he would be repaid out of the rents and proceeds of the property.

When upwards of £600 had been laid out on the buildings, and between £200 and £300 advanced beyond the amount of the rents to the heritable creditor and the superior, it was discovered that the property would not pay the debts preferably secured on it. Sprot thereupon raised action against the acceding creditors for repayment of these advances and relief of the obligation come under to the Commercial Bank, and for the amount of the charges in his professional account, and maintained, that, as the proceedings of the trustees were warranted under a liberal interpretation of the trust-deed, and were sanctioned and homologated by the defenders, they had incurred personal liability to him, at all events for that proportion of the debt due to him which they would have borne had all the creditors acceded.

In defence against the action it was maintained, inter alia, that Sprot had no authority from the defenders, either in virtue of the trust-deed, the deed of accession or otherwise, to borrow the money or make the advances in question, and that his business charges and outlay fell in terms of the deed to be paid, so far as justly chargeable against the trust, prior to the interest of the heritable creditor, and that Sprot having failed to act in accordance with this provision had no claim against the personal creditors.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined : *—" Finds, Imo, That neither by the trust-deed, nor

* " The Lord Ordinary wished this case not to be decided till all the disputed facts were ascertained, and suggested various issues to the parties in the course of the debate, under which he conceived that its whole merits might be disposed of by a jury. But both parties objected to this course (and probably with sufficient reason, so far as related to the particular issues suggested), and pressed for such a decision as could be given on the construction of the written documents and the admitted facts of the case. The Lord Ordinary has accordingly given such a judgment, assuming all the pursuer's averments of proveable facts to be true—and giving no effect to the defender's allegations of the fabrication and false representations of the minutes—or of the absence and ignorance of several of them from the meetings which they are said by the pursuer to have attended. If the judgment should be adhered to, the defenders may have no cause to regret this—but if the grounds on which it now rests should be thought insufficient, the consequence may be embarrassing.

" The difficulty of the case arises from its apparent analogy with that of creditors subjected in the expenses of a sequestration, under which they may have drawn nothing, or in the expenses of mercantile or other transactions into which they were

Moreover, that as every thing depended on the private contract and understanding of parties, their obligations must be regulated altogether by the their contract, and by nothing else. Now, in the first place, it seems to be a condition of the contract, that the accession should be universal; point of fact, only five out of sixteen creditors named in the deed actually and as it does not appear that the non-accession of the other eleven was tied to those five, there was great reason to doubt whether their actual presence at the meetings would bind them to the party withholding this information. Even if they might otherwise have been bound by what was then done, doubtless a very different thing to be bound as one of five instead of one

In the second place, the trust in this case was not an ordinary trust for the payment and distribution of an insolvent estate among the acceding creditors, but exclusively for the finishing and ultimate disposal of a tenement of property which there was already an heritable security, as it has turned out, to the value; the object being to get the houses finished, and thus to improve the security in spite of the bankruptcy of the debtors; and the motive held by the personal creditors being, that, by such an expenditure, the value might be increased as to pay every body. In such circumstances, it was natural that the proposal should be, that the expenditure should be made out of the funds, or on the security of them only, and not on the individual responsibility of the personal creditors; and the Lord Ordinary thinks there is sufficient ground for this proposal. The trust did not originate with the petitioners, nor were they nor any of them ever allowed to consider the proposal at a general meeting, or on any other occasion, where explanations might be given. It was concocted entirely between the bankrupts and the paragon; he was then the private agent of the heritable creditor, and in no other way connected with their affairs; and after it was extended, the accession of the personal creditors was solicited by a circular letter, in which this object is explained. It is stated, that it will take only £250 to finish the houses—that, when finished, they will be worth £2000 more than the heritable debt—and the trustees will have in their hands about exactly the £250 that is wanted. It is not stated in the circular letter where the trust-deed itself might be inspected, nor is it explained in the record in this action, that it was ever exhibited to the creditors. It is satisfied, that, to insure despatch, the deed of accession will be sent round

No. 118. creditors, either for the purpose of finishing the houses constituting the greater part of the trust-estate, or for payment of the interest due to the trust. Dec. 29, 1836. *Scott v. Muir.*

and 'that the completion of them by us, viz. the bankrupts, is necessary to their being sold, or let at a fair value;' and then it provides, that 'the funds hereby conveyed shall be applied' (inter alia) for payment 'of whatever sums may be expended by the trustees in finishing the said subjects,' &c. But there is not a word importing that the creditors were to be personally liable for any sums, if the fund so conveyed should prove inadequate. The deed of accession again confessedly contains no such stipulation, but merely approves and adopts the trust-deed, and binds the creditors not to pursue separate measures. These three deeds, however the trust-deed, the circular letter, and the accession, are the whole contract between the parties; and the Lord Ordinary thinks he is sufficiently warranted in finding that they import no such obligation as the pursuer is now seeking to enforce.

" 3. If this, however, had been doubtful on the face of those instruments, the matter is apprehended to have been cleared by the conduct of the parties in negotiating for the credit with the Commercial Bank, and by the terms in which the matter was ultimately adjusted. It appears that, so early as 18th August, 1826, before the trust-deed (which is dated the 28th) was executed, and while the pursuer had no other character than that of agent of the heritable creditor, he did write to the Commercial Bank, setting forth the object of that intended deed; and after stating that it would require only £250 to finish the houses, and that one creditor had agreed to supply the timber, suggests, that the other personal creditors (of which the bank was the most considerable) should agree to advance the money necessary for wages and the other parts of the work, and no other advance or responsibility of any sort is hinted at. The bank says, that the proposal was positively rejected, while the pursuer avers merely that no answer was made to it. But the important thing is, that, about a month after, when the trust-deed had been signed and the imperfect accession already mentioned, and when a meeting of the trustees without any communication with the creditors, had resolved that a credit should be established with this bank for £350, the matter was immediately settled by the trustees binding themselves, not only as trustees, but expressly as individuals, to the repayment of this money. The meaning of this is thought to be plain enough, and the Lord Ordinary cannot but think that it is utterly inconsistent with the supposition, that the bank could ever be called upon to relieve the pursuer from the consequences of this, his individual obligation. It seems scarcely possible, in the deed, to conceive a more flagrant inconsistency. The present action is actually raised for payment of a sum of money to replace what has been advanced by the bank on this obligation of the pursuer and his co-trustees as individuals, and the bank is the principal defender in this action. Suppose that there were no other conclusions now insisted on, and that there were literally no other defenders, the action would be an action against the bank for payment to the pursuer of a very sum of money for which the pursuer is expressly indebted to the bank by his own personal obligation. The shape of his case is, that, as a trustee, he is entitled to relief from the bank as an acceding creditor. But the answer is conclusive that he is bound to the bank, not only as trustee, but distinctly and expressly as an individual, and that their money was advanced to him only on the condition of his so binding; and that the meaning of their stipulating for that individuality, was to take away all pretext for any such claim of relief on his part, and to mark distinctly their resolution not to be personally bound, directly or indirectly, for any outlays or advances which might be made in the management of the estate. If this, however, was the case of the bank, and necessarily known to be so by the pursuer and all concerned, it is impossible to suppose that any other acceding creditors were more willing to come under such an obligation. The only other creditor now solvent, is a creditor only as the trustee on a sequestrated estate, and it is manifestly have been acting beyond his powers, and contrary to a very plain

gement began, and the first advance was made by the trustees, the Lord Ordinary thinks it clear that nothing done at any subsequent meeting can be held to have changed that relation, or imposed any new responsibilities on the acceding creditors. It is remarkable enough, that no meeting whatever of the creditors was held for about a year after this period, and they not only were not consulted when the credit was got from the Commercial Bank, but that advances had been made for finishing the houses and paying the heritable creditor, not merely to the extent of £250 (which was the maximum originally mentioned), or the amount actually obtained, but to more than double that extent before they or any of them had a first meeting with the trustees. It is no doubt true that, at subsequent meetings, it appears, from the minutes (which are here assumed to be unimpeachable), that the past conduct of the trustees was approved in that they are authorized, upon their own motion, to make farther payments both for the buildings (which ultimately cost near £700 instead of £250), and for the interests and feu-duties due to the heritable creditor and to the superior. But this is the whole that is established by those meetings, and they neither give any intimation on the part of the trustees, that they held the creditors prelatively liable for those advances, or any cognition of such liability on the part of the creditors. The conclusion, therefore, is, that they only sanctioned the advances from or on the credit of the trust-funds, and never contemplated that they were to be personally responsible for this amount. Even to this extent, however, their sanction was obviously highly valuable, and indeed necessary, for the trustees, as by every such vote the creditors diminished the present funds for their payment, and enlarged the amount of the preferable claims on the

But there is another specialty in this case, which of itself would probably have been pronounced by the Lord Ordinary. There was substantially no fund here but the heritable property; for though personal funds were advanced to the extent of £250, not a farthing was ever recovered, and these were, from the beginning, destined from the beginning to be expended on the heritable property, to more than double that extent were actually so expended. All the advances too, without any exception, were on account of that heritable property, and of nothing else, being either payments of interest to the heritable creditor, or of feu-duties to the superior, and the whole management and agency was confined to that property and nothing else. Now it is settled law, that even

No. 118. estate alone should be answerable for repayment of any advances that might be necessary; the bankrupts and their trustees having, till a very
 in. 29, 1836.
 prot v. Muir.

those rents, all of them advanced not only apparently, but necessarily, for the exclusive benefit of the heritable creditor. Look only to the first case. Suppose £1000 is added to the value of the property by a loan effected by the trustees for finishing the buildings, and that after all the price or value is only £3000, being the net amount of the heritable debt: Shall this £1000 be taken out of the pockets of the personal creditors, who are to receive nothing, and pass wholly into the pocket of the heritable creditor, at their expense? The other advances are still more clearly for his benefit only. The interests which he would not otherwise have received so soon, can only be regarded as anticipated payments out of the heritable subject, on which alone he had any claim, and which he gets at last entire to pay back the loans by which he was enabled to get these anticipated payments. The advances of feu-duties again were only with the view of protecting the subject in which he alone had any interest, from the ruinous diligence of the superior,—and all the benefit of the interference was therefore with him. If the case, therefore, had occurred under a statutory sequestration, where the interest of the heritable creditor is not at all represented, the Lord Ordinary inclines to think that he and not the personal creditors would have been liable for these advances. But the actual case is far stronger, and justice cannot be done to the complex view of it on which the Lord Ordinary has proceeded, without considering that the pursuer, who was all along the acting trustee, was the private agent of the heritable creditor, and appears to have acted much more in that character than in any other.

“ 6. This, accordingly, is the last specialty which belongs to the present case, and it affects it in two ways; first, As substantially making the heritable creditor a party to all those transactions; and, 2d, As giving such an aspect to the acting of the pursuer individually, as materially to affect his personal claim for payment and remuneration. In both views it is necessary to keep the facts in mind. The trust-deed was framed by the pursuer, and the whole scheme concocted between him and the bankrupts, without the slightest communication with any of the personal creditors. He had about a year before vested his client's money on the security, and of course was anxious that he should suffer no loss by it. When the bankrupts stopped payment, his client's interest was left unpaid, and he went to consult with them as to the best way of securing him. He had, and could have at this time no other interest to attend to, and it is not pretended that he had, for he confessedly had no connexion either with the bankrupts or their affairs, except as agent for the heritable creditor, and could have no object in consulting with them at this crisis, but to secure and benefit him. The result of this consultation, however, was, that a trust-deed should be executed, and the pursuer, still behind the backs of the other creditors, framed the deed, and made himself the leading rather sole trustee. The object openly set forth in the deed was to get the tenements of houses on which his client was secured finished, and of course increased in value, and one of its first provisions is, that all the funds conveyed, personal as well as real, shall be applied in the first instance to the satisfaction of the heritable creditor. Even before the deed is executed, he makes propositions to the Commercial Bank for an advance of money to finish the buildings, and within a few days after he acceded to the trust, binds himself individually to repay what they may supply. Having thus obtained the money, he instantly proceeds to get the houses completed, and at the same time gets the consent of the trustees, the creditors hearing nothing of the matter, to pay up the interests due to his client, and in this way obtains advances for the exclusive benefit of that person near £600 beyond the funds in hand within six months after the date of the trust, and before having any communication whatever with the body of the creditors. The trust was executed on the 1st of August, 1826, and the first meeting of creditors is not called till 18th August, 1827. Only two or three creditors then attended, and an approval of what had been done, with directions to pay more interests and feu-duties are duly entered.

ed of their management, uniformly represented the said estate as No. 11:
 s than sufficient to answer these advances: Finds, 2do, That, Jan. 29, 18
 Sprot v. M

22. There are a few subsequent meetings in the following years of nearly description, the pursuer generally requiring more money to be laid out on sty, and bringing messages from the heritable creditor purporting that sy pay up his interests, and satisfy the superior, he will bring the subject ediate sale, though it does not appear from the correspondence that he l my such purpose. In the end, between £600 and £700 are laid out on sgn, and between £200 and £300 advanced beyond the amount of the de heritable creditor and the superior, and at last it is admitted that the will not pay the debts preferably secured upon it, and the present action is ist the acceding creditors for repayment to the pursuer of those advances, mething about £270 for his professional services and commission on the mactions; the other trustees, who never took any real concern in the having been for some time bankrupt, and being no parties to the

i this short abstract of the procedure, it is manifest that though not a be trust, the interest of the heritable creditor was in truth the only inte- lered, and that he was faithfully and constantly represented by the pursu- ly acting trustee. The Lord Ordinary thinks it would have been fairer ' if he had been made an acceding creditor in form, and bound himself as e sell the subject prematurely upon the improvement of which so much son his suggestion to be expended. But at all events this was not a mere xenefit conferred on him incidentally by creditors seeking only their own , but a benefit partly stipulated for him directly in the body of the trust- afterwards increased on the application of his agent, who never dissem- character, and never acted it would appear in any other. The result of sgn has been confessedly beneficial to his client, and beneficial to him only, fore, between him and his client the charges involved in them should

o the personal objections to the pursuer's claims in this action, the Lord is not of opinion that, in order to support them, it is necessary that the should make out a case of wilful fraud or dishonesty. If that charge sly made, it could only be disposed of by a jury. But the admitted facts s show such a visible preference of the interests of his original client over he acceding creditors as to make his claim for remuneration, or even for , on the latter, to say the least of it, extremely unfavourable. He had a bly to perform to his client, as well as to the defenders, and if he per- one duty very zealously, it was perhaps unavoidable that he should, in s, fail in the latter. It was unfortunate that he should have undertaken his was his own free act; and it seems pretty plain, that, as he clearly the device of a trust entirely out of regard for the heritable creditor, so he rest mainly in view through the whole course of his trust administra- the result of all his operations being beneficial only to that person, it is unjust to support a claim made exclusively on others.

Lord Ordinary, however, is unwilling to press this topic any farther. He and that his judgment proceeds upon a complex view of this very pecu- and the conduct and probable motives of the pursuer individually are not to be disregarded in digesting such a view. To him it appears that great light upon any thing that may be doubtful as to the import and that is stated in the circular and the trust-deed, or in the transactions commercial Bank, and go far also to explain why the expression of those documents was left so imperfect, and so little opportunity afforded to the acquiring into their meaning.

His Lordship has decided only as to the charges for advances and relief His own impression, however, is, that the charges for

No. 118. even assuming (as the pursuer may be entitled, *hoc statu*, to assume that the minutes of the several meetings of creditors referred to do set forth the *res gesta* at those meetings, and that they are binding on those who attempted them; the said minutes do nowhere bear that it was ever communicated to the creditors (though it was necessarily known to the trustees), that less than one-third of those mentioned in the deed had signed the deed of accession; though the circular by which the whole creditors were invited so to sign expressly stated, that the trustees could not enter on the management till all the creditors had acceded: Finds, 3^{to}, That the said minutes show no trace of any deed having ever been made by the trustees for the extraordinary and enlarged power of binding the creditors personally for the money they might borrow, or the advances they might make in the course of management, or of any consent or undertaking on the part of the creditors so to become bound: Finds, 4^{to}, That the tenor of the pursuer's letter to the Commercial Bank, of the 18th of August, 1826, compared with the terms of the obligation which he and his co-trustees afterwards granted to the said bank, by which they bound themselves not only as trustees, but also as individuals, to repay the whole sum of £35 which they had obtained a credit with the said bank (by far the largest of the acceding creditors, and now almost the only one solvent), affords conclusive evidence that the said bank had positively refused to make any advances as such creditor, or on the sole security of the trust-deed, and that the terms of the loan or credit appear to have been known to the other acceding creditors. Finds, 5^{to}, That though the trust is not yet realized, nor the trust wound up, it is admitted by the pursuer that the defenders and the other personal creditors have not received, and have no prospect of receiving, any benefit whatever from the advances or outlays in question, but that the whole have been applied, and must ultimately operate to the advantage of the heritable creditor, whose private agent the pursuer was at the beginning, and through the greater part of his trust-management, whom he never proposed to make an acceding creditor, though the leading purpose of the trust was to secure the subject of his security, and the very first application, even of the pursuer's personal funds, was to be for his payment, and from whom finally the pursuer has obtained collateral securities for a great part of his advances. Therefore, and in respect of the other admitted circumstances of the case, finds it unnecessary to order an investigation into any of the relevant grounds of defence, which depend upon facts that are denied.

professional services and commission must also be disallowed, since the whole of these arose from the transactions as to the heritable property, and have benefited no one but the heritable creditor. There may, however, be a distinction, and as there was no agreement applicable to such a distinction, he thought fit to allow parties, if they require it, to be farther heard."

reference to the points reserved in the above interlocutor, the Lord Ordinary pronounced as follows, adding the note subjoined :—" In respect of the whole of the pursuer's money transactions appear to have been made for the exclusive benefit of the heritable creditor, Finds, That the pursuer has no claim for commission on these transactions against the defenders, or any of them; and in respect that by far the greater part of his professional actings under this trust appear in like manner to have been for the benefit of the heritable creditor alone, and also in respect that it is expressly provided by the trust-deed (framed by the pursuer) that the very first and preferable application of the trust funds is for defraying the expense of management, and that it appears that the funds have been realized more than sufficient to defray these expenses, after satisfying the claims of the superior, Finds, That no part of the business accounts of the pursuer can be charged against the defenders, and therefore absolves them from the whole conclusions of the defenders, not disposed of by the former interlocutor, and decerns. Finds, That the pursuer is entitled to expenses, allows an account thereof to be given in, and that the same when lodged to the auditor for his taxation and payment be reclaimed.

But for the reason last assigned in the interlocutors, the Lord Ordinary probably have allowed some small charges, as for the framing the trust-deed and of accession, the calling of the earlier meetings, and such of the preparatory arrangements as indicated a purpose on the part of the defenders to avail themselves of the machinery of a trust. But the provision in the trust-deed itself

No. 118. **LORD MEDWYN.**—The whole trust appears to have been concocted behind the backs of the creditors generally, and they were merely informed of it by the circular letter. Without supposing that there was any view of injuring the personal creditors, I think the heritable creditor's security was the object of the trust. The first purpose was to pay the heritable creditor, and then the expense of finishing the houses; and it was not expected that it would be necessary to make a demand on the personal creditors, but that there would be a surplus. The deed contains no authority whatever to borrow money, and the circular holds out no such idea. The parties must have considered the money borrowed from the bank to be a mere temporary accommodation, and the trustees did not even get a cash-credit. It does not affect me much that the Bank required the trustees to join in a personal obligation, but the mode in which the money required was raised satisfies me that it was expected that the advances would be repaid by immediate sales, and were not to be recovered from the personal creditors. Then in the deed of accession there is no indication that the personal creditors were to be liable; and, on these grounds, without going into the intricate speculations of the Lord Ordinary, I think it is clear that none of the creditors, whether acceding or not acceding, are personally liable.

LORD GLENLEE.—I entirely agree, and was quite satisfied the interdict was right, from the tenor of the trust-deed itself,—being, in the first place, payment of the heritable debt, and then for the finishing of the houses, which made a preferable debt, before the personal creditors should be entitled to anything. The creditors acceding must therefore have been postponed; but it more follows that they should be liable personally for these sums, than for the heritable debt. They could only infer from the deed that they were to allow the expense of finishing the houses, as well as the heritable debt, to be deducted from the proceeds before they were to be paid. These trustees acted without the sanction of the whole creditors, and the mischief was done before the creditors were called to one single meeting. No doubt, if the acceding creditors had been told of themselves as if liable for the debt, that might have created a difference; there must have been the plainest indication that the matter was fully explained to them, and that they gave their approbation to it with their eyes open. The reverse of this, however, was the case; for this claim of the pursuers was represented as more than a preferable claim on the estate, to be ranked along with the heritable debt, as of the same class and character, but not a claim requiring personal liability against the creditors; and there is no foundation whatever for inferring such liability.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

The COURT accordingly adhered.

THOMAS SPROT, W.S.

Agents.

quent action for payment of the difference as to the second half, that it went to prove by parole that it had been raised at the lower rate under agreement between the parties.

ly, 1825, the advocator, Thomson, miner at Airdrie, made a Feb. 2, 1836.
offer to the Monkland Steel Company, to raise and burn 3000
iron-stone, at the rate of 8s. per ton of calcined iron-stone, "to 2d Division.
every fourteen days." This offer was accepted by the Company Ld. Jeffrey.
inter missive, and Thomson accordingly proceeded to raise the R.
as stipulated for. The execution of the contract extended over
of years, during which the payments were made by the Compa-
ny to agreement, every fourteen days, at the rate, for the first
of 8s., but for the remaining 1500, at 7s. 6d. per ton only.
as at this rate were regularly inserted in a pass-book kept by the
y, and although Thomson denied that he was cognizant of this
k, he admitted that the payments were fortnightly made, and at
of 7s. 6d., alleging, however, that that rate was not accepted in
that the payments were merely to account. He further admitted
r the 3000 tons contracted for under the original missives had
out, he entered into a new contract verbally with the Company,
g an additional quantity of 2000 tons, at 6s. 6d. per ton; and
e extent of upwards of 1500 tons he implemented this contract,
alleged was then improperly broken off by the Company. For
00 tons he was duly paid; but, in 1831, he instituted an action
e Sheriff of Lanarkshire against the Company, concluding for an
balance of £57 odds, made up of the 6d. per ton short received
at half of the 3000 tons originally contracted for and of a sum of

No. 119. contract, but the Sheriff overruled the objection, and allowed a proof which clearly established the averment of the Company.

b. 2, 1836. Thomson v. Bankland & Co. As to the charge for extra work again, Thomson offered to refer to the oath of the partners of the Company, "that he was not paid for the oncos labour performed by him for them, during the period referred to in the pay-list, dated 25th February, 1826, and that the wages amount to the sum referred to under this branch of the dispute."

The Sheriff refused this reference as incompetent, in respect it was limited to the non-payment of the claim, and did not extend to its constitution also; and, in regard to the other claim, he found it proved that the original contract "was departed from by the parties, and a subsequent verbal agreement came to between them, whereby the pursuer (Thomson) agreed to put out 1500 tons of the iron-stone at 7s. 6d. in place of 8s. as stipulated in that contract;" and he accordingly assoilzied the Company, with expenses.

Thomson thereupon brought an advocacy, pleading mainly that it was incompetent to modify a written contract by parole evidence.¹

To this it was answered, that the undoubted rule of law on this point was in no way violated by the sheriff's judgment, inasmuch as here the question was, not as to the implement of the contract, and whether, in enforcing implement, its terms could be modified by parole; but it truly was whether the 1500 tons actually put out and paid for at 7s. 6d., were truly supplied under the original contract, or had been raised under a new verbal agreement, at a lower rate; and to establish this, it was perfectly competent to adduce parole proof, more especially as it was merely in confirmation of the evidence arising from the admitted circumstances of the case. The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—

"In respect that, by the terms of the contract libelled on, as consisting of the offer set forth in the summons, and admitted by the defender to be correct, and the letter of acceptance produced, being No. 11 of process, it was expressly provided, that the work was 'to be paid every fourteen days,' and in respect that it appears, both from the pass-book in process, and the pay-list now transmitted, so far as it comes down, that payments were regularly made throughout the years 1825, 1826, and 1827, every fourteen days, which payments are, by the nature of the action, admitted to have taken place, Finds that it was not incompetent for the defender, in explanation of the payments so made and accepted of, to prove, by parole evidence, that, at a certain period of the contract, the pursuer did verbally agree to modify the rate of payment originally expressed in the written missives: and finds it distinctly proved that the pursuer did make such an agreement, at the same time that the other

¹ Law v. Gibson, Feb. 3, 1835 (ante, XIII. 396).

a reference to oath, contained in the petition of the 8th February, was so expressed as to appear to take for granted the constitution debt, and to refer only the question whether it had been paid or not; but finds the advocator ought still to be allowed to amend or explain his reference, so as to comprehend distinctly both the constitution and the existence of the debt: And, before further answer, appoints the cause enrolled, and in the mean time reserves the question of expenses." Thomson reclaimed.

D. GENLEE.—If the dispute had arisen during the currency of the contract, and the defenders had then attempted to change the price, there would have been great difficulty in allowing evidence by parole of the change of the contract.

But that is not the nature of the cause. The contract is at an end, and 3000 tons have been raised years ago; and the question is, whether we are to attribute the raising of these tons to the original contract, or to a new contract. We must be satisfied that it was under a new contract, for on Thomson's

This case does not appear to be affected by the principle of the case of *Gibson*. That case stood on a regular deed of lease, without which there could have been no binding contract. This is a case of a mere undertaking in writing, the terms being expressed in unstamped missives. But the mode in which the contract was executed, on either side, appears distinctly from the course being proved by the pass-book and the pay-list, so far as it goes. The pay-list does not come down to the most material period. But the pass-book is distinct to the very expiry of the contract, and beyond it; and it appears that, almost without any exception, the payments were made constantly every fourteen days, and, indeed, the sums due for 3000 tons were drawn out, one-half at 8s. per ton, and the other half at 7s. 6d. It is only in corroboration of this real and written evidence

No. 119. own admissions it is clear, that quoad the remaining 1500 tons, a new contract was entered into. He takes the money, and afterwards makes a new bargain for a further quantity at a still lower rate; and I have no apprehension, the Lord Ordinary's interlocutor, we will in the least shake the authority of Scotland as to the rule of a written contract not being liable to be varied by parole.

LORD JUSTICE-CLERK.—I entirely agree.

LORD MEDWYN.—I also concur. This is a totally different case from Thomson v. Law. It may be true that the pass-books are no evidence against Thomson, but it is admitted that he received payment at the time at the rate of 7s. 6d. for 1500 tons, and now he attempts to go back on the old settlement. Besides, there was a very informal contract, and as to a matter which might have been verbal from the beginning. I am also therefore for adhering.

THE COURT accordingly adhered.

WOTHERSPOON and MACK, W.S.—J. MARSHALL, S.S.C.—Agents.

No. 120. WILLIAM BAIRD, Pursuer.—*More—Cook.*
HUGH ROBERTSON, Defender.—*Sol.-Gen. Cunninghame—Whigham.*

Property—Feudal Title.—Circumstances in which a conveyance to certain "cum lacubus" held to be a sufficient title to the solum of a loch, one side of which was bounded by the lands in question.

Feb. 2, 1836. THE lands of Lochwood and others, prior to the Reformation, formed part of the Archbishopric of Glasgow, and included within them several small lochs; on the largest of which, now known as the Bishop's Loch, the archbishop had a residence. In 1587, King James VI. granted the whole archbishopric lands in commendam, and with power to assign to Walter Commendator of Blantyre, by whom a considerable portion of the lands, including the greater part of those lying on the west side north of the Bishop's Loch, and comprehending the lands now called Easterhouses and Gartloch, were feued out under the general name of Gartcosh. Of date 22d October, 1598, King James granted a charter in favour of Robert Boyd of Badinraith, whereby he conveyed to him "Totas et integras quatuor libratas terrarum de Lochwode cum lacubus et piscationibus earundem, mansione, manerie loco, domibus, edificiis, hereditariis partibus, pendiculis, et pertinentiis suis quibuscunque, jacent in domo baronia et regalitate de Glasgow, parochiis de Calder et Monkland, et respective, et infra vicecomitatem nostrum de Lanark, quæ per prius assignaverunt archiepiscopatu Glasgowen. tanquam pars temporalitatis et reddituum temporalium eiusdem. Et nunc ad nos pertinent et in manus nostras et ad nostrum donationem et dispositionem virtute dicti actus annexationis ceciderunt et denuerunt."

These lands of Lochwood came subsequently into a family of

and pertinents yrof quhatsumever, lyand as above wras, to the said
Robert and his foresaids, or his certain actorney, be delyverance
and stone yrof, with ane drope of water of the said loches, as

same family also acquired right to the adjoining lands of Easter-
which are bounded by the Bishop's Loch; but, in the titles
there is no mention of the loch, or of lochs generally. The lands
wood and Easterhouses were, in 1694, acquired by Grahame of
re; and, in 1732, Nicol Grahame, then of Gartmore, sold to one
in the lands of Easterhouses above mentioned, with certain privi-
regard to the loch, thus expressed—"together also with the
and privilege of the loch of Lochwood, where contiguous to the
ds, for washing, bleaching, watering of cattle, and fishing, and
erty also of taking mud or sleet out of the said loch, for manu-
l gooding of the foresaid lands, until such time only as the said
the parts thereof contiguous to the lands hereby disponed be's
by me, the said Mr Nicol Grahame or my successors, in case we
t to drain the same."

lands of Lochwood were retained by the Gartmore family till
when they were purchased by the late Robert Colt of Auld-
be conveyance being in terms of the former titles, "with the
ad fishings thereof;" and, in 1826, they were acquired by the
exander Baird, father of the present pursuer, William Baird.
ands of Lochwood and Easterhouses were situated on the south
the loch, and on the opposite side are the lands of Gartloch, the
of the titles to which, extant, is a seisin in 1617, wherein the

No. 120. to be proprietor of the whole solum of the loch, in virtue of his titles to Lochwood, raised an action of declarator (since his death insisted in by his son, the present pursuer), against the Misses Hill (now carried on against their disponee, the defender, Robertson), to have it declared, that the portions of ground embanked by the late Mr Hill were his property, and to have the defenders ordained to cede possession and remove therefrom.

Feb. 2, 1836.
Baird v.
Robertson.

Among other defences to this action, it was pleaded, that the proprietor of Lochwood had no exclusive title to the loch, and that the proprietor of Gartloch, by virtue of his titles, with parts and pertinents, had a common property therein, and was entitled to execute the operations complained of, ex adverso of his own lands.

The parties having made opposite averments as to the use of possession, the Lord Ordinary allowed a proof.

From this proof, it appeared that, while the proprietors and tenants of Gartloch had generally been in use to fish and shoot on the loch, and cut reeds on the margin, without being interrupted, the proprietors of Lochwood had claimed and exercised a power of preventing any parties from doing this when they chose, and had at times prevented the tenants of Gartloch from doing so; that the general understanding of the neighbourhood was, that they had the exclusive right to the loch; and that there was a current tradition that the laird of Lochwood was entitled to cut all the wood on the banks which he could reach with a "six quarter" area from a boat sailing round the margin of the loch. It further appeared that, in their leases to tenants, the Gartmore family, and afterwards Mr Colt, had been in use to reserve the right to drain the loch, and the fishings and reeds; and that, in settling with the Forth and Clyde Canal Company, for a consideration on account of a certain privilege given them of the use of water from the loch, Mr Colt, as proprietor of Lochwood, was the only party recognised as interested therein, or who received any part of the consideration, the renunciation and discharge executed by Mr Colt on the occasion having been drawn up in the office of Mr Hill himself, who was a writer in Glasgow.

On advising this proof, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note: *—" Finds that the pursuer has

* " In giving the property of the loch to the pursuer, the Lord Ordinary goes chiefly on the terms of his titles to the lands. He thinks the construction he puts upon them is confirmed and supported by the proof of possession, and of general understanding, ab antiquo. But though these show that a certain larger and higher right was all along assumed on the part of the proprietors of Lochwood, and apparently admitted by the proprietors of adjoining lands, that prerogative is scarcely defined by any such precise evidence as clearly to refer to a right of absolute or exclusive property, and would be quite insufficient to support such a claim of property, if the titles of the other proprietors were of the same description with his. On the other hand, his titles not having any express or specific reference to

lota, maresia, &c. &c. But this is by no means the character of the question. There were known and considerable lakes in the lands dis- and there is no conveyance of waters by any other name. Then, it is not f lands with the vague adjunct 'cum lacubus' only. It is in the charter t Boyd in 1598, an express conveyance of the four-pound lands of Loch- with the lochs and fishings of the same,' and in the sasine of Robert Maile the disposition is recited as conveying 'the said lands of Lochwood, with and fishings thereof.' And the instrument not only bears that corporal m, state and sasine was given of the said lands, 'and lochs and fishings but that this was done 'by delivery of earth and stone for the lands, with of water of the said lochs, as use is, for the same.'

quite in vain, therefore, to represent this as a mere clause of style, by thing special is conveyed, more than by a common clause of parts and in.

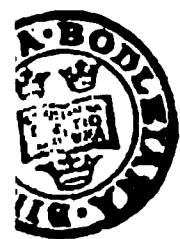
question then is, when the common author, having the undoubted pre- a lake, conveys a part of the lands by which it is surrounded, with such as has been recited, to one disponent, and other parts of the surrounding others without any such clause, and without any mention whatever of the m as bounding their properties, whether the whole right to the lake does xclusively to the disponent, who has the benefit of such a clause, and such ment? If there had been only one loch in the common author, the Lord y would not have considered the question as doubtful. But in the present re were three lochs in all, two of which were wholly within the lands con- o the first disponent, with the clause already mentioned; and the third, s that in dispute, only partly within those lands, and partly bounded by ade retained for a short time by the original superior, and afterwards dis- o others without any such clause. The defenders contend that the two mposedly transferred by the first disposition, satisfy the clause on which mer relies, and that it must therefore be held to apply to them only, leaving ts of parties to that which lies interjected between their lands and that munes to the common rules of law. The Lord Ordinary expressed doubt

No. 120. ings of the said loch, but also the alveus or solum usually covered by said water; but before farther answer, appoints the cause to be entered on the 2d inst. 1836.
 Lord v.
 Robertson.

authority of Lochwood, and in consideration of compensation money, paid only, and that without challenge of any kind by any one of the other proprietors, seem to the Lord Ordinary conclusive. It seems pretty well proved to the pursuer's authors controlled the fishing all over the lake, and that the Loch Hill (the defenders' predecessor) was sometimes the organ through which they acted.

" It is also in evidence, that on several occasions they cut reeds all round the margin, and at a distance from their property lands. The ancient belief and standing of the country too is not unimportant in such a question, and is very well established, and even the story of the Lochwood lairds making a progress round the lake and cutting the copse wood with a long-handed axe, has a genuine air of antiquity. The want of more unequivocal indications of occupancy as proprietors is incident to the nature of the subject; and the trespasses by strangers as well as neighbours are sufficiently accounted for by the small value of the subject and the non-residence of the owner.

" But supposing the property made out, the Lord Ordinary is far from thinking that the pursuer is therefore necessarily entitled to insist in the other conclusions of the libel, and on the contrary, rather anticipates that he may find, in the result, that he has gained but a barren victory. It seems impossible to deny, that, in the events, the defenders and others have acquired various important and valuable servitudes over this loch, and that they have right of access to it for watering cattle, and for various other domestic and prædial purposes. These alone probably prevent the pursuer from draining it, if his contract with the Canal Company did not, at any rate, render this impossible. The solum, therefore, which is so anxious to recover, is probably destined to remain for ever under the water, and to limit his enjoyment to that precarious element. As to his right to have the land delivered over to him, for his own occupancy and emolument, and in their present embanked state, the small patches of ground which the defenders are said to have redeemed from the alveus, along the borders of their own territory, the various material questions to be discussed before this is sanctioned, and which there have been hitherto no serious debates. First of all, there is the question of the pursuer's long acquiescence in these open and expensive embankments, which, though not stated on the record, was touched on at the debate, and which still be added: and this may require a much more specific account of the nature and extent of the several successive operations than has hitherto been given. There is the question of the true nature of these alleged encroachments, which is by no means settled by the proof—Whether they consisted chiefly (as the defenders say) in the slightly raising and consolidating soft and swampy places, which were never actually covered by the water, except in very high floods, or in rearing dykes far out into the usual bed of the water. The Lord Ordinary thinks the former operation quite lawful, and embanking also, if not carried further than the medium or ordinary water line on an average of seasons. The pursuer, as he understands, claims up to the highest water-mark. 3d, There is the question of meliorations, if the pursuer is to have the benefit of these expensive improvements. But above all, there is, 4th, the question, whether the pursuer can, in any rate, claim more than that the embankment shall be levelled, and the water allowed its former free range along the margin of the defender's property. It is difficult indeed to see what interest he can have to insist for this, unless he could show that by these small encroachments his fish are straitened, or the water made



that parties may be further heard as to the pursuer's alleged right to take actual possession of the portions of land said to have been taken from the said alveus by the defenders, by means of embankments or otherwise, and as to the right of the defenders, either to retain the said portions, or by throwing down the embankments to restore the said ground to the alveus, and maintain their own access and communication with the lake as their boundary; and also as to the privileges and servitudes which the defenders maintain they have acquired in and over the said loch and its shores."

Robertson reclaimed.

LORD GLENLEE.—The Lord Ordinary has simply repelled the objection to the title, and every thing is kept open on the merits of the conclusions of the summons. I see no reason to alter.

LORD MEDWYN.—The interlocutor just removes an obstacle raised by the pleas in the defences, reserving every conclusion of the summons unexhausted, and it seems to me to be quite right.

LORD JUSTICE-CLERK.—It is impossible to dispute that the loch is comprehended in the titles, and we must adhere.

THE COURT accordingly adhered.

T. and T. DARLING, W.S.—W. COOK, W.S.—Agents.

— HILL, Pursuer.—Robertson—Patison.

HIS CREDITORS, Defenders.—A. McNeill—J. Anderson.

Cessio—Diligence—Alimentary Fund.—Circumstances in which, where the pursuer of a cessio was said to possess an alimentary subject, exempt from the diligence of creditors, it was arranged, of consent, that the disposition omnium bonorum should neither specially dispoise, nor specially reserve, that subject.

page on his side. But it would rather seem that he is at all events entitled to no more. If a man's property is encroached upon, his redress is to have the encroachment removed. If part of his flooded land is unlawfully laid dry by his neighbours, the remedy is to restore it again to the waters, and to put all things into the state in which they were before the encroachment began. If this be done, the pursuer has suffered no damage; but the damage and injury to the defenders would be immense, if the necessary consequence of these rash embankments was to introduce another proprietor between them and the loch, and to cut them off, it may be, by a high wall, or a crowded manufacture, from what gives all its amenity, and part of its value to their residence."

No. 121. **THE** pursuer, Hill, obtained the benefit of the cessio. He was possessed of a small liferent of heritage, which was said to be held under a title declaring it to be alimentary, and not to be subject to the diligence of creditors. The creditors called on him to dispoⁿe this liferent specially to them in the disposition omnium bonorum; and he, on the other hand, insisted on his right to have it specially reserved out of the disposition. After considerable discussion at the bar, parties agreed that the disposition should be granted, without special reference to the liferent, either in reserving it, or disposing it.

THE COURT were understood to approve of this as the proper form of disposition, which would neither have the effect of unjustly enlarging or restricting the respective rights of parties.

—Agents.

No. 122. **NATIONAL BANK OF SCOTLAND, Pursuers.—Rutherford—More.**
WILLIAM ROBERTSON, Defender.—D. F. Hope—Moir.

Bill of Exchange—Cautioner.—A party drew three several bills, at intervals, on a house in London, each bill at 60 days' date: he successively discounted them with a bank in Aberdeen, producing, along with each, a relative letter by a third party, "guaranteeing its regular acceptance:" the bank's correspondents in London did not present any of the bills for acceptance until the period of payment, and, before the first fell due, the drawer had failed, and the drawees refused to accept—Held, that the cautioner was not liberated, but remained liable under his guarantee.

Feb. 3, 1836.
ST DIVISION.
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S.
JOHN MILNE, merchant in Aberdeen, was in the practice of discounting bills, drawn on Hughes and Son, merchants, Deptford, with the agent of the Aberdeen branch of the National Bank of Scotland. The bank did not place confidence in Milne, and at first declined discounting a draft until notice of its acceptance was received from their correspondents, Glynn and Co. in London. In order to avoid the delay thus arising in cashing his drafts, Milne offered to give a letter of guarantee, for regular acceptance, along with the draft; and, on this footing, the bank discounted the draft as soon as it was presented along with the letter of guarantee. A considerable number of drafts, with relative letters of guarantee from Sim, a brewer in Aberdeen, were thus discounted, and one or two drafts, with similar letters, from William Robertson, merchant tailor in Aberdeen.

On 1st September, 1834, Milne drew on Richard Hughes and Son for £40, payable at London, at sixty days after date. He presented this draft to the National Bank, along with the following letter from Robertson, addressed to the bank agent, Chivas:—

terms with those already quoted. A third draft, on the same
, dated 27th September, for £60, at sixty days after date, was
ted by Milne, along with a relative letter of guarantee by Robert-
The National Bank discounted these bills as soon as they were
ively presented, and immediately forwarded them to Glynn and
London. Glynn and Co. did not present them for acceptance
he date when the first fell due, being 3d November. Be-
is time Milne had failed, and acceptance was refused by the

■
National Bank notified this to Robertson, and, after the period
ment of the other bills, which the drawees also refused to accept,
ational Bank brought an action against Robertson, under his
of guarantee, for payment of the contents of the several bills,
erest from the date of payment of each, together with the charges
ed.

taking up a record, Robertson averred, that, subsequently to the
f his last letter of guarantee, Richard Hughes and Son had ac-
other drafts by Milne, negotiated through a different channel, to
unt which exceeded the drafts guaranteed by him. The National
also averred, that their correspondents in London had been induced
y presenting Milne's drafts for acceptance, so soon as sent to
in consequence of a request by Milne himself; and that he had
them to allow his drafts so to lie over, in order that Richard
s and Son, being advised by him, might call at the banking-office
an and Co. in London, and there accept them, because, in this
expense of 5s., for sending the bills to Deptford to be accepted,

No. 122. rely that due acceptance had taken place, since he received no information to the contrary. And if the non-acceptance of any draft had been intimated to him, he would not only have refrained from subsequent guarantees, but would have taken instant measures of recourse against Milne, who was then solvent.

—
b. 4, 1836.
George v.
Milne.

The National Bank answered, that they were under no obligation whatever to present the drafts for acceptance until the period of payment. If Robertson conceived any different course to be necessary for his security, it lay with him to intimate this to the bank, and to make his guarantee refer, in gremio, to such a condition. But as he granted an absolute guarantee for regular acceptance, the bank were entitled to hold the bills until the day of payment, as they had done.—And, separately, any deviation from the practice of instantly presenting bills for acceptance had taken place at Milne's desire, and for his sole benefit. His cautioner could not be liberated by this conduct on the part of the bank, even if it had been contrary to the due negotiation of the drafts.

The Lord Ordinary “repelled the defences, and decerned against the defender in terms of the libel; and found the pursuers entitled to expenses.”

The defender reclaimed.

THE COURT without calling on the pursuer's counsel, adhered, and awarded additional expenses against the defender.

LORD BALGRAY.—Had the letter of guarantee stipulated for the presentation of the drafts for acceptance within a certain time, the defender's case would have been in a very different position. But the guarantee was unconditional and the pursuers have done nothing to liberate the cautioner.

The other Judges concurred.

GOLDIE and PONTON, W.S.—H. INGLIS and DONALD, W.S.—Agents.

No. 123 JAMES GEORGE, Pursuer and Advocate.—*Sol.-Gen. Cunningham—Robinson.*

ISOBEL MILNE and OTHERS, Respondents.—*D. F. Hope—Maitland.*

Arbitration.—Circumstances in which the Court held, that an award, by a special referee, was not liable to reduction, and that an allegation of its being *in vires*, and of its not exhausting the subject of the submission, and of its being pronounced without duly hearing parties, was unfounded.

main stocking on the farm of Netherhill had been bequeathed to Milne and others, or had been bequeathed to George. On assumption that it belonged to him, and that Isobel Milne and having taken possession of it, were liable for the value of it to George retained £197, on account of it, and he retained other sums out of other alleged items due to him, the whole amounting to £ the proceeds of the bill. He alleged, that he had done this in pursuance of an agreement, made on 21st October, 1826, with the authority of Isobel Milne and others, and that they had homologated the agreement, and had concurred with him in valuing the stocking

acceptor of the bill was Morrison of Auchintoul, and as he failed to pay the bill was fully paid up, George ranked on his estate for the balance remaining due by him.

Under the circumstances, Isobel Milne and others raised an action of debt and reckoning against George before the Sheriff of Banffshire, praying, that George should be decerned to pay them "the sum of £197 and the legal interest thereof since due and till paid, deducting therefrom all and every sum and sums of money paid by said defender to the pursuers, or either of them; or to any other person or persons for his use and behoof." This was the only conclusion besides that for debt.

George lodged defences, founding on the agreement, and denying that the sum of £197 was due.

A compromise was lodged by the pursuers, after which a mutual submission was entered into, in these terms:—"The parties in this action

No. 123. wards made a series of orders, which are enumerated in the following notes, issued by him on 12th August, 1833:—

Feb. 4, 1836.

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filne.

“ Banff, 12th August, 1833.

“ 1st, So far back as 21st March last, the judicial arbiter appointed the defender to produce a state of payments on the bill libelled, and of his intromissions in general therein, and assigned the 2d April then next for that purpose.

“ 2d, That not having been done, he, on the 15th of July, 1833, on hearing parties' procurators, again appointed the defender, or his agent, to make up and produce an articulate account of debit and credit betwixt the parties, arising out of said bill, together with the relative vouchers thereof, and that against the 22d then instant.

“ 3d, On hearing parties' procurators, of date 22d July last, he prorogated the term for obtempering the above interlocutor till Saturday the 27th then instant, with certification; and,

“ 4th, On the 27th, being the day so assigned, after again hearing the agents for the parties, he, in respect the defender had failed to obtemper the above appointments, granted diligence at the instance of both parties against havers, for recovery of the bill libelled on, and other vouchers connected therewith, to be reported against Wednesday the 31st then instant.

“ None of these appointments have been fulfilled. Unless, therefore the productions required be made on or before Wednesday next the 14th August instant, at two o'clock afternoon, the arbiter will endeavour to make up his mind without them, and pronounce such sentence on the merits as the facts in process may warrant.”

On 7th December, 1833, the arbiter issued farther notes, stating that the actings of all the parties in reference to the bill had been of a peculiar and unusual kind; that the question between them depended on their own circumstances; and that each party should be held responsible for his actual intromissions. He then intimated that “ he would take up an endeavour to dispose of the case, down to the date of the libel, on principles of equitable adjustment between them, under its own peculiar circumstances, narrowing them to the three following heads, viz. :—1. The balance in Auchintoul's hands, and ranked in the defender's name, as executor on his estate.” 2. A point not requiring to be noticed. “ 3. The £253 drawn by the defender, and debited the pursuers. These really contain, and will be found to embrace and comprehend, all the moneys in dispute between the parties. Now, 1st, With regard to the balance in Auchintoul's hands, the defender is executor confirmed, and cannot throw off or denude himself of the office. He has drawn money of the pursuer's bill, and stands ranked for a balance of it as executor thereof. The arbiter, therefore, on coming to pronounce judgment, would ordain and decern him henceforth to go forward in earnest.”

at the 16th instant, with certification."—"As to the third head, viz. £253 drawn by the defender from the money of the pursuers. The court holds this to be an intromission on his part, vitally affecting their estate, and the ranking on Auchintoul's estate, and for which he is liable to them as executor on the conclusions of their libel. The payments of this sum in process are very unsatisfactory; but before farther observations on this head, the arbiter appoints the defender to give in a minute showing the grounds and application of this sum, and to produce herewith authenticated copies of the vouchers of this transaction by Mr Smith, if such exist, as alleged by the pursuers, together with the original inventories and valuations of the crop, new grass, and stocking of Netherhill, referred to in process, and vouchers of the items making up the £253, within eight days from this date. And if the defender's doing so, the arbiter will proceed to give judgment on the documents before him."

18th December, 1833, the arbiter "having advised the process—respecting the defender has failed to obtemper the several appointments made, as mentioned in the arbiter's notes of the 7th instant—appoints the defender to find caution to the pursuers, at the sight of the clerk of Court, for the performance of his office of executor quoad the bill or promissory note in question, and for his and all other intromissions thereon from and the ranking thereof on Auchintoul's estate, and that within fourteen days from this date, with certification; and, in the mean time, decerns and binds the defender forthwith to consign and pay into the hands of the bank for the bank of Aberdeen here, the sum of £253 sterling, drawn on the bill, and taken credit for from the proceeds of said bill, of date, 23d

No. 123. in said action, he appoints them to be heard within the sheriff-clerk's
 Feb. 4, 1836. office here on that day, at twelve noon, with certification." On April 2,
 George v. he adjourned the appointment till April 3, with certification; and on that
 Milne. day he issued this award:—"Having heard parties' agents at great length
 —In respect the defender has failed to find caution in terms of the ap-
 pointment of the 18th December last, decerns and ordains him forthwith
 to do so, as therein appointed; and farther, in respect he has also failed
 and now refuses to consign as formerly ordained so to do, and of the
 whole circumstances of this case, decerns against him at the pursuers' in-
 stance for the £253 sterling referred to in the arbiter's interlocutor of
 said 18th December last, with interest thereof from the date he received
 the same, till paid; reserving to the defender his claims against the pur-
 suers, as accords of the law; and having considered the accounts of ex-
 penses as taxed, modifies the same to £8 sterling, for which also decerns
 against the defender at the pursuer's instance, and for the expense of
 extracting."

Against this judgment, George presented a reclaiming note to the
 arbiter, craving a recal of the judgment, and that he should be allowed to
 prove the minute of agreement of 21st October, 1826, to have been acted
 on by all parties. The arbiter refused to receive, or to write upon the
 note. Thereafter the sheriff, on the pursuer's motion, "interponed his
 authority to the above decree of the judicial referee, and decerned."
 Against this judgment, George presented two reclaiming petitions to the
 sheriff, both of which were refused as incompetent. He then raised a
 reduction of the minute of reference, and of the arbiter's judgments, and
 of these judgments of the sheriff. He also brought an advocacy, or
 contingentiam, which was conjoined with the reduction.

The chief reasons of reduction were—

1. It was ultra vires of the arbiter to ordain George to find caution for
 the due execution of his office of executor, the only question before him
 being one of accounting. 2. He had not exhausted the questions between
 the parties, but had ordained George to pay £253 to Isobel Milne and
 others, "reserving to George his claims against them as accords of law."
 The object of the action of accounting had been to settle all these ques-
 tions, and this object was frustrated by the award. 3. While there were
 matters thus in dispute, George's failure to consign the sum of £253
 might have warranted an absolute decree of consignment on the part of
 the arbiter, which decree, Isobel Milne and others might have taken the
 usual steps to enforce; but it did not warrant what the arbiter
 had done, in ordaining actual payment of the whole sum by George to
 Isobel Milne and others, reserving to him his claims against them, whate-
 ver they were. Such a proceeding was contrary to the principles of
 essential justice. 4. It was competent for the sheriff, if he thought there
 had not been a due hearing by the arbiter, to refuse to interpose his
 authority to the award, and to remit to the arbiter to hear parties farther

sutor in regard to it. This was a question necessarily involved in counting of the parties, and requiring to be extricated as such. reference was exhausted if it decided all that was properly raised the action. In the action itself, if Isobel Milne and Others had good grounds for obtaining decree for £253, and if, on the other George had shown that injustice might be done to him unless a tion of his claims was inserted, it would have been competent for eriff to have given decree for the £253, subject to such reservation. was equally competent to the judicial referee. He might have re- d from making such reservation, as George failed duly to instruct ims in question; but, having made it in favour of George, it was his instance especially, that it could be called in question. 3. It ot merely in respect of the failure to consign, but "of the whole stances of the case," as expressly stated in the award, that the r had ordained payment of the £253. The arbiter had previously ted that he considered the case as one requiring to be dealt with own circumstances; and he was entitled to pronounce his award nt specifying all, or even any, of the special grounds of it. 4. After ward was pronounced by the arbiter, it was incompetent for the f to open it up; and the reclaiming petitions of George against the ector interponing the sheriff's authority, were properly refused. e fullest opportunity had been afforded to George to be heard, as biter's interlocutor showed; and repeated hearings took place, not- anding George's repeated failure to avail himself, as he ought, of portunities of being heard. In regard to the reclaiming note, which nly presented to the arbiter after he was functus, he was not bound,

No. 123. George reclaimed.

1836.
George v.
ne.

LORD PRESIDENT.—The pursuer of this reduction, when he was before arbiter, had repeated opportunities given to him to obtemper the orders of arbiter, which he neglected. He would neither find caution nor consign ; unless the arbiter was to allow the reference to be hung up for ever, he had alternative but to pronounce an award as he did.

LORD GILLIES.—I think this case is attended with considerable difficulty have not formed a decided opinion against the interlocutor, but I shall express the doubts which occur to me. The conclusion of the action before the sheriff was merely for payment “ of £1000, and the legal interest thereof since due till paid, deducting therefrom all and every sum and sums of money paid by defender to the pursuers, or either of them ; or to any other person or persons for their use and behoof.” That was the sole conclusion. The action was admitted, and the arbiter gave decree for payment of £253. But his decree does not appear to me to exhaust the cause. He decerns against George, “ reserve to him his claims against Milne’s, as accords of law.” Now what were the claims except the “ deductions” which, in the summons in the sheriff-cour was stated should be allowed before decree of payment of the balance was pronounced against George? Yet, if this be so, I am not satisfied that this award exhausted the submission. It would rather appear the reverse. These claims reserved, seem to have been before the arbiter, and yet he does not dispose of them. But farther, he ordains George to find caution “ for the due performance of office of executor, quoad the bill.” Why is it that this is in the award? Either the decerniture to pay £253 disposes of the whole sum under the action of counting, or it does not. If it does so, I cannot sanction the surplus order a

suer, especially when taken in connection with the 17th article of the condescence, in which it is alleged that he held private meetings with the opposite parties. But the refusal to hear is always coupled with some statement, which implies this is only averred argumentatively. He refused to hear ‘ in effect,’ or, because he did not receive a reclaiming petition after he was functus ; and then a reason is always given, which implies that he did not refuse, but merely that, having been refused, he differed from the pursuer. When confined strictly to a refusal, the averment is refuted by the proceedings.

“ The alleged private meetings amount to a charge of corruption, which is stated in the summons, and is only thrown into the condescendence with such utter want of time, place, or circumstance, that no issue or other course of procedure could possibly be adopted with regard to it. The other grounds of reduction are all plainly irrelevant.

“ As to the advocacy, the sheriff merely interponed his authority to the award and the objection is, that, as there was a petition to the referee, which he, being functus, could not receive, the sheriff was bound to do so, to the effect of at once remitting back to the arbiter—a dangerous doctrine, which would virtually destroy the finality of awards, and enable parties to go on as much after they were pronounced as before, provided they did so first before the sheriff, who, instead of simply interponing his authority to what the arbiter had done, would be enabled to send the parties back to a new course of extrajudicial litigation before him. Besides, even though this had been competent, there was no ground for the sheriff doing so in this case.”

stances, I consider this to be a case attended with a great deal of doubt, I do not feel prepared at present to alter the Lord Ordinary's judgment. **PRESIDENT.**—If the arbiter remained doubtful whether the £253 belonged to the one party or the other, he would have been wrong to ordain payment by the one to the other. But although he might, at one stage of the case, think it necessary only to order consignment, he might afterwards be of opinion that the money belonged to the other party; and, on failure to consign, he might, with perfect justice, ordain not mere consignment, but actual payment. The arbiter rested this order on his view of "the whole circumstances of the case." I must hold that he was satisfied the money was due to the party in whose favour he made the order of payment.

MACKENZIE.—I am in favour of the interlocutor. I concur with Lord Ordinary in thinking, that the failure to consign would not, in this Court, have amounted to more than a decree of consignment. But this is a case of arbitration; and the arbiter, when he made an order of payment, proceeded not merely on the ground that he was to consign, but also and expressly "on the whole circumstances of the case." And that was enough. Indeed, if it were open to enquire what were the grounds of his finding and decree, there is one marked circumstance in support of it, that George admitted having a sum out of the bill to that amount in his hands. He explained this, by alleging he had a set off against Isobel Milne and her husband to that amount; but, notwithstanding repeated orders, he would give no satisfactory explanation as to this set-off; and after full opportunity to obey these orders, the arbiter pronounced an order for payment of the sum, reserving his rights against the other party as accords. As to that reservation, I am not prepared to hold that it was any thing so wrong in itself, or so palpable an absurdity, as to allow this finished award to be opened up. I do not see it proved that the claims reserved were a necessary part of the submission. They might be or not. In truth, I rather regard it in the same light as most other

No. 123. that the award could not be opened up. But even that was a different case from this. This is just the case of an ordinary judicial reference, in which the sheriff had no power to review the arbiter's final award.

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LORD BALGRAY.—I am for adhering to the interlocutor. The arbiter ordained George to pay the sum he had in his hands, and to find caution in reference to future intromissions. I think it was all right.

THE COURT adhered and awarded additional expenses.

J. SOUTER, W.S.—J. CULLEN, W.S.—Agents.

No. 124. MRS JANE STUART or WATSON, Pursuer.—*Whigham*.

MRS JEAN MACONOCHIE or EDWARDS and OTHERS (Maconochie's Executors), Defenders.—*Rutherford—Moir*.

Presumed Payment—Proof—Stamp.—1. Circumstances in which a party, who was appointed by a regular power of attorney to intromit with a certain succession, in 1816, and who intromitted to an extent of more than £1000, was presumed, in 1830, to have already sufficiently accounted (except as to an admitted item), without any discharge whatever being produced, or any receipts except such as were irregularly signed, and unstamped; in respect, inter alia that the accounting arose out of transactions between near relations who were in a very humble line of life, and were illiterate, and kept no books; that various payments were admitted; that the original parties lived for a considerable number of years, and died without any allegation being made of a short accounting; and that the claim against the executors of the one party had been bought by the pursuer, for an insignificant sum from the children of the other.

Process—Record.—2. Circumstances in which a record was appointed to be opened up, in respect that it was not satisfactorily prepared: and cause decided under the new record.

4, 1836. THE late James Stuart of Idoch, died intestate in December 1815, leaving a widow, Mrs Jane Stuart or Watson, but no children. He left both heritable and moveable effects, especially the latter. Alexander Maconochie, shoemaker in Aberdeen, was entitled to be served heir portioner to Stuart, along with John Cameron wool-comber in Aberdeen. Helen Maconochie, wife of William Johnston, tailor in Kinore, a place about thirty miles from Aberdeen, was entitled to be confirmed executrix to Stuart, qua next of kin, along with Cameron. Mrs Johnston was the aunt of Alexander Maconochie, and was a person in straitened circumstances. In January, 1816, an agreement was entered into between Maconochie and Mrs Johnston and her husband, to adopt joint measures in making up titles and realizing his estate, and binding themselves to divide equally between them, any succession which might be obtained. Maconochie bound himself to be at the expense of establishing the propinquity in making up titles, and he renounced all right of relief for these disbursements excepting out of the first proceeds of the succession to be recovered.

5, the said Helen Maconochie and William Johnston, not only approve of the foresaid contract, but also, we do hereby nominate point the said Alexander Maconochie to be attorney for us, and for us, with full power to him to complete, by confirmation or otherwise the titles of me, the said Helen Maconochie, to the share of the James Stuart's personal and moveable property to which I have now to uplift, receive and discharge all debts and sums of money which are due to the said James Stuart, and which now belong to me, as ex-foresaid; and if needful to sue for the same, either in his own name, or in the names of us, the saids Helen Maconochie and William Johnston either of us," &c. And on the other part, Maconochie also "not approved of the contract," &c., but likewise "obliged himself faithfully to account to the saids Helen Maconochie and William Johnston of all intromissions he might have with her share of the property of the James Stuart, in virtue of the powers before written." Mrs Johnston could not write, and she signed these deeds by the intervention of us. Both deeds were prepared by professional men.

At this time Alexander Maconochie had been served heir-portioner with Cameron; and Mrs Johnston had been confirmed co-executor with Cameron also.

In August 1816, an agreement was entered into between Mrs Stuart, widow of James Stuart of Idoch, and Maconochie and Cameron, by which they agreed to pay her £2350, with all the household furniture of the late James Stuart, in consideration of a discharge of her claims as widow. Apparently this was a considerable over payment, as the report of an auditor of the Sheriff Court of Aberdeen who, at a subsequent period, had occa-

No. 124. receipts, that in April, 1816, he had received from them £41, 16s. 6d., of executry effects; and that in May 1818, £500 farther had been paid to him.

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In 1821 Mrs Johnston executed a deed reciting the power of attorney which had been granted to Maconochie, and recalling it, and at the same time assigning to Mrs Stuart her whole interest in Stuart's succession, "in so far as not already recovered by me, or my attorney or co-executor." Mrs Stuart was empowered to sue for all debts due to Stuart, "and particularly, without prejudice to the foresaid generality, to call for the accounts of the intromissions and management of Charles Donaldson with the said estate and effects and to clear and settle accounts with him." The conveyance was declared to be in trust only, and Mrs Stuart was to account for the balance recovered by her. This deed did not set forth that there was any balance due by Alexander Maconochie, or give any power to call him to account.

It did not appear that this deed was ever intimated to Maconochie.

In 1824 Donaldson died without having fully accounted for his intromissions. Maconochie thereafter, as acting under the power of attorney in the deed of 1816, raised an action before the sheriff of Aberdeenshire, against Donaldson's executors, and obtained a decree finding the debt due to Mrs Johnston to be £266; and in a multiplepoinding raised by the executor he in respect of that debt obtained decree for £120, which he drew in 1827. He died in the same year, and Mrs Johnston also died. The executors of Maconochie gave up an inventory amounting to £658.

After both of these parties were dead, Mrs Stuart, in consideration of the payment "of a certain sum of money," not specified, obtained from John and Helen Johnston, the children of Mrs Johnston, an absolute conveyance of their whole interest in Stuart's succession, and a discharge of all liability to account to them under the trust-conveyance of 1821. This deed narrated that Alexander Maconochie had continued to intromit with Mrs Johnston's share of Stuart's succession, and in particular had drawn a dividend from Donaldson's estate, notwithstanding the deed of recall of his power of attorney in 1821; and that he had not accounted for such intromissions, or for the dividend. The deed specially assigned to Mrs Stuart whatever had been received by Alexander, on behalf of Mrs Johnston, "but had not been accounted for by him," with power to sue his representatives in a count and reckoning.

In 1830 Mrs Stuart raised an action of count and reckoning against Alexander Maconochie's executors. In explanation of the sums of £41, and £500, which appeared to have been paid to him in 1816, and May 1818, the defenders referred to a note of payments amounting to £120, consisting of sums chiefly from £12 to £20, stated as paid to Mrs Johnston when she went to Aberdeen, or as having been sent to her by a private hand. This note had been delivered by Maconochie to Mrs Johnston in 1818. The defenders also produced a letter from Mrs Johnston's daughter Helen, in November, 1816, to show that the remittance of sum

sums, by a private hand, had occasionally been resorted to between them, as it requested Alexander to send them a sum of £12, by one Davidson. The pursuer admitted that the sums contained in the above note, to the extent of £77, had been received. The defenders produced also the following document, in the form of a missive addressed to Macconchie.—“Huntly, 9th June, 1818. Sir, I hereby do acknowledge to have received from you the sum of Two hundred and fifty pounds sterling, being the half of Five hundred pounds sterling, paid on account of the funds of the late James Stuart, Esq., and am your most obedient servant—(Signed) WIDOW JOHNSTON.” The defenders averred that the signature, “Widow Johnston” was adhibited to this document by Helen Johnston, the daughter, at the desire of her mother, who could not write. They also produced a piece of paper of the following tenor:—

“1818. June 9. To cash, £130 0 0
Aberdeen, 23d Oct. 1818.

“I anoladg to have recvd from Alex. M'Conachie the sum of £26 for my mother.

“(Signed) HELLEN JOHNSTON.”

They averred that the acknowledgment for £26 was written and signed by Helen Johnston. The defenders produced another document of this tenor:—

“1818. June 26. By cash, £10 0 0
“Oct. 23. By cash, 26 0 0
“1819. June 9. By cash, 50 0 0
“1820. Sept. 7. By do. . . . 3 0 0
“Aberdeen, 9th June, 1819.

“I hereby acknowledge to have recvd from Al. M'Conochie Fifty pounds st^r. for account of my mother.

(Signed) “JOHN JOHNSTON.”

The defenders averred that the signature “John Johnston” was the genuine signature of the son of Mrs Johnston. These averments were denied by the pursuer.

A record was made up in which Mrs Stuart did not specify the price which she paid for the assignation in her favour in 1827: and she refused to state this when called on to do so. The Lord Ordinary considered the record to be unsatisfactorily prepared, and therefore his Lordship appointed the record to be opened, and the parties to revise their papers, with a view to the more specific statement of the circumstances relating to the administration of the succession of James Stuart, and also the circumstances under which the deeds founded on by the pursuer

No. 124. were granted,—the consideration given for them,—and the means taken in virtue of them, prior to the raising of the present action.” *

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* “ NOTE.—This is an action of count and reckoning. But after hearing question argued, and looking into the documents in process, the Lord Ordinary thinks it essential that there should be some more distinct explanation in relation to various matters of fact, than that afforded by the record as it stands. The action is brought to obtain an account of the intromissions of the deceased Alexander Maconochie with the succession of James Stuart. Alexander Maconochie was a shoemaker in Aberdeen, and the late Helen Maconochie, wife of William Johnston, were the next of kin, and executors of James Stuart, and the same Alexander Maconochie and John Cameron were Stuart’s heirs-portioners. Stuart died in the year 1815; and in 1816, a written agreement was entered into between Alexander Maconochie and Helen Maconochie, by which they consented to the benefit respectively accruing to them as heir-portioner and joint executor: in the same deed, Helen Maconochie granted to Alexander a power of attorney to uplift her share of the executry, as joint-executrix with Cameron.

“ It appears that Messrs Hutcheon and Donaldson, writers in Aberdeen, were employed by Cameron and Alexander Maconochie to realize the succession of James Stuart; and there are documents in process which prove that Donaldson did to Alexander Maconochie part of Helen Maconochie’s share of the moveable succession. In particular, £41, 16s. 6d. appears to have been paid to him in 1816, and £500 in May, 1818; for the half of which sums he, by his agreement with Helen Maconochie, was bound to account to her.

“ In the year 1821, Helen Maconochie recalled the power of attorney granted to Alexander, and substituted the pursuer, the widow of Stuart, in his place. The deed contains no statement that Alexander Maconochie had not accounted for his prior intromissions, and it gives no power to pursue for such intromissions. The recital bears merely that Alexander Maconochie had been empowered to cover Helen’s share of Stuart’s executry, ‘and that considerable funds have yet been recovered by his executors;’—and it gives a power to recover the funds, ‘in so far as not recovered by me (Helen), or by my attorney or co-executor.’ This conveyance was merely in trust, and bound the pursuer to account to the granter for all sums which might be recovered under it. It is averred by the pursuer that this deed, recalling Alexander Maconochie’s, was intimated to Alexander Maconochie; but this is denied on the other side. One thing is certain, that notwithstanding such recall, Alexander Maconochie did proceed, without objection on the part of the pursuer, the new attorney, to recover funds due to Helen. For, in the year 1824, he raised an action against the representatives of Donaldson, and ultimately, in the year 1827, drew a dividend of £120 from Donaldson’s executor, being a dividend on the debt due by Donaldson on account of his intromissions as agent with the moveable estate of James Stuart. By this time Alexander Maconochie was dead, although the period of her decease is not specified in the record; and Alexander Maconochie also died in the end of the year 1827. After his death, the pursuer obtained a second deed, dated in December, 1827, by John Johnston and Helen Johnston, the son and daughter of Helen Maconochie, setting forth the original power of attorney to Maconochie—the deed, 1821, giving that power—and in particular, that, notwithstanding that recall, Alexander Maconochie had continued to intromit with the executry, and had drawn the dividend on Donaldson’s estate. It then sets forth, that ‘the said Mrs. Jean Johnston, otherwise Stuart, has made payment to us of a certain sum of money in full of

The pursuer reclaimed, and the Court adhered.

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A new record was then prepared in which the pursuer, inter alia, stated £35 to be the consideration given by her for the assignation of Stuart Maconochie

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Maconochie

of reversion, under the deed of assignation, conveyance, and trust, hereinbefore narrated, and in consideration of our granting these presents.' And upon special, the granters renounce the right of reversion competent to them under the deed 1821, discharge the grantees, the pursuer, and convey to her their right to the representatives of Alexander Maconochie to account. There is no averment upon the record as to the precise date of the first demand made against the grantees, the representatives of Alexander Maconochie, under this deed; but in the year 1831, the presentation of accounting was brought against them, the sum being laid exclusively on the first deed by Helen Maconochie in 1821. This was afterwards amended by an addition founded on the deed 1827, and an action a record was afterwards made up in usual form.

From the documents produced, the charge against Alexander Maconochie appears to be pretty clearly established. In particular, it seems to be established, by the depositions of Donaldson and Maconochie's receipts, that the above-mentioned sums of £1, 16s. 6d. and £500 were received by him to account of Stuart's executry. Some of the articles of discharge are admitted; but the more important of them are not, and, in particular, a payment to Helen Maconochie of £250 in June, 1818, and the half of the £500 drawn by Maconochie. Papers bearing to be receipts for such and other payments have been produced by the defenders, which papers were to be signed by the son and daughter of Helen Maconochie, who, it is admitted, could not write. The authenticity of these signatures is denied by the pursuer, but all question upon this point is superseded by the consideration that they were stamped, and consequently cannot be received.

Independently of these documents, however, it appears to the Lord Ordinary that in the case of the pursuer still may require some farther explanation. Alexander Maconochie, whose intromissions are now to be accounted for, was a shoemaker in Glasgow, against whom no very unfavourable presumption can arise from the circumstances of his failure to keep regular accounts and to take regular receipts. Helen Maconochie was confessedly unable to write, and was as commonly in circumstances not likely to dispose her to leave her money unaccounted for in the hands of her attorney. In so far as the Lord Ordinary can judge from the documents produced, the amount of his intromissions must have been a matter of great variety, or at least easily attainable, as he could intromit only in conjunction with James Cameron, the other executor, and did, as it appears, intromit only through the agency of Donaldson. The sums chiefly in dispute are sums drawn by him prior to the year 1818. The first assignation by Helen Maconochie to the pursuer affords a strong presumption that Helen, the granter, did not then consider Maconochie to have any money of hers in his hands; and though she survived that several years (the precise time is not mentioned in the record) it is not averred by the pursuer that she, during her lifetime, made any demand on Maconochie for his intromissions. Even in the deed 1827, granted after her death by the son and daughter of Helen Maconochie, the only intromissions specified are those said to have been had by Maconochie subsequently to the deed 1821, and in particular, the sums drawn from Donaldson's estate; and, last of all, the pursuer has deposed, and relied upon, to state what was the consideration she gave for the last

Under all these circumstances, the Lord Ordinary thinks this

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1827, and she alleged that the Government duties had not been paid on Stuart's succession, and the liability connected with them had been one cause why she obtained the conveyance at so moderate a cost.

In these circumstances, the defenders pleaded that the only sums to be accounted for were £41, received by Maconochie in April 1816; £500 received in May 1818; and £120 drawn in the multiplepoinding in 1827. As to one-half of this last sum, it was admitted to be still due, under deduction of £5, 0s. 3d., being one-half of the cost of recovering it. As to the other sums, Maconochie had been an illiterate man, engaged in the trade of a shoemaker, and had kept no books. But all his intromissions, prior to Donaldson's death in 1824, were through Donaldson, and these were easily traced. Considering the admitted fact that Mrs Johnston was in circumstances which made it unlikely that she should not call for her share in the funds as soon as they were recovered; that there was practice of sending small remittances to her, of which £77 were confessed to have been so received at an early date; that Mrs Johnston never alleged he had not fully accounted to her for all that he received, though she lived for many years after granting him the power of attorney, and, that, even in recalling that deed and granting a new power of attorney, in 1821, to the pursuer, she had never alleged any short counting against him; and that the present claim was bought for so insignificant a sum, and insisted in only after the death of both the parties; there was a combination of circumstances, sufficient to produce a conviction that nothing remained due, except one-half of the sum drawn in the multiplepoinding.¹ But in addition to this, there were written memoranda of acknowledgment of the sums of £250, £50, and £26. It was true that these were not regular or written on stamped receipts. But they were not founded on as receipts, but merely in the same way that any jotting, or excerpt from a book might be, as a minicle of evidence, in support of the other presumptions in the case. When all these circumstances were taken into view, along with the

claim of accounting is to be received with some suspicion, and certainly with caution. The intromissions mainly in dispute were had as far back as the year 1818, by a person, from his situation and habits of life, presumably ignorant of the precautions of regular accounting. The action was raised in 1831, after a period of thirteen years, and long after the death both of the intromitter and his co-tenant. There is no evidence, nor even any averment, that while they lived, a claim had been made by the latter against the former; and there is an implication, or something nearly amounting to it, from the deeds in process, that no such claim was understood to exist by the parties interested. The Lord Ordinary does not think that these considerations are conclusive against the pursuer; but he thinks they fairly warrant the demand for some further explanation: and upon this ground he has pronounced the prefixed order, for which, as being somewhat unusual, he thought it right to assign his reasons."

¹ Wilson, Nov. 26, 1783 (11646).

of attorney, and not intrusted with large sums, as he very war-
rante; he was therefore bound to show satisfactory evidence that he
aid them. Though in a low rank of life, it was his obvious duty,
and to matters of so much importance, to act with regularity, and
to whatever professional advice was necessary for that purpose;
could not have been difficult, where agents were employed to
the succession at any rate; and had also been employed at pre-
the power of attorney. In regard to the irregular and unstamped
ts, they could not be looked to in Court, and so the Lord Ordinary
estimated in his note already issued. And in the whole circum-
s, it would be extremely dangerous, and would be in truth a partial
oding of the law of prescription, if a party was allowed to discharge
lf of debts of this amount without any satisfactory evidence of their
ent being produced.

Lord Ordinary pronounced this interlocutor:—" Finds that the
s of charge insisted in by the pursuer, as now in right of the late
Maconochie, against the defenders, as the executors of the late
nder Maconochie, are, 1st, The sum of £41, 16s. 6d., received by
nder Maconochie in April, 1816; 2dly, The sum of £500, received
n on the 11th day of May, 1818; and, 3dly, The sum of £120,
, received by him on the 12th of June, 1827; for the half of which
the said Alexander Maconochie was bound to account to the said
s: In regard to the two first articles of charge, finds, In respect
e whole circumstances of this case, as admitted or established
s record, particularly the situation in life, and the relationship of
rties—the long silence on the subject of those claims, a silence

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against the said defenders for one-half of the amount thereof, being £60, 0s. 4½d. sterling, with interest thereon from the said 12th day of June, 1827, and until payment: and finds the defenders entitled to expenses, subject to modification." *

Against this interlocutor both parties reclaimed. The defenders merely craved an alteration to the effect of being allowed to deduct one-half of the expense of recovering the sum of £120, from the half of that sum which they were decerned to pay. The pursuer did not dispute the accuracy of this claim, if the interlocutor of the Lord Ordinary was in other respects adhered to.

Under the pursuer's reclaiming note, the Court adhered, and awarded additional expenses against the pursuer, without calling on counsel to support the judgment.

LORD PRESIDENT.—This dispute arises out of a claim between two parties, who were near relations of each other, and both of whom were in the humble walks of life. The claim was not preferred during the lifetime of either; but, soon as both were dead, the pursuer acquired her right from the children of one of the parties to rear up a claim against the executors of the other. She acquired the claim in an awkward manner and under suspicious circumstances; and I find it impossible for me to sustain it to a greater extent than the Lord Ordinary has done.

The other Judges concurred.

Under the note for the defenders the Court altered, as craved.

J. MARTIN, S.S.C.—H. INGLIS & DONALD, W.S.—Agents.

* "NOTE.—The opinion of the Lord Ordinary rests mainly upon the considerations mentioned in the note subjoined to his interlocutor of the 11th of May 1834, opening up the record as originally closed; and without entering into a detailed repetition, he has only to add, that, in his opinion, those considerations are materially strengthened by the record, as now finally adjusted, and fairly warrant the application of the principle adopted in the interlocutor, a principle sanctioned by the authority of the Court, under circumstances even less favourable, in the case of *Wilson v. Wilson*, Nov. 26, 1783 (Morr. 11,646)."

THOMAS AITCHISON and OTHERS, Pursuers.—*D. F. Hope—Anderson.*
MAGISTRATES and TOWN COUNCIL OF DUNBAR, and SIMON SAWERS,
Defenders.—*Rutherford—Marshall.*

Burgh—Title to Pursue—Jurisdiction.—An action containing reductive, declaratory, and petitory conclusions, having been brought by certain parties, burgesses and town-councillors of a burgh, against the Magistrates and Council, to try the legality of an act of council in reference to an alleged alienation of the property of the burgh, on the passing of which act the pursuers were in the minority;—Held, 1. that they had a good title to pursue; and 2. that the Court of Session had jurisdiction.

In 1778, the Magistrates of Dunbar granted permission to the proprietor of a field adjoining the town, to make a drain through the Kirkhill of Dunbar for the purpose of draining his property, but with a prohibition against allowing the water from certain conterminous flat ground to be carried off by it. A covered drain was accordingly made. In 1825, the defender, Sawers, who had acquired the field in favour of which the servitude had been constituted, and also the neighbouring lands known by the name of Newhouses, applied to the Magistrates to have the drain enlarged, for the purpose of effectually draining the whole of the flat ground. After some procedure before the Sheriff and Court of Session, it was found, in an action of declarator at the instance of the Magistrates, that Sawers was not entitled to have the drain deepened.¹ Thereafter, in 1830, he presented a petition to the Magistrates, stating that the “petitioner, finding it necessary for the effectual draining and improvement of his lands at Newhouses, to have a pipe, of from a foot to eighteen inches in diameter, passed from the water reservoir under the post road and through the Kirkhill to the flat between the foot of the hill and the sea-beach, requests to be allowed to perforate the Kirkhill by a small tunnel for that purpose; and, if need be, to sink a shaft or well on the north side of the post road, to facilitate the tunnelling under the road, which tunnel and well will be again filled up when the perforation under the hill is completed: That, as the laying of a pipe as above proposed, will be of great advantage to the town of Dunbar, by affording a constant supply of fresh water in aid of the supply brought from Spott, your petitioner humbly conceives that such a constant supply of water, which is much needed at present for many useful purposes, will be a full compensation to the town for the indulgence he prays for, as the tunnel will do no injury whatever to the surface of the Kirkhill; but, should your Lord-

¹ Ante, VII. 672.

No. 125. ship and the Council think the same not sufficient, your petitioner will give any farther moderate and reasonable consideration for the indulgence prayed for:" The Magistrates agreed to grant the permission craved, on payment by Sawers of a fair price or consideration, and on the following conditions, which, in October, 1830, were embodied in a minute of council, viz. " 1. That the remuneration to be received by the town should be fixed by arbiters mutually chosen, with power to name an oversman; 2. That in estimating this remuneration, the arbiters should have in view the advantage which Sawers' property would derive from the operation of the tunnel; and if it should be necessary to advertise the grant in terms of the act 3 Geo. IV., c. 91, that this should also be done; 3. That the laying of the pipe mentioned in the petition was not to be " set forth as an advantage to the town in bar of remuneration;" 4. The grounds encroached upon by the proposed operations to be restored to a proper condition; and 5. " As the grant was for the benefit of Mr Sawers, he was to pay the whole expenses which might be incurred on the part of the town."

4, 1836.
Wilson v.
Magistrates of
Dunbar.

Sawers accepted of the grant subject to these conditions, and the parties chose arbiters in terms of the agreement. The arbiters having differed in opinion as to the sum to be awarded against Sawers, an oversman was appointed. Mean while Sawers was allowed to proceed with and complete his cut through the Kirkhill, the Magistrates and Council agreeing to this " without prejudice to their claims." The oversman, however, never gave his award, and the submission was allowed to expire. After some previous communication with Sawers, the Magistrates raised an action for implement against him before the Sheriff of Haddington, concluding for payment of £200,¹ or such other sum as should be found to be an adequate remuneration.

On the 31st October, 1833, defences to this action were ordered to be given in, but shortly thereafter Sawers was elected Provost of Dunbar, and no farther proceedings took place till the 30th October, 1834, when the order for defences was renewed. Three days afterwards, on the 3d November, the following motion was brought forward at a meeting of the Magistrates and Town Council:—" That it is the duty of the Magistrates and Council on all occasions to encourage any improvement that is not prejudicial to the town's property; and, considering that the deepening of the drain by Mr Sawers, from the Newhouse lands through the Kirkhill, which was a grant from the Magistrates and Council to the former proprietor of Newhouses, has done no injury to the town's property, but, on the contrary, has afforded an additional supply of water for the town's cattle, and that the

¹ This was the sum fixed on by one of the arbiters, Mr Low, present Professor of Agriculture in the University of Edinburgh.

and also town councillors of the burgh of Dunbar," brought an action against the Provost, Magistrates, and Town-Council of Dunbar, against Sawers as an individual, setting forth the proceedings above-mentioned, and that the foresaid resolution was illegal, and that it acted "to their hurt and prejudice," and concluding (1.) for the revocation of the resolution of the 3d November; (2.) to have it found and declared that the Act and Minute of Council in October, 1830, gave the only right and title of the defender, Sawers, to the privilege conferred on him; and farther, that the Provost, Magistrates, and Council had no right to discharge or pass from the claim to the money, and the obligations and conditions stipulated by the said act and minute, but that they and their successors in office were bound to take all proper steps for obtaining payment and performance of the same; (3.) that they should be ordered and ordained to do so accordingly; and (4.) that the majority of Magistrates and Council who voted for the resolution of 3d November; and Sawers individually, as defenders, should personally, conjointly and severally, be found liable in expenses.

The defenders having objected to the citation of one of the councillors, as said in the execution of the summons to have been cited at his dwelling-place, while it appeared he had been more than forty days absent from Scotland, a supplementary summons was raised, of the same tenor as the former, with which it was subsequently conjoined.

In this action defences were given in, setting forth that two of the defenders had ceased to be councillors; and further, that Sawers, on the 8th of November 1835, "although prepared to maintain the legality as well as the propriety and reasonableness of the act of council under challenge," had

o. 125. patrimonial interests;¹ and the circumstance of their being a minority of the Town-Council, as well as burgesses, cannot of itself give them a title,² there being, besides, no instance in the books of an action having been attempted on such a title.

. 4, 1836.
obison v.
gistrates of
ubar.

2. The pursuers have no interest to insist in the action, in respect that before it was instituted the act of council thereby challenged had been voluntarily rescinded and annulled.

3. The Court of Session have no jurisdiction in a question such as the present, which is one of public moment, and relating to the mal-administration of the property of the burgh.³ The statute 1693, c. 28, was required to give the Court of Session jurisdiction in the particular case of the magistrates contracting debt without a previous act of council, thereby implying that it had no jurisdiction in such matters at common law; and the statute 3 Geo. IV., c. 91, points out the Court of Exchequer as the proper tribunal in which to seek redress in such a case as the present.⁴

The pursuers answered—

In regard both to the pursuers' title and the jurisdiction of this Court, it is necessary to keep in view the nature of the action and the character of the resolution under challenge. The leading conclusions of the action are the reductive and declaratory conclusions, and it founds on an act of the Council which is averred to be "illegal;" the pursuers, as a minority of the Council, are entitled to have the legality of an act of Council

¹ Erskine, I., 4, 23; Burgesses of Inverury v. The Magistrates, Dec. 14, 1820 (F. C.); Magistrates of Lauder v. The Burgesses, May 17, 1821 (ante, I., No. 15).

² Baxter and Burgesses of Cupar v. Munro, 1772 (Brown's Supp. 629).

³ Erskine, supra; Burgesses of Inverury, supra.

⁴ The act 3 Geo. IV., c. 91, provides that an account of the common good and revenues of every royal burgh of Scotland, specifying the particulars of their income and expenditure, shall be annually stated and deposited in the manner directed by the act. (Sect. I.) On failure to lodge this account, the Provost, Magistrates, and members of Town-Council are to be subject to a penalty, "to be recovered, with costs of suit, upon information to the Court of Exchequer, at the suit of any three or more burgesses of such burgh." (Sect. II.) It is also provided that the account shall be subject to the inspection of the burgesses, who may state objections thereon in writing, and, if the explanations given are not satisfactory, any three or more burgesses may make complaint in writing to the Barons of the Court of Exchequer in Scotland, who shall proceed to determine the same in a summary manner. (Sect. III.) The Magistrates and Council are to cause all feus or alienations of heritable property, being part of the common good of the burgh, to proceed by public sale and notice thereof is to be given during an Exchequer term; and in the event of the enactment not being complied with, the Magistrates and Council are made liable to a penalty, which is to be recovered by complaint in Exchequer in the same way as is provided in regard to the annual account. (Sects. V. and VIII.)

no provisions of the 3 Geo. IV., c. 91, do not apply to the present case. If a town-council is entitled to try in the Court of Session the legality of an act of a former town-council,¹ there can be no objection for holding that the minority of a council are not entitled to sue for the legality of an act of the same council, and which act is still in force.

The Lord Ordinary repelled the defences, issuing the note subjoined.
The defenders reclaimed.

JUSTICE-CLERK.—I am of opinion that the title on the part of the pursuers is good. The present question has nothing to do with the right of individuals to complain of acts of the Magistrates, because this action is brought in the instance of four constituent members of the Town-Council, who were in the majority when the act complained of passed. They aver that the act was illegal, fundamentally null and void. The action is a complicated one; there is a primary conclusion, but there are likewise reductive and declaratory conclusions. It is possible that as the action is proceeded in there may be ground to pause, as to whether the matters of accounting under the petitory conclusion can be taken. The Court of Session is the only tribunal competent to reduce an illegal act to nothing, or declare its illegality. I deny the right of the Court of Exchequer to do so by a formal decree of reduction, or declare an act to be illegal. And then the question is, was this such an act? If it were incompetent to bring this action, it would be an admission of the existence of a gross wrong for which there is no remedy. I must hold it competent for the minority of the Council, averring that a resolution was passed "to their hurt and prejudice," to bring this reduction to the Court. And if these parties have a title to sue, it appears to me they are

p. 125. rity of the citation, it would have required consideration before we could have sustained it.

4, 1836. **LORD GLENLEE.**—I certainly think the Lord Ordinary did right in repelling the objection to the title. I was moved at first by the fact of the cancellation of the act of council, but I see no acknowledgment that it was wrong; on the contrary, when the defenders entered on the new proceeding they maintained mordicus the legality of the old. The only question is, whether the pursuers are not entitled to have it declared that this resolution was illegal and void? I do not rest on the circumstance that they are members of the town council, but that they complain as burgesses of the illegality of an alienation of the town's property. As the illegality of the act is asserted here I am not disposed to carry too far the distinction between burgesses and town councillors. I am inclined to think, that at common law, burgesses have an interest and title to look after matters of this sort. In Erskine's time this was doubtful, but in the passage referred to he speaks as to the administration of the burgh revenues. I believe there are decisions sanctioning the right of burgesses to pursue the magistrates for setting property beyond the legal time, and I think they are entitled to insist in an action to have it declared that the magistrates have no right gratuitously to alienate the property of the burgh.

LORD MEADOWBANK.—Lord Glenlee has expressed my opinion on every point. The supplementary summons removed the objection to the citation, but I agree with the chair that there was no necessity for calling a councillor who had left the country, and had not been a party to the illegal act. In an action with petitory conclusions alone, the decisions referred to may be sufficient to prevent burgesses having simply a personal interest from suing, but they do not apply to the having an act of council reduced and declared illegal. I should not say that a burgess had not this power, but a minority of the council clearly have the right.

LORD MEDWYN.—Recollecting the case of Inverury I had at first some difficulty in agreeing with the Lord Ordinary, but my doubts are now removed. In regard to the rescinding of the act by the council themselves, it only took place after the first summons was in Court, and the pursuers insist because the defenders would not allow the declaratory conclusion to be well founded. As to the jurisdiction of this Court, the accounting provided for in Exchequer has nothing to do with a reduction and declarator such as this. The present case stands quite clear of the statute of George IV. The Court has jurisdiction just as it had in the case of the Magistrates of Selkirk,¹ where a reduction at the instance of a town council of the act of a previous town council was held good, and this goes far to sanction the title of a minority. I do not go on the right of burgesses alone, but hold that the minority, being also burgesses, have an interest and are entitled to try this question of the legality of an act of the council in the only court where the question could competently be brought.

THE COURT accordingly adhered, finding additional expenses due.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—PATRICK DALMAHOY, W.S.—Agents.

¹ Ante.

... of the case reported ante, XII. 173, which see. THE COURT res. 9, 1830.
allowed a "proof before answer," a long proof was led before the
juries, which established that the letter mainly founded on in
f the alleged marriage had been granted by Menzies, on the one
nd accepted by Stewart on the other, collusively, for the purpose
iving the friends of a lady, from an engagement to marry whom,
s desired to get free. On advising this proof, the Lord Ordinary
nd Menzies from the declaratory conclusions for marriage and
ey, and appointed the cause to be enrolled that the pursuer might
ether, and to what effect, she meant to proceed with the alterna-
clusion for damages as for seduction. His Lordship at the same
ued the subjoined note.*

2d Division.
Consistorial.
Lord Jeffrey.
T.

The pursuer has evidently no case in the declarator without the letter of
arch, 1826, the separate proof of verbal acknowledgments or open marital
tion having altogether failed. If the letter, though delivered for the pur-
xpresses (with the continued intercourse after its date), does not constitute
ge without the other proof, it will not materially supply the defects of such
If it was delivered and accepted for quite another purpose, it makes the
se for the pursuer than if it had never existed.
Lord Ordinary thinks there is, on the whole, sufficient evidence that it
vered and accepted for such a special and improper purpose, and he rests
ment on this. But he is also of opinion, that, in the circumstances of this
are the declaration or acknowledgment of marriage is conditioned on the
a child, and where it is certain that there had been a great deal of per-
xcourse before the letter was delivered, the mere delivery of that letter,
ref that the intercourse was afterwards continued, are not sufficient to
to a marriage according to the law of Scotland. If any reliance, indeed, is
need on the report of the opinions delivered when the reclaiming note for

No. 126.

Feb. 4, 1836,
Stewart v.
Fenzies.

The pursuers reclaimed, and maintained generally that the letter in question, with subsequent cohabitation, was sufficient to constitute a marriage.

The defender answered, that, although the proof had been allowed

was delivered or accepted for the purpose of constituting or proving an actual marriage, but for a very different purpose, of imposing upon third parties by a false pretence. That this is sufficiently proved, it is supposed would scarcely be disputed, if the evidence of Mr Stewart of Crossmount was allowed to be competent. But a strong effort was made at the debate to have his evidence set aside, as being in substance an improper disclosure of admissions made confidentially by a party when consulting and seeking advice from another, with a view to an impending law-suit. But though it is quite true that Mr Stewart was so consulted, and that his situation approaches in principle to that of a law agent, where advice is sought in similar circumstances, still the Lord Ordinary can find no authority for extending this disqualification beyond the professional limits within which he conceives it has hitherto been confined: And this is less to be regretted, as the admission of this evidence only tends to confirm, beyond all question, what was already legally established by the uncontradicted testimony of the two Stewart (uncle and aunt of the pursuer), and rendered morally certain by almost all that appears, and that does not appear on the face of the proof. There is, first of all, the admission that the letter, though bearing date in March, 1826, was not delivered till some time in 1828. Next, there is the clear proof by the defender's letter to the pursuer's brother (appendix to reclaiming note of 8th July (January), 1834, p. 4), and by the depositions of Captain M'Dougall and his brother, that the letter was really prepared and delivered with a view to impose upon these gentlemen; and, finally, there is the conclusive circumstance, that, from beginning to the end of her proof, and during the whole period of her connexion with the defender, there is not a vestige of evidence of her ever having directly claimed the title or rights of a wife, or even hinted to her confidants and relations that such was truly her condition. She has brought forward two witnesses to swear that the defender sometimes called her by a name which, though it properly signified a thing more than woman, was yet often used (they say) as equivalent to that of wife. But neither these nor any other witnesses, say they ever heard her address the defender, or speak of him as her husband, though of the two she was evidently the most likely to indulge in such epithets, and to hazard, in this way, the occasional breach of a not very intelligible scheme of concealment. There are many circumstances, also, independent of her acquiescence in the baptism of the children as bastards, and in their universal repute as such, which afford irresistible evidence of her consciousness of her true state and condition.

"But though the case is not attended with much difficulty, when it is considered that the pursuer was bound to make out her allegations by legal evidence, it is impossible not to feel that there are parts of it still enveloped in a painful obscurity, and which present but an awkward aspect for the defender. The Lord Ordinary alludes particularly to the evidence about the letter from Hamilton—the private letter from the defender himself to his agent, of 24th August, 1826 (appendix, p. 3)—to the proof (p. 3, &c.) of his having said that he durst not marry, and that there were people about him who prevented him from marrying; and to the singular tone of deep feeling and despondency in his letter to the clergyman of 15th June, 1827, which is much more like that of a man committed to an unsuitable and disreputable marriage, than of a young Highland officer who finds himself the father of an illegitimate child. It is plainly impossible, however, to hold these as proofs of an actual marriage, and the indications of kindness to her relations, which were quite as likely to flow from the influence of a favourite mistress, as of an humble wife, are of still less importance.

"The Lord Ordinary scarcely supposes that the pursuer means to insist in her claim of damages as for seduction."

that effect, and the proof had been allowed "before answer," the
ons as to the effect of the letter, and the relevancy of the proof,
sen settled at the former advising. Their Lordships considered
roof to have clearly established that the letter had been granted
concurrence of the pursuer, in furtherance of a scheme to deceive
parties, and they accordingly adhered.

affirmed with costs 6 October 1841
GREG and MORTON, W.S.—JAMES FERGUSON, W.S.—Agents.

OHM BLAIKIE and SONS, Pursuers.—*Sol.-Gen. Cuninghame—*
Dingwall.

No. 127.

THOMAS HOUSTON, Defender.—*D. F. Hope—Moir.*

mess.—Where tradesmen, before raising action for their account, offered to
a smaller sum than that for which they ultimately obtained decree—held
l to the expenses of process, notwithstanding that the litigation had been
ted by them with unusual pertinacity.

is was an action by plumbers in Aberdeen for payment of an Feb. 5, 1836.
it for work performed by them in the employment of the defender. 1st Division
a valuation of the work being made by men of skill, the Lord Or-Ld. Fullerton
decerned for £96, 13s. 10d., in favour of the pursuers: and, as
as a trifle more than the pursuers had intimated their willingness
ept of, before raising their action, his Lordship also awarded ex-
t in favour of the pursuers, though his Lordship, at the same time,
ted that he considered them to have conducted the litigation with

No. 128.

b. 5, 1836.

Wylie v. Adam.

ROBERT WYLIE, Pursuer.—*Thomson.*ROBERT ADAM, Defender.—*Patton.*

Title to Pursue—Homologation—Agent and Client.—A law agent raised an action declarator, implement, and damages, in name of his client who was abroad: the grounds of action consisted of certain alleged procedure, adopted towards the client during his absence from this country: the action was raised without the client's knowledge, and was dismissed for want of a mandate: before a reclaiming note was advised, a mandate was produced from the client, homologating the agent's whole proceedings, and authorizing the action—held that the original objection to the title to insist was thereby cured, and remit made to the Lord Ordinary to proceed with the action.

b. 5, 1836.

1st Division.

L. Fullerton.

In April 1835, an action was raised in name of Robert Wylie, ship owner in Kincardine, setting forth, that he had granted a heritable bond for £500, in 1830, to Robert Adam, writer in Falkirk: that in October 1834, the pursuer had sailed, in prosecuting his trade, from London to Bahia on the coast of Brazil: that Adam, in his absence, had insisted for payment of the bond, and refused to delay till his return to Britain, and had used letters of inhibition against him, and served a schedule of intimation at his dwelling-house, in terms of the bond, with a view to proceed to a sale of the subjects, on the expiry of the period of intimation: that within the currency of the intimation, the pursuer's law agent procured a party (Thomas Hutchison), who agreed to pay the debt and take a transference to it; and that the agent had accordingly applied to Adam for his grounds of debt so as to enable him to prepare a disposition and assignation in favour of Hutchison, of which deed a draft was sent by the pursuer's said agent to Adam: that the amount of account due to Adam was taxed, under a reference, and the pursuer's agent, who acted for Hutchison, afterwards offered payment of the whole account justly due to Adam, as well as of the principal and interest due under the bond, and intimated to Adam's Edinburgh agents in terms of his letter afterwards quoted, that unless the draft-assignation was immediately returned so as to get the matter closed, "I (the agent) shall, in order to entitle my client to the legal rate of interest, consign in bank the principal sum interest and taxed amount of the account, and bring action against the creditor to compel him to grant the transference in favour of my client:" that this offer of payment was refused, whereupon Hutchison consigned in bank the amount, including principal, interest, and taxed expenses, on a deposit-receipt, &c. The summons concluded declarator that the pursuer had fully satisfied the bond, and expenses; that Adam was only entitled to bank-interest on the sum consigned; that Hutchison was entitled to the interest at five per cent in terms of the bond, from and after the date of the summons: and farther that Adam should be decerned to return the draft of the assignation of

lam pleaded in defence that the action was raised without any writ, the pursuer being abroad, and not even in the knowledge that a step was taken: the action ought therefore to be dismissed.

the Lord Ordinary, "in respect that the pursuer, Robert Wylie, in the name the action is brought, is now forth of the country, and that sufficient mandate is produced to authorize raising such an action, ordered the first defence, dismissed the action, and decerned, and found the defender entitled to expenses." *

NOTE.—In this case the defender is the holder of an heritable bond, containing power of sale, on certain property belonging to Robert Wylie, in whose name the action is raised; Wylie being absent from this country, the defender intimated to his family and agent his intention to call up the money, and, on failure of payment, to exercise the power of sale granted in the bond. His agent very properly took steps for preventing this, by raising the sum on a proposed transfer of the security, and this was agreed to by the defender, who was and still is willing to grant assignation to Mr Hutchison, by whom the money was to be advanced. The point truly remaining to be settled, was the amount of the expenses to which the defender was entitled. An account of these expenses was adjusted, on a reference to the Auditor of Court, by the defender and the agent for Mr Hutchison, who was also agent for Mr Wylie. A difference seems then to have arisen, whether the effect of the reference was not limited to Mr Hutchison, or was effectual and binding as to Mr Wylie; and the defender proposed to insert in the assignation to be made, a reservation of any further claim for expenses he might have against Mr Hutchison beyond the sum as adjusted by the Auditor. Whatever might be the merits of this reservation, it does not appear to the Lord Ordinary to have presented any insurmountable obstacle to the completing of the transaction, as it was merely a reservation of a personal claim against Mr Wylie, whose defences, of course, must have been

No. 128. A reclaiming note was lodged in name of Wylie, and, before it came to be advised, a mandate was obtained from him, dated 30th September, 1835, which narrated the alleged cause of the action, and stated that his agent "with concurrence of Thomas Hutchison, raised an action of declarator, implement, and damages, at his (Wylie's) instance, &c.;" that the action had been dismissed for want of a sufficient mandate; "and now, seeing that the said measures upon my part were adopted to protect my rights and interests during my absence, and that it is necessary for me to intent and follow out the same; therefore I have homologated, &c., as I hereby homologate, &c. not only the whole proceedings above narrated, &c." The mandate also empowered the farther prosecution of the action.

5, 1836.
 Tod's Trustees
 Melville.

After this mandate was produced, the defender objected, that, as the action was originally raised without authority, and was not truly at Wylie's instance, the case was different in principle from any cause which a party had actually authorized but omitted to execute a formal mandate to carry it on when going abroad. The defect, in this case, was radical and incurable.

THE COURT, without calling on the pursuer's counsel, altered the interlocutor, in respect of the mandate produced, and remitted to the Lord Ordinary to proceed.

HUTCHES and MEIKLEJOHN, W.S.—GOLDIE and PONTON, W.S.—Agents.

No. 129.

TOD'S TRUSTEES, Pursuers.—*M'Neill.*
 DAVID MELVILLE, Defender.—*Keay—Walker.*

Agent and Client—Commission.—Circumstances in which held that no claim lay for commission on a course of cash transactions between parties standing in the relation of agent and client.

5, 1836.

DIVISION.
 Ld. Jeffrey.
 F.

PRIOR to the year 1796, the late Mr Alexander Melville had become a client of the late Mr George Tod, W.S. From that period down to 1829 or 1830, a variety of transactions were carried on between them for their mutual convenience, and in their relation of agent and client. Melville was collector of Government taxes in the stewarty of Kirkcudbright, where he chiefly resided, Tod being for some years cautioner for him in the annual bonds to the Crown and the county for his intromissions. Tod, who carried on business in Edinburgh, was in the habit of receiving

more inexpedient and injurious to all parties can well be conceived than the present action, which must have the effect of postponing the transference of the security, and of most unnecessarily creating a loss of interest on one side or the other. The Lord Ordinary thinks that a very special mandate indeed from Mr Wylie would have been required to raise or maintain such an action; and, as no such mandate been produced, he thinks that the action must be dismissed."

1799 down to 1821, accounts, setting forth the state of the transactions between them, were at different intervals rendered by Tod to Melville, fully signed and docqueted, the docquets bearing that the vouchers were delivered up, while the balance in the respective accounts was forward to the credit of Melville. Subsequent to 1821 there was no account-current rendered down to 1st January, 1828, the balance being always in favour of Melville. These last accounts, not docqueted, were homologated by relative correspondence.

Of the accounts was any mention made of commission, though such cash transactions were given in detail, nor was there any mention of that or other claims.

Melville died in 1832. Thereafter, David Melville, his son and executor, and Tod, instituted mutual actions; that at the instance of Melville concluding for count and reckoning and payment of the balance of Tod's intromissions since March 1821, and the other, at the instance of Tod, concluding for count and reckoning from 1799, and payment of a balance of £798, alleged to be due to him on the whole state of accounts, and also for relief of the cautionary obligations come under by him to Mr Melville, when collector of taxes. After these processes, which were subsequently conjoined, had been raised, Mr Tod died, and his remains were interred in his room.

In support of their action the trustees alleged, that there never had been any final settlement of accounts between the parties; that the statements rendered did not comprehend Tod's whole charges, and in particular did not contain his professional charge for commission, nor his travelling postages and incidents, and for the share of an Edinburgh

No. 129. titled to make it in his final account, and that there was no room
 application of the triennial prescription to a case such as this, wh
 b. 5, 1836. were unsettled accounts between the parties, and mutual claims.
 d's Trustees
 Melville.

Melville answered, that the trustees were bound by the sta
 counts, as brought down to January, 1828; that they were bar
 taciturnity of thirty years; and their claim besides cut off by t
 nial prescription.

The Lord Ordinary pronounced the following interlocutor,
 of the action at the instance of Tod's trustees, and reserving 1
 counter-claim, and added the note subjoined:—" Finds, That t
 and tenor of the various accounts which were rendered and regul
 queted, and the vouchers given up by the parties from 1799 to 1
 of the several subsequent accounts, which were made out and rer
 the original pursuer, George Tod, now deceased, up to 1828, '
 transactions between the parties substantially ceased, together
 letters written by the said George Tod, along with or relative
 the said sets of accounts, make it incompetent for the said Geo
 or his trustees (who have been regularly sisted as his represen
 both actions), to insist in the claim for commission on the cash
 tions, embraced in the foresaid accounts, which is now set for
 action at his instance, or in the claims for certain average and a
 conjectural charges for stamps, postages, clerks, and incidents,
 posed to be made, in addition to the specific charges of the sam
 tion, which occur in the aforesaid docquetted or rendered account
 That in respect of the accounts and correspondence above menti
 of the taciturnity of the pursuer for so long a period, no claim ca
 made by the said George Tod or his representatives for one-thi
 the price of a newspaper said to have been sent by him to the l
 ander Melville, from 1808 to 1833: Finds, separatim, That th
 now pursued for by the said George Tod has fallen under the
 prescription—the latest entry in the said account, with the exc
 that for the newspaper, and these for slump annual charges for
 stamps, postages, &c. (all now disallowed), is dated in July 183
 action at his instance was not executed till February, 1834; a
 fore, and in respect of the whole circumstances of the case, su
 defences stated against the action at the instance of the said Geo
 assoilzies the defender from the conclusions of that action, and
 and in the counter action at the instance of David Melville, Fi
 the accounting between him and the said George Tod and his
 tatives must proceed upon the footing of the whole previous ac
 tween the parties having been closed by the docquet mutually
 by them on the 5th of March, 1821, and of the said George T
 bound, by whatever appears on the face of the accounts sul
 made up and rendered by him to the deceased Alexander Melv
 that, before extracting any decree for the balance which may be
 found due to the said David Melville in these accounts, he, th

" The case of *Scott v. Gregory's Trustees*, 24th February, 1832 (10 Shaw, seems a precise authority for holding that commission charges for payment of y in the account of a man of business, fall under the triennial prescription, as is the other charges in such an account. And the Lord Ordinary is not of opinion that this defence is obviated by the circumstance that the party pleading it is the pursuer of a counter action of count and reckoning, inasmuch as that was not raised till after the period of prescription had elapsed, and when previously prescribed claims could not be pleaded even in compensation, and were ground of defence. But the fact here is, that these claims are insisted to the extent of near £800, after extinguishing all the counter claims of the opposite party, and it is only as against the petitory conclusions for this sum of all balance, that the defence of prescription is, by the form of the interlocutor, made.

But, independently altogether of prescription, the claim for commission is disallowed, on the plain ground, that it is sufficiently evident from the circumstances in case, that it was never intended between the parties that it should be made, that it was purposely omitted by the pursuer in the different accounts which were settled and rendered for so long a course of time, and must now be held to have been substantially waived and abandoned by the terms of these accounts, and in various letters in regard to them.

If the charge had been one for an ordinary and clear debt, which could not have been remitted except from a purpose of pure donation, like a charge for commodities furnished, or interests confessedly due, its mere omission in a series of general statements, however precise, would not, perhaps, afford sufficient grounds for presuming that it had been abandoned. But the charge for commission on money received and paid over is quite in a different situation; and, though legalized in modern times, was neither a very common charge when the dealings of those parties began, nor is yet very explicable, upon the principles of risk, skill, or personal trouble. As a per centage upon the sums passed through hands, the profits are as exorbitant where those sums are very large, as they are insignificant where they are small. To cash a draft on a deposit account for £10,000, and pay it into the hands of the receiver-general, is an operation as easy and safe as doing the same with a bill of £10, and may not only appear scarcely to justify a charge of £200, but

of accounts, it appears that Mr Tod was from first to last very largely in the hands of Mr Melville, his employer, and was in fact allowed to retain at each time sums varying from £1500 to £5000 of his client's money, for his own accommodation; and the correspondence shows that he was fully aware of this indulgence, and duly grateful for it. It is not very wonderful, that he should have charged no commission for drawing £3000 of his money, when it appears that he generally kept half of it in his own hands, without any special warrant, or that he finally paid it into his account with the bank in general, without seeking any farther profit than he had already made, but for three or four months at his disposal. It is very true that he always kept himself with interest for the sums so retained; but it would be quite reasonable to hold that this discretionary power of retaining, without security or prevention, and just so much, and for so long as he needed it, and no longer, is a man in business, and often pressed for money, a very valuable accommodation, and such as most men would gladly have purchased, by the small troubling and paying over a few large sums eight or ten times in a year.

"The correspondence, however, in the Lord Ordinary's apprehension, is clear and certain, which the tenor of the accounts and the circumstances mentioned make so highly presumable. From first to last, the letters accompanying the accounts apologize for the magnitude of the balances which they shew to the writer, and frequently beg indulgence, and promise speedy remittance of their liquidation. Take, for example, that remarkable letter of the 29th of December, 1827, accompanying one of the very last accounts so rendered by Tod. After mentioning that the balance, brought down to 1st January, 1828, is £1868, 1s. 6d., at his debit, he adds, "I hope it will be convenient for you to let this balance still to remain in my hands for some time longer, at five per cent. interest," the ordinary rate for a shorter period being four per cent. The Lord Ordinary finds it quite impossible to believe, that the man who writes, and who has been in the practice of writing in this manner, for a period of more than thirty years, was not understood and believed that his correspondent understood that he was a creditor for large sums of commission, amounting at the date last mentioned to more than £3000. The case of Young against the Phoenix office, 5th December 1834 (12 Shaw, 680), and that of Young v. Bell, decided by Lord Corehouse in December 1834, seem to have been far weaker cases than the present.

"The other articles, viz. the new charges for stamps, notaries fees, and

DE GLENLEE and MEADOWBANK having concurred,

THE COURT adhered.

JAMES WRIGHT, W.S.—WALKER, RICHARDSON and MELVILLE, W.S.—Agents.

JAM DRUMMOND, for FIFE BANKING COMPANY, Pursuer.—*Robert-son—Munro.* No. 180.

ROBERT W. RANNIE, Defender.—*Keay—Mackenzie.*

lower.—A party guaranteed to a bank payment of the balance of a bill that remain after "their ranking upon the estates" of the acceptors, two in number of the one being at the time sequestrated under the bankrupt statute, and one of the other being under sequestration at the instance of his landlord for the bank neither claimed nor took any steps as to the latter, who, after some time without leaving any funds, but who had, in the mean while, paid a commission of 5s. in the pound to certain of his creditors.—Held, That by the neglect of the bank, the cautioner was totally liberated, and that any enquiry as to what had been recovered by the bank was irrelevant and inadmissible.

the year 1816, the Fife Bank granted a credit for £300 to Charles Hill, residing at Easter Cash, under a bond executed by him, together with his brother, James Greenhill, one Baxter, and the defender, who was Charles Greenhill's brother-in-law. This credit was called upon by Charles Greenhill till 1821, when it was recalled, the balance due the bank upon his cash account being £370. On this occasion Charles and James Greenhill (Dec. 27, 1821) accepted two bills

Feb. 5, 1836.

2^d DIVISION.
Ld. Moncreiff
R.

and I consider that it was your duty to have enquired whether was retired, in order that you might have got up your obligation; however, I am always very averse to enter into litigation, which is attended with expenses to all parties, I have no objections, in order to avoid it, to rank upon the estates of the Messrs Greenhills for the amount due, and to draw the dividends that may be got from them, and, in the mean time, to delay proceeding against you, you being responsible for any deficiency that may eventually take place. I hope you will consider this as more than reasonable, the more especially as, had I obtained payment from you by diligence, you would just now, in all probability, have been a creditor of Charles Greenhill's alone, to the same amount where I suspect there will be nearly a total loss."

To this Rannie answered (Dec. 16) as follows :—" SIR— I subscribed a bond of credit to the Fife Banking Company for Charles Greenhill of Easter Cash, to the extent of £300 sterling, along with James Greenhill of Cordon, and James Baxter, writer to the signet, the same having been called up by the said banking company, there appeared to be a balance due thereon by the said Charles Greenhill on the 27th December, 1821, of £370 sterling, which balance, it was agreed should be settled by two acceptances by the said James and Charles Greenhill to me, and indorsed by me to the said Banking Company, of which acceptances, dated the said 27th December, 1821, at six per cent, for £197, 5s. 6d., I understand still remains in the hands of the bank retired. Now, although recourse has been lost against me on the first acceptance, by the bank not intimating to me the dishonour of the same, yet to avoid legal measures being resorted to, I do hereby bind and

ing on a farm on which he was tenant, were under sequestration by
ndlord, taken out in the preceding month of November. The
ranked on James Greenhill's estate, but made no claim in the
of sequestration against Charles, nor otherwise made any effort
over payment from him. In 1824 the Bank drew a dividend of
a the pound from James Greenhill's estate, and for the balance still
ning due the then cashier of the Bank made a demand on Rannie
ly, 1826, in answer to which, he, of date 11th July, wrote as fol-
—" I have just now received your letter, demanding payment of
and Charles Greenhill's bill for £197, 5s. 6d. You will please
re that the Bank lost recourse upon me for the debt, by not giving
gular intimation when the bill became due ; however, as I did not
to take advantage of this neglect on the part of the Bank, I agreed
any deficiency that might ultimately be due on this debt, provided
bank first ranked and drew the dividends from James Greenhill's
, which I understand will nearly pay in full. This I expect they
will do, and then I shall most willingly pay the balance." No
communication appeared to have passed between the Bank and
ie till June, 1828, when an application was made to the latter to
the plea of prescription on the bill. This Rannie consented to, by
allowing letter, of date June 28, 1828, addressed to the Cashiers of
bank :—" Having agreed, as mentioned in my letter of 10th July,
, to pay any deficiency that might arise on James and Charles
nhill's bill to me for £197, 5s. 6d., on condition that the Fife Bank,
still hold said bill, first ranked and drew the dividends on James
Charles Greenhill's estates ; and understanding that there is an obsta-

No. 130. management of a trustee for his creditors, and upon that estate the Bank have ranked in fulfilment of the condition in your first letter. (C. 5, 1836. *Summond v. Rennie*.) receiving a final dividend from his estate, they will therefore claim of you for any deficiency, without waiting to discuss Charles Greenhill whom you must just take into your own hands. They have no doubt claim against him also; but as he has no estate on which the Bank can rank, the insertion of his name in the second letter was improper. I wish therefore, you would write a new letter leaving out his name, and I shall send you, upon receipt of it, the one I got from you." Rennie replied (17th July):—"My being from home was the reason your favour of the 1st July was not answered sooner. You will observe my first letter to the Fife Banking Company, dated Cupar-Fife, 16th December 1823 (a copy of which I have subjoined), is the one that binds me to pay any deficiency that may remain due upon the Messrs Greenhills' bill for £197, 5s. 6d., after the Bank first ranks and draws the dividends from Charles and James Greenhills' estates. My second letter, dated 10th July, 1826, is in reference to the first, and I consider the Bank has a right to apply to me for any part of the bill, until they have ranked and drawn all the dividends from both the estates of Charles and James Greenhill." On the 9th September thereafter, the agent of the Bank wrote Rennie in these terms:—"I have duly received yours of the 17th July, with the copy of your obligation respecting your bills to the Fife Bank of the 16th December, 1823, which certainly shows that you granted the obligation contained in it, on condition that the Fife Bank were to rank on the estates both of James and Charles Greenhill. On enquiring for this letter at the present cashiers, I found they knew nothing about it, and only had your obligation of the 10th July, 1826, in which you do not mention that the Bank were to rank on Charles Greenhill's estates." He further added,—what, he observed, seemed to render the mistake of no consequence,—“that there was no reversion of Charles Greenhill's funds on which the bank could rank,” and requested Rennie to say if he knew of any funds belonging to Charles Greenhill on which any ranking might be made by the bank, in order that a claim might be lodged thereon. Rennie on this, returned an answer expressing his surprise at the statement of there being no reversion of Charles Greenhill's estate, and asking information; to which the agent for the bank replied by a letter, of date 29th September, with a state of the sale of his sequestrated effects, bringing out a balance of £57 still due to the landlord, from whom the information had been received. To this letter no answer was returned by Rennie, and no farther communication took place between him and the bank for some time.

In 1832, a final dividend of 3s. was received by the bank from the estate of James Greenhill, leaving still due on the £197 bill, a balance of £121 10s. 2½d., including interest. For payment of that sum, the pursuer, *Summond*, as cashier of the bank, resting entirely on the obligation of

that, in 1825, Charles Greenhill had offered to his creditors a composition of 5s. in the pound, which had been accepted by and paid to them, but that the bank had not claimed it. They averred, that the effects sequestrated by the landlord were sold by him, and insufficient to discharge the rents, for which they were hypothecated, and left no reversion on which the general creditors could have claimed; that Rannie was himself a creditor of Charles, and never claimed his share of the composition; that Charles never acquired funds therefrom, and that he died in 1828 in a state of derangement, and without any property; and they contended—

that the obligation undertaken by them in the letters between them and Rannie was simply to rank on the estates of the two brothers, the one sequestrated under the Bankrupt Act, and the other under judgment of sequestration, at the instance of the landlord; but that the letters did not import any obligation to discuss these parties.

That the averment, that the sequestrated effects of Charles Greenhill were entirely absorbed by the preferable claims of the landlord, was intended to elide Rannie's plea, independent of the allegation which they were willing to substantiate, that he never acquired any estate out of which payment could have been effected; and,

that, at all events, they could only be bound to deduct the dividend of 5s., which was the utmost that, by having ranked, it could be proved they would have drawn from Charles.

On this it was answered, that any enquiry as to what might have been realized from Charles Greenhill was altogether irrelevant, as the obligation on the part of the bank to implement their obligation entirely

No. 130. by neglecting duly to discuss Charles Greenhill, or to use due means for rendering the debt effectual against him or his estate, have lost their recourse on the defender, in virtue of the letters libelled on, for the contents of the bill therein referred to; finds that no other ground of liability is set forth in the libel; therefore sustains the defences, assoilzie the defender, and decerns; finds expenses due, and remits the account, when lodged, to the auditor to be taxed."

Drummond, for the bank, reclaimed.

LORD JUSTICE-CLERK.—This would be a case of great importance if we were to depart from the principle of the Lord Ordinary's interlocutor. The obligation, it is clear, is a direct cautionary obligation. The defender became bound to pay the deficiency under this particular bill, and, looking at the whole letters from beginning to end, it is clear that it was meant that the bank should proceed against the estates of both Charles and James. It was an engagement of guarantee under a condition, and the party enforcing the guarantee must show he fully complied with the condition. The violation of the condition precludes all enquiry as to the injury actually sustained, and we are not to go into an investigation of what might have been the result of pressing the debtor. That is not a legitimate object of enquiry, if we are satisfied that it was a strict cautionary obligation. Now what was the duty of the bank? It is expressly covenanted that the bank was to rank on both estates. Then what does ranking mean? Not that they were to be satisfied with having *heard* that the estate was not worth claiming on. That is not what the law implies. It requires the party to proceed to discuss him according to law, whether by claiming, if his estate be sequestrated, or by other diligence if it be not. It is, however, admitted there was a composition contract entered into by Charles, and that certain

'James and Charles Greenhill,' by which was plainly meant, that they should use all competent means to recover payment from them.

" 3. It is clear to the Lord Ordinary that the second letter was meant to express mere renewal of the obligation in the first, though the name of Charles was casually omitted. And this is clearly explained by the third letter, and the correspondence which followed on it.

" 4. The Lord Ordinary is satisfied, on the facts disclosed on the record, and the letters of correspondence produced, that the pursuer, or those acting for the bank, did entirely omit to take any proper means for discussing Charles Greenhill or his estate. He thinks it is shown that they might have recovered something. But, being clear to him that they did not pursue the measures which were evidently competent, and naturally called for in the circumstances, he is of opinion that it is not now necessary to enter into any nice reckoning of the sum which they might not have recovered. They have failed to comply with the condition on which alone the defender agreed to hold himself liable, and therefore the Lord Ordinary is of opinion that he is entirely liberated. The case of *Fleming v. Thomson* in the House of Lords, May 28, 1826, appears to settle the principle which must regulate such a case.

" 5. It was evidently not incumbent on the defender to do any thing, or to give any notice to the pursuer regarding Charles Greenhill or his affairs."

er.

D GLENLEE.—I am afraid I must concur. In considering the effect of the obligation I was a good deal influenced by the terms of the third plea of law pursuers. At the date of the obligation there was pending a sequestration

Charles at the instance of his landlord, and the condition that the bank might not be bound to look after Charles quoad what have they to say as to this sequestration at the instance of the bank in which they took no steps, and might have drawn a dividend? This therefore, is a plain admission that they have failed to do that which was the immediate object in contemplation at the time of the agreement, and how much I regret that the libel is so drawn as not to admit of any other claim under the guarantee, I have not courage to go against the interlocutor.

D MEDWYN.—I have doubts whether the principles of law compel us to

This case is totally different from that of magistrates and messengers acting their duty in regard to debtors under diligence. As to the import of the obligation I differ from the Lord Ordinary. I do not think it imports that the bank was to discuss the debtor. They were only to rank on the estate and draw dividends; and when we see this party himself did not rank on Charles's estate and look at the situation of Charles, I hesitate much to hold him liberated.

Charles was not sequestrated under the bankrupt statute, but there was merely a sequestration of the effects on his farm by his landlord, and these are averred to have been exhausted by the preferable claim for rent. The case is very different from what it would have been had the bank failed to rank on James's estate.

If it can be shown that nothing would have been got by ranking on Charles's estate, where was the obligation to incur expense by such proceeding? If satisfied the bank was not bound to discuss him, and though the subsequent correspondence did not affect the obligation actually undertaken origi-

No. 131. MRS AGNES KERR or M'ROBERT and HUSBAND, Pursuers.—*Brodie—*
R. Robertson.
 v. 6, 1836. ALEXANDER MARTIN, Defender.—*M'Neill.*
 v. Martin.

Personal Objection—Process.—A party raised a reduction of a decree which he stated in his summons to have been pronounced in two processes, which were conjoined; he repeated, in the record, an explicit averment that there had been a conjunction of the processes: the Lord Ordinary assoilzied from the reduction; and the party reclaimed, and stated, in a minute, that the processes had never been conjoined, and that only one of the processes was before the Judge who pronounced the interlocutor of conjunction, and therefore that the subsequent decree was necessarily irregular and inept:—held that the party was not entitled to state the objection relative to the non-conjunction.

v. 6, 1836. MRS AGNES KERR or M'ROBERT, and Husband, having obtained the benefit of the poor's-roll, raised a reduction reductivé against Alexander Martin in Laigh Craigmore, in which they called on him to produce "pretended decree of reduction and absolvitor obtained before the Lord of Council and Session on 4th June, 1824, &c., in two conjoined processes of reduction and declarator." The summons stated the institution of the two processes, first, of declarator by the pursuers, and second, reduction by the defender; and also the import of the decret; and libelling the third reason for reducing "the said decret," it stated that a certain plea was maintained "in the aforesaid actions, whereupon the said Lord Eldin, Ordinary, the said actions having first been conjoined pronounced therein the following interlocutor, of date the 27th February 1824: 'Having heard parties procurators in these conjoined processes of reduction and of declarator, before answer, appoints the pursuer of the reduction to state, in a special condescendence, the facts and circumstances,'" &c. The summons then stated that the condescendence was not lodged, but, that, after again hearing parties, the Lord Ordinary, on 4th June, 1824, "sustained the reasons of reduction, &c., and in the declarator, assoilzied," &c. Having quoted the decree, it concluded, in common form, that it should be reduced.

In making up a record, in the reduction reductivé, Martin averred that "the action of reduction was conjoined with the said action of declarator."—"In these conjoined actions, the pursuer represented himself," &c.

The pursuers answered in these terms:—"Admitted, with reference to the proceedings themselves, and the pursuers' statement of facts, article 4th."

In article 4th of the pursuers' own statement, here referred to, they state the institution of the two actions, and that "the actions of declarator and

daction having being conjoined, Lord Eldin, of this date, pronounced an *interlocutor*, " &c., ordering a condescendence.

In the reduction *reductivé*, the record was closed, and the Lord Ord- ^{Feh. Kerr}
ry having heard parties, pronounced an *interlocutor*, finding, *ex proprio*
ctu, " that before farther procedure in this cause, the original process
 which the decret of Lord Eldin, now under reduction, was pronounced,
 not be produced, in order that the state of the said process at the time
 when the said decret was pronounced, may be seen." This production
 having been made, his Lordship made *avizandum*, and pronounced an
interlocutor, sustaining the defences of Martin, and *assoilzieing* him.

The pursuers reclaimed, and now made a statement to the Court, that,
 the date when the *interlocutor* of conjunction was pronounced, by Lord
 Eldin, the two processes were not before his Lordship, but one of them,
 the reduction, was still before Lord Alloway, under an order to satisfy
 a production; that it was only after great *avizandum* to the Inner
 House, and a subsequent remit to Lord Eldin, on 21st February, 1824,
 being nine days after the *interlocutor* of conjunction, that the reduction
 was brought to depend before Lord Eldin at all, and that no new *interlo-*
cutor of conjunction was ever pronounced. In these circumstances, the
reducere, which proceeded upon the assumption that a previous conjunction
 had taken place, was incompetent, and it was *pars judicis* to notice this
 action of incompetency which was radical and incurable. The pursu-
 ers were not liable to any personal exception for not stating this at an
 earlier stage, as they were litigants on the poor's-roll, and had not acted
culpa fide, but had truly been ignorant of the state of the processes.
 At any rate, personal objection, in the conduct of a litigant, could
 not create a jurisdiction in a judge who had none.

The pursuers separately objected, that, any *interlocutor* of conjunction
 should necessarily be written on both processes: and that the *interlo-*
cutor in this instance was written only upon one, which arose from
 there being only one process then before Lord Eldin.

The defender answered that a party on the poor's roll was liable to all
 the rules, respecting the regularity of judicial procedure, which applied
 to any other litigant. The pursuers were bound to have known the state
 of these processes when the new reduction was raised, and to have
 acted accordingly: but in place of this they had explicitly stated both
 in the summons and in the record, that the processes had been conjoined,
 they closed the record upon that statement. They were therefore
 legally barred from making a contrary averment now, and the Court
 did not listen to it. But if it was open for inquiry, then, as the *interlo-*
cutor of Lord Eldin, of 27th February, 1824, ordering a condescend-
 ence, expressly bore, " having heard parties procurators in these con-
 ditioned processes;" and as both parties proceeded on the footing of this
 recorded sufficient evidence that *de facto* there had been

No. 131. **MRS AGNES KERR or M'ROBERT and HUSBAND, Pursuers.—Bro
R. Robertson.**
J. 6, 1836.
T v. Martin. **ALEXANDER MARTIN, Defender.—M'Neill.**

Personal Objection—Process.—A party raised a reduction of a decree which was stated in his summons to have been pronounced in two processes, which were joined; he repeated, in the record, an explicit averment that there had been conjunction of the processes: the Lord Ordinary assoilzied from the reduction; a party reclaimed, and stated, in a minute, that the processes had never been joined, and that only one of the processes was before the Judge who pronounced interlocutor of conjunction, and therefore that the subsequent decree was manifestly irregular and inept:—held that the party was not entitled to state the objection relative to the non-conjunction.

J. 6, 1836. **MRS AGNES KERR or M'ROBERT, and Husband, having obtained benefit of the poor's-roll, raised a reduction reductivé against Alexander Martin in Laigh Craigmore, in which they called on him to produce a pretended decree of reduction and absolvitor obtained before the Court of Council and Session on 4th June, 1824, &c., in two conjoined processes of reduction and declarator."** The summons stated the instigation of the two processes, first, of declarator by the pursuers, and secondly, of reduction by the defender; and also the import of the decret; and in libelling the third reason for reducing "the said decret," it stated that a certain plea was maintained "in the aforesaid actions, whereupon the said Lord Eldin, Ordinary, the said actions having first been conjoined and pronounced therein the following interlocutor, of date the 27th February 1824: 'Having heard parties procurators in these conjoined processes of reduction and of declarator, before answer, appoints the pursuers to state the reduction to state, in a special condescendence, the facts and circumstances,'" &c. The summons then stated that the condescendence was not lodged, but, that, after again hearing parties, the Lord Ordinary, on 4th June, 1824, "sustained the reasons of reduction, &c., in the declarator, assoilzied," &c. Having quoted the decree, it concluded, in common form, that it should be reduced.

In making up a record, in the reduction reductivé, Martin averred "the action of reduction was conjoined with the said action of declarator."—"In these conjoined actions, the pursuer represented himself," &c.

The pursuers answered in these terms:—"Admitted, with reference to the proceedings themselves, and the pursuers' statement of facts, decree 4th."

In article 4th of the pursuers' own statement, here referred to, they stated the institution of the two actions, and that "the actions of declarator

been made, his Lordship made avizandum, and pronounced an order, sustaining the defences of Martin, and assoilzieing him.

The pursuers reclaimed, and now made a statement to the Court, that, when the interlocutor of conjunction was pronounced, by Lord Eldin, the two processes were not before his Lordship, but one of them, only, was still before Lord Alloway, under an order to satisfy the reduction; that it was only after great avizandum to the Inner House, and a subsequent remit to Lord Eldin, on 21st February, 1824, nine days after the interlocutor of conjunction, that the reduction might depend before Lord Eldin at all, and that no new interlocutor of conjunction was ever pronounced. In these circumstances, the Court, which proceeded upon the assumption that a previous conjunction had taken place, was incompetent, and it was *pars judicis* to notice this ground of incompetency which was radical and incurable. The pursuers were not liable to any personal exception for not stating this at an earlier stage, as they were litigants on the poor's-roll, and had not acted negligently, but had truly been ignorant of the state of the processes. In any rate, personal objection, in the conduct of a litigant, could not impeach a jurisdiction in a judge who had none.

The pursuers separately objected, that, any interlocutor of conjunction should necessarily be written on both processes: and that the interlocutor in this instance was written only upon one, which arose from the fact that only one process then before Lord Eldin.

The defender answered that a party on the poor's roll was liable to all rules, respecting the regularity of judicial procedure, which applied to other litigant. The pursuers were bound to have known the state

No. 131. a conjunction, or at least, it barred the pursuers from founding on the want of such conjunction. As to the allegation that the interlocutor of conjunction was only written on one process and not on both, it was irrelevant and immaterial.

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err v. Martin.

The Court allowed these facts and pleas to be stated in a minute and answers, and then disposed of this question before entering on the rest of the cause.

LORD BALGRAY.—The pursuers, who take this objection, were participant in the irregularity of which they now complain. I think they cannot be heard to object to an irregularity which it was in their power to prevent at the time; they are equally barred, whether they failed to prevent it from negligence or design.

LORD PRESIDENT.—I am of the same opinion. I have no doubt the decree was irregular, but is it competent for these parties to found on the irregularity? I think the plea of competent and omitted debars them from doing so. A long litigation has gone on, in which they have failed to notice this irregularity, which should have been founded on, in limine. Undoubtedly there could be no admission of this new statement without the previous expenses being paid; but even on that condition, I apprehend the pursuers have no right to state this objection. It comes a great deal too late.

LORD MACKENZIE.—There is one part of the summons which explicitly set forth that the processes were conjoined: the same statement is made expressly by both parties in the record, and then the record is closed. In the teeth of all this, is a party to be allowed to reverse his own allegations on record, and state that there was no conjunction? I cannot think there is the smallest foundation for the plea of *res noviter*. And the fact just appears to be that the pursuers deliberately chose their ground and set forth that there had been a conjunction; and having done so, I think they should not be permitted to play fast and loose, but should now be held to the ground which was selected by themselves. And besides this obstacle to their being allowed to state the plea at all, I think that even if they could state it, they would be barred by a personal objection from taking any benefit under it. They acquiesced in the interlocutor of Lord Eldin which expressly narrated that the processes were conjoined. They adopted, or acted upon, that interlocutor in foro, and the former actions proceeded on the footing that there had been a conjunction. In all the circumstances, I consider myself bound to hold that there was a conjunction of the processes; the averments on the closed record in this action prove it; and the pursuers are barred from stating any thing to the contrary.

LORD GILLIES was understood to express a doubt whether the actings of parties could be viewed in the former process as equipollent to an interlocutor of conjunction, which was the proper act of the judge alone: and, whether, if there was no conjunction, it was not now *pars judicis* to notice this, the processes themselves being before the Court.

THE COURT found that the pursuer was not entitled to state the objection relative to the want of conjunction of the processes of reduction and de-

tion.—Certain issues having been prepared for trial, and subsequently
 e an arbiter, with full power to determine the matters therein contained,
 same manner and as fully and freely " as could have been done by a judge
 —Held, That although the arbiter, in his findings, should have given a wrong
 ion to the issues, this would only amount to an error in judgment, and
 sand for suspending a charge on the decree as being ultra vires.

CESS of declarator was for a considerable time in dependence, at Feb. 6. 1836.
 nce of the late Mr Kinloch of Kinloch against the suspenders, 2d Division.
 n and Miller, to have it found and declared that their lands of Bill-Chamber.
 and Tullyfergus were astricted, cum omnibus granis crescentibus, Ld. Cockburn.
 ch's mill of Blacklaw.¹ In 1831, the cause having been remitted T.
 ary Court, the following issues were adjusted :—
 eing admitted that the pursuer,* Anderson, is proprietor of the
 Upper Chapelton, and of Chapelton of Saint Fink, and that the
 Miller, is proprietor of the lands of Tullyfergus ; and it being
 by the pursuers that they have established, by prescription, an
 y from thirlage to the mill of the defender, Kinloch, of omnia
 escentia ;
 ither for forty years or upwards, or for time immemorial, the
 Anderson, or his predecessors, proprietors of the said lands of
 Chapelton, and of Chapelton of St Fink, have paid multure to the
 . only on all grain which he or they had occasion to grind, and
 ll grain growing on the said lands of Saint Fink.
 ither, for forty years, or for time immemorial, the pursuer, Mil-
 predecessors, proprietors of the said lands of Tullyfergus, have

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 lerson v.
 loch.

After the case had been set down for trial, the parties submitted to Sheriff-Substitute of Forfar, as arbiter, "the whole matter contained the said issues; with full power to him to take all manner of probat thereanent, to hear parties thereon viva voce, or by written pleading and to fix, determine, and declare the matters contained in the said issues in the same manner, and as fully and freely in all respects as could have been done in the Jury Court, and by the Jury and Judge or Judges therein, if the case had been tried before them, and the said issues had been fixed and determined by the verdict of a jury; with power also, quod ultra, to fix and determine, and to bring to issue the said action of declarator, and to judge in and decide upon the question of expenses incurred in said process, and to be incurred in the course of this submission, and to give decree therefor against either party in favour of the other, in the same way, and to the like effect of a final issue to the cause, as if it had continued before the Lords of the Second Division, and been decided by their Lordships, after a verdict had and obtained from a jury." The parties bound themselves to fulfil "whatever the arbiter should do or determine," under a penalty of £100, over and above performance; and they consented to the registration of "the interlocutory orders, interdicts, decrees, and decree arbitral to follow on the submission," for preservation and execution.

Mr Kinloch, the original party to the submission, having died, his son, the present charger, was sisted in his room. The arbiter thereafter pronounced an interim decret arbitral, containing the following findings: "First, I find that the said David Anderson has not proved the foresaid issue in which he was pursuer. Second, I find that the said David Miller has not proved the foresaid issue, of which he was pursuer. Third, I find it proved, That during the said pursuer's alleged possession of immunity, the proprietor of said mill was fourteen years in minority. Fourth, I find in the terms, and to the effect of a verdict on all the said issues in favour of the original defender therein, and now in favour of the said George Kinloch of Kinloch, as representing, and as the disponee of the said deceased George Kinloch his father."

The arbiter also found Anderson and Miller liable in expenses, both before and after entering into the submission, and decerned for implement of the decret, under the penalty in the submission.

Kinloch having then given a charge for payment of the expenses of the whole proceedings and of the £100 of penalty, Anderson and Miller brought a suspension on the grounds, inter alia, that the decree was null and void, in respect of its ordaining performance, under the penalty of £100, while it was only the obligation to fulfil a final decree which could not be thereby enforced; and also in respect that the arbiter had departed from the terms of the question as fixed by the issues, in reckoning the four years of the late Mr Kinloch's minority in the period of the suspension of possession of immunity; and, in support of this ground, they maintained

ing a charge on the decree.

Lord Ordinary passed the bill to the extent of the £100 of penalty for, and refused it quoad ultra; and found the suspenders liable as, subject to modification, adding to his interlocutor the note d.*

suspenders reclaimed.

MEDWYN.—Even if the arbiter had put a wrong construction on the bill, it was a mere error in judgment, to which a judge presiding at a trial would have been equally liable. But there is this difference, that a judge may be put right by a bill of exceptions while an arbiter cannot be put right.

per v. Harvey (Murray, IV., 25; and ante, VII., 267); *Loya, Mason, and others* (ante, IX., 333; and 5 W. and S. 384).

The suspenders have raised an action of reduction, under which they may obtain repetition, or any other address they may be entitled to; but the Lord Ordinary does not think that they have as yet exhibited any such prima facie titles which entitle them to have the decree-arbitral superseded summarily by suspension.

The objection that the submission does not in direct terms warrant an interim-decree, is obviated by its authorizing the registration 'of the interlocutory or interim-decrees, and decree-arbitral, to follow hereon;' by the charger being as a party to the submission on his father's death; by a minute on the deed of submission, by which he is bound 'to implement whatever decree or decrees shall be pronounced;' and by the minute of the suspenders, informing the Lord Ordinary that they left him to 'exhaust the submission by proceeding to the commission to issue an interim-decree, as he considered proper.'

The objection that the arbiter gave a wrong construction to the issues as to

No. 132. The other Judges having concurred,

6, 1836.
Whitside.

THE COURT adhered.

ISAAC ANDERSON, S. S. C.—R. PEARSON—Agents.

No. 133. ROBERT WHITSIDE, Petitioner.—*Wilson*.

Public Records.—Authority granted to transmit a royal warrant from the records of Chancery to the Home-Secretary's office to have a misnomer corrected.

No. 6, 1836. WHITSIDE presented a petition, setting forth, that, in certain Letters Patent which he had obtained from Chancery, on 17th November, an error had been made in his name, by substituting "Richard" instead of "Robert," which error had originated in the royal warrant, as sent in the records of Chancery, whereon the letters proceeded; it was necessary to have this warrant transmitted to the office of the Home-Secretary, in order that the misnomer might be corrected; but the director of Chancery and his deputies considered that they had no authority to deliver up the warrant to the petitioner, or transmit it to the Home-Secretary even for this temporary purpose, without the sanction of the Court of Session.

The petitioner, therefore, prayed the Court "to grant warrant to authorize and appoint the director of Chancery in Scotland, and his clerks, on the said letters-patent, of 17th November last, being delivered to them to be corrected, cancelled, or otherwise disposed of, either to deliver the said royal warrant, dated the 30th day of October last, to the petitioner, or his authorized mandatory, or to transmit the same to the Secretary of State for the Home-Department, for the purpose of correction; or to grant the petitioner such other relief in the premises as your Lordships shall seem just."

THE COURT granted warrant as craved.

JOHN RONALD, Solicitor—Agent.

re there was no absolute necessity for the power, and no positive loss
ave accrued from the refusal of it, the Court nevertheless granted the
aved. The factor loco tutoris on the Duke of Buccleuch's estate having
for power to make a purchase of particular lands, it was granted, 10th
1758, Craigie, petitioner.

efore, as the power now craved will not only prevent loss to the estate,
; prove positively advantageous, by enabling the tutor to pay off a num-
all debts, by means of the sum to be borrowed, we are of opinion that
r of the petition ought to be granted."

THE COURT thereupon granted authority to borrow as craved.

er's *Authorities*.—Wilson, Dec. 11, 1834 (*ante*, XLII. 176); Milne, Dec.
Th. 222); M'Gruther, July 27, 1835 (*ib.* 569); Finlayson v. Kidd, June 4,
861).

JOHN MORRISON, S. S. C.—Agent.

as CATHARINE ROSS OF MUNRO, and HUSBAND, Pursuers.—
Buchanan.

No. 185.

JOHN and ANDREW R. DRUMMOND, Defenders.—*Anderson.*

—*Diligence*.—1. Alexander Ross, not being the heir-at-law, made up titles to
, as heir under a strict entail, and was infeft: he committed various acts
l contravention, and afterwards contracted personal debts to Drummond:
l was thereafter recorded in the register of entails, and a substitute heir
eclarator of irritancy, in which defences were lodged by Ross, but decree
of the libel was pronounced (in 1805) in default of his further appearance.

No. 135. nion by the Court, (1.) That an unregistered entail is equivalent to a non-existent entail, in reference to any third party contracting with the heir in possession, and such creditor cannot be affected by any subsequent registration of the entail, nor by any proceedings founded on the entail (such as a declarator of irritancy, or otherwise) whatever may be the length to which these proceedings have gone: and, (2.) That the principle of the decision in the case of Smollett went that length.

b. 9, 1836. SEQUEL of the case reported June 11, 1828 (ante, VI. 945), which see.

T. Division.
Fullerton.
D.

The late Alexander Ross made up titles as heir of the estate of Cromarty under a strict entail, and was infeft in that character in 1787. The conditions and irritancies were engrossed in the sasines. He was not heir-at-law to his immediate predecessor, the entailer. The entail was not recorded until 1803. Prior to this time, and as early as 1796 and 1798, Ross had contracted debts by bills and a bond to the late Robert Drummond, banker in London.

In 1804* Mrs Catharine Ross or Munro raised an action against Alexander Ross alleging that he had granted heritable bonds over the entailed estate, and had committed other acts of contravention, both prior and subsequent to the personal debts already mentioned; and concluding for declarator that he had forfeited all right to the estate, that his right should be resolved ab initio, and that the estate had fallen and devolved to her, as fully and freely in all respects, as if it had never been possessed by Alexander Ross.

Defences were lodged for Alexander Ross, and afterwards, in the absence of counsel for the defender, the Lord Ordinary in January 1805 "having heard the pursuer's counsel, repelled the defences, and decreed against the defender, conform to the conclusions of the libel, and declared accordingly." This interlocutor was brought under review by representations at the instance of three several parties, Alexander Ross, Colonel Steele a heritable creditor on the Cromarty estate, and Lord Cathcart another creditor. These representations were appointed to be answered but no answers were lodged.

In February 7, 1806, Drummond obtained decree of constitution for the sums contained in the bills and bond, with interest thereon, under certain deductions. And in February 1808 he obtained a decree of adjudication of the Cromarty estate, which was recorded in the register of adjudications in April following, and this was followed up by presenting a signature in Exchequer as the lands held of the Crown. In March 1808 Mrs Ross or Munro raised a new declarator of irritancy against Alexander Ross, which, in November 1808, was conjoined with the

* None of the details connected with Ross's trading and bankruptcy in England appear to require notice.

gister of tailzies on 27th May, 1803, the estate could not, after that
be legally adjudged, or affected by real diligence in payment of
of Alexander Ross: farther, that, prior to the decrees of constitu-
ed adjudication, the estate of Cromarty had ceased to belong to
in respect that he committed acts of contravention prior thereto,
did thereby act in direct violation of the conditions imposed upon
y the said deed of tailzie, and did thereby contravene the conditions,
ations, limitations, prohibitions, and clauses irritant thereof, where-
terms of the said deed of tailzie, the said Alexander Ross, for
lf and the descendants of his own body, irritated and forfeited his
air right and title to the foresaid estate of Cromarty." The sum-
also set forth the interlocutor obtained by the pursuer in 1805 in
clarator of irritancy, " which interlocutor was not then, and has
l the present time been altered, although brought under review by
fenders, the process having been allowed to fall asleep." The sum-
concluded for declarator, 1st, That the estate was held under a
entail, and so could not be attached for the personal debts of Alex-
Ross: 2d, That the estate " could not be affected by the said de-
of constitution and adjudication, inasmuch as before the respective
thereof, the said estate of Cromarty had ceased to pertain and belong
said Alexander Gray or Ross; and it being so found and declared,
resaid pretended decret of adjudication ought and should be redu-
ce. and declared to have been from the beginning, to be now, and in
se coming, null and void," &c.
fences were lodged, and the Court assoilzed the defenders.¹ Mrs
took the judgment to appeal. The House of Lords found " that

No. 135. Under this remit the Lord Ordinary ordered cases, in which the pursuers insisted in various pleas, but the following was the only branch of the cause which was now decided by the Court.

b. 9, 1836.
 v.
 summond.

Pleaded by the Pursuers—

1. The acts of contravention of Alexander Ross were not only null in themselves, but had the effect of resolving his own right utterly *ab initio*, so that the next substitute heir would pass him by, and make up titles by serving to his predecessor. He never acquired any right to the estate, excepting under the condition of such right being resolved, *ipso facto*, by any act of irritancy: and the creditors who contracted with him, were disabled from doing any effectual diligence, against the estate, after these acts of irritancy had been committed, because their debtor had no longer any right in the estate.

2. At all events, from the date of raising the declarator of irritancy, or at least of obtaining decree in that declarator, no subsequent diligence could affect the entailed estate, his right to it having been judicially declared void and null by the decree. The interlocutor of 1805 was such a decree; and, though representations were lodged against it, it remained unrecalled. But, if necessary, it was competent still to waken and transfer the process (as the pursuers were truly in *cursu* of doing), and to insist for decree, which, when obtained, would necessarily operate retro to the date of the summons.² There was no incompetency in doing this on the ground that Alexander Ross was dead, because, where litigation had taken place, even a penal action might be transferred against the heir,³ and there was no legal ground of objection, on the plea of mora.

Pleaded by Defenders—

1. An act of contravention, even where the entail was recorded, did not *ipso facto*, resolve the contravener's right: it was generally purgeable at any time before decree in the declarator following on it.⁴ But it was unnecessary to inquire into this, because the entail was not recorded at the date when the defender's debts were contracted. As to them, he was therefore, in every sense, a fee-simple proprietor: and any acts of irritancy, whether committed before or after the contraction of their debts, could no more affect them, than similar acts of irritancy when committed by an entailer, and founded on against his creditors.⁵

¹ Wauchope, July 1, 1817 (F.C.)

² 3 St. 3, 30; 2 Mack. on Tailzies, 488, 91; 4 St. 18, 6 and 7; 3 Ersk. 8, 30; Gordon, Nov. 14, 1749 (15387); L. Craigie's Opin. in Ross, June 11, 1828 (and VI. 949).

³ 3 St. 9, 14; 4 Ersk. 1, 70.

⁴ 2 Ersk. 5, 27; Dict. v. Irritancy, 7234-53; Gordon, July 23, 1748 (7231); Nov. 18, 1766 (7289); Sandf. on Ent. 297.

⁵ Willison, Dec. 8, 1724 (15371); Hall, Feb. 17, 1726 (15378).

inciple of litigiousity, a principle which was of no avail against a
e's competing diligence, but only against voluntary deeds.¹ But
the declarators could now be prosecuted to a decree, such decree
not affect the defenders, to whom the estate lay as open as any
in fee-simple. It was in that position when their debts were con-
; and it must remain in that position, so far as regarded diligence
ment of these debts. Their decrees of constitution and adjudica-
are therefore unimpeachable.

eral other points were argued, but the Court intimated that they
not prepared to decide any other than this, without remitting in
it place to the Lord Ordinary.

ir Lordships delivered an unanimous Opinion*—

et an entail not registered has not the authority of this Court inter-
e it, and gives not the public notice which the statute requires. It is
e of no force, and equal to an entail not yet existent, in reference to any
arty contracting with any heir who is in possession of the entailed estate.
be substitutes of entail have, in reference to such creditors, no rights
e founded on the entail; and debts so contracted by such heirs are in
e situation as entailer's debts. That creditors in such debts cannot be
by any subsequent registration of the entail, which, in reference to them,
warrant; nor by any proceedings upon the entail, which, in reference to
editors, are entirely ineffectual, and such as they are not bound to ac-
lge, no matter to what extent these proceedings may have gone. That
eiple of the decision in the case of Smollett went that length, since
fter the contraction of the personal debt by an heir of entail, the entail
stered; and after the registration the estate was brought to judicial

No. 135.

Feb. 9, 1836.

Kerr v.
Cochran.

sale by the creditors, in spite of the fetters; on the principle that, in respect to the creditors, the entail was as if it never had existed, nor any thing done upon it. That this principle must equally apply in the present case to registration, and to the decree of forfeiture, or any other proceedings which or could follow on the entail in reference to creditors who contracted while entail was still unregistered."

THE COURT pronounced this interlocutor:—"Finds that the dependence of the conjoined processes of declarator of irritancy and contraven against Alexander Ross, and the interlocutor or alleged decree founded on, does not bar the claims of the defenders against the entailed estate in respect of debts contracted prior to the date of recording in register of tailzies the entail of the estate of Cromarty, and does not affect the decrees of constitution and adjudication in favour of the defenders; therefore, to that extent, sustain the defences, and repel the reasons of reduction, and decern; and with this finding remit to Lord Ordinary to proceed further in the case."

HORNE and ROSE, W.S.—A. and C. DOUGLAS, W.S.—Agents.

No. 136.

MISS EUPHEMIA KERR, Pursuer.—*Rutherford—Ivory.*
ALEXANDER COCHRAN, Defender.—*D. F. Hope—Milne.*
WILLIAM KEITH (Cochran's Trustee), Defender.—*Cowan.*

Clause—Entail—Testament—Personal and Real.—Found, on construction of settlements of a deceased party, that substitute heirs of entail taking under the settlements were, in their order of succession, personally liable to pay the provisions of certain parties beneficially interested therein; but all questions as to the effect and application of this finding in regard to any individual heir-substitute reserved.

Feb. 9, 1836.

2D DIVISION.

Jd. Moncreiff.
R.

SEQUEL of the case reported 10th March, 1835 (ante, XIII, 61) which see. On the cause being remitted to the Lord Ordinary, the question remaining to be determined was, whether, in terms of the clause of entail and general disposition of the late Archibald Cochran, an obligation was laid on all the heirs of entail successively to pay the provisions made by those deeds in favour of the pursuer and other persons similarly situated? The clause in the settlements mainly founded on by the pursuer, in reference to this point of the case, was the following:—"whereas the estate and funds, real and personal, hereby settled by me on my said son in fee-simple, may be nearly adequate to the special burden with which the same stand charged, as well as the foresaid restricted provision; therefore my said son, by accepting hereof, or my entailed estate in terms of the settlement thereof, and the heirs succeeding to him therein, stand pledged and engaged, as aforesaid, to satisfy and procure

as barred by her own mora from obtaining a declaratory ruling that substitute heirs of entail were under an obligation to make payment of provisions.

The pursuer answered that the plea of mora was not raised in the present action, and was incompetent, but that it would be reserved entire for substitute-heir who might be called upon to pay the provisions in question.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined :—" The Lord Ordinary having considered the record as

The Lord Ordinary can see no question remaining to be determined upon the record, but the abstract question involved in the demand of a declaratory judgment and decree, that, by the legal construction of the entail's settlements, obligation is laid on all the heirs of entail successively to pay the pursuer's claims, in so far as they may not have been paid before the succession of any one, and to that only he has directed his attention.

The Court have decided that the provisions cannot be made the grounds of objections against the entailed estate. The Lord Ordinary takes that judgment on the principles of it, as conclusive against the first point in this declarator. The question as to the personal liability of all the heirs in their order, is left fully and expressly open. Neither is there the slightest inconsistency between holding that the entailed estate cannot be affected, and the supposition that all heirs may be successively liable. An example of this may be seen in this deed of entail (Ap. 16), where it is declared, with regard to the provisions for wives and children, that the fee of the estate shall not be affected for them; at the same time, that one-third of the free rents, ' and the persons of the heirs or substitutes in fee or life, ' &c. and all other estates belonging to them, be liable to execution for such provisions. And a question precisely of this

No. 136. closed on the summons and defences, and the interlocutor of the
 and having heard parties' procurators on the remaining point in the
 9, 1836.
 err v.
 Cochran.

pointed reference to it in many points. The entail, from the nature of the deeds, is made in a perfectly simple form, by disposing and obliging the testator to resign the lands for new infeftment to himself in liferent, and his sons and to the heirs of entail meant to be called, under all the usual conditions of a strict entail, and with reserved powers to the heirs. But the entailer retained in himself full power to alter or revoke the settlement, or to sell, alienate, or otherwise dispose of the property at his own pleasure. But though the entail is thus simple in form, there is no doubt in point of law, that it was perfectly competent for the testator to make any deed expressive of his will, and more especially by a deed made at the same time, to lay upon all or any of the heirs of entail, called as his gratuitous vassals, and that either primarily or subsidiarily, any obligations which he might wish to impose; and that he could do this while the fee of the entailed estate was preserved entire, is equally clear.

" Archibald Cochran had other valuable estates and property, and he intended to provide for the payment of his own debts, and for the comfort of the members of his family. With this view, he executed the general deed of settlement, by which he conveys that property to his son, whom failing, to the persons mentioned, under the burden of payment of his debts, and under the influence also of the provisions therein expressed, which were afterwards increased by two codicils of latter dates. It may be taken to be quite clear, as it appears from the intention, that the testator meant that these provisions should, in the first instance, be paid from the property conveyed by this general settlement, and by the persons who might obtain possession thereof. By the judgment of the Court, it is taken as settled also, that he intended to preserve the fee of the estate unimpaired, and by some words which occur in the important clause on page six,¹ it is assumed that he believed the separate property to be nearly sufficient for discharging all those burdens.

" But the testator may be presumed to have foreseen that the provisions might not be paid by his immediate heir taking the whole property. By many circumstances the unentailed estate and effects might not at his death be sufficient, or nearly sufficient. He might suffer losses, or he might have miscalculated the value of such property, as many other testators have done. His immediate heir might be of an improvident character, and the effects in his own hands might be spent or carried off by his own creditors, before his near relations, natural or legal, could render their debts effectual; and he might die at an early age, leaving his affairs in embarrassment, and the other members of the family in distress to the utmost difficulty, or placed in an impossibility of recovering their portions from his estate. However fixed, therefore, the testator's intention might be, that the provisions should be paid by his first heir, and that out of the separate funds conveyed, nothing can be more probable or rational than that he should not intend to leave his other children to depend absolutely on the bounty of the first heir, or that he should provide that the obligation for their provision should attach to all the heirs of entail successively. - The question is, whether the testator expressed his intention to this effect or not.

¹ This is the clause quoted in the text of the report.

acceptance, it must receive effect according to the true meaning expressed
well as the Court can find that meaning. And though there may be some
in the form of it, the Lord Ordinary is of opinion that it does explicitly
be testator's understanding and intention, that every heir of entail accept-
s entailed estate, whether succeeding to any other property or not, should
l to satisfy every debt, obligation, provision, or bequest created or con-
y the testator, or incumbent on him, so that the same should cease to exist.
deduced by a declaration that whereas the fee-simple of the estate given to
might be 'nearly adequate' to the special burdens, &c. as well as the
l provision immediately before alluded to; therefore, &c. Now it is justly
not this expression 'nearly adequate,' necessarily implies that the testator
his mind that they might not be quite adequate. But if he was looking at
ability, the conclusion is inevitable, if there are words following of sufficient
is the very thing he intended by the clause was to declare a general and
liability of all the heirs of entail, so as to secure the full payment of the
as in all events; and if he intended this generally, it will be very difficult
the obligation.

in that narrative what does he declare? 'Therefore my said son, by
g hereof, or my entailed estates, in terms of the settlements thereof, and
succeeding to him therein, stand pledged and engaged, as aforesaid, to
and procure discharges and extinctions of every debt, and obligation, pro-
ad bequest of every description, created or contracted by, or incumbent on
that in such habile, proper, and effectual manner as that the same shall
cease to exist, or afford action and execution against my entailed

From the last words, an implication was deduced, that he meant his
estates to be liable. But the Court have held that such an implication
warranted, or is not sufficient, there being no direct declaration that the
estates should be liable to be attached for the provisions, or for any thing
which by law affected them. But this is not the state of the question as
ability of the heirs of entail. As to them, there is a direct declaration of
action imposed; and the Lord Ordinary cannot construe the clause other-

No. 136. other lands in their order, as they may successively succeed to, and
tain possession of, the entailed estates, are bound and obliged, as a c
b. 9, 1836.
err v.
ochran.

There must have been a definite meaning in this. They are declared to be pledged and engaged; and this cannot be extinguished by the words 'as aforesaid.' The Lord Ordinary reads these words very differently. In so far as it may have been meant to have any particular force, this seems to be the impression. 'In the same manner as I have already declared, that the disponees in this settlement, by accepting thereof, shall be subject to the burdens, so I now declare that my son, either by accepting it, or by accepting the entailed estate, and also the heirs succeeding to him, shall stand pledged and engaged,' &c. It is the declaration of what the testator meant and understood to be the engagements of his heirs, whether under one deed or under another.

" This is the view which the Lord Ordinary takes of the clause, and he finds nothing in any other part of the deed which can take away what appears to be the only construction of which the clause will admit, giving effect to every word of it. The testator probably thought that the burden would be very light, which may be the meaning of the narrative. But that will not alter the legal effect of the obligation expressly created. The Lord Ordinary will only further observe, that, though the case of Macdonald, May 29, 1832, may not be precisely of the same kind, the judgment which laid the provisions on the succeeding heirs of entail, without relief against the executors of the first heir, is, in his opinion, much stronger than any thing that is called for in the present case.

" The counsel of the defender urged very anxiously on the Lord Ordinary, in argument to show that the pursuer was barred from insisting in this action, on the consequence of her not having duly proceeded against the unentailed estate, that she had discussed the estate of Archibald Cochran; and it was confidently stated that the provisions constituted real burdens on the unentailed estate, and that this was admitted by the trustee in his defences in this cause. The Lord Ordinary has neglected that argument; but he thinks that there is no such question before him, and that so far as there are data on which he could judge, it is not sound to give effect to such a plea, which must be maintained, 1st, There is no such plea in this record, the pleas stated in the defences being confined to the construction of the deed of settlement. 2d, The Lord Ordinary does not find that the Court decided on such ground, when they found the estate not liable. 3d, The conclusion of the summons is merely declaratory, and is not at all affected by such a plea, which must first assume that the obligation was laid on all the heirs of entail. The effect of this otherwise is not within this declarator. 4th, So far as the Lord Ordinary can judge, it rather appears that the pursuer did claim a preference in the rank with Archibald's creditors, and that the claim was disallowed by a judgment of the Court. But the point not being raised in the record, and the facts not being distinctly brought out, he may be mistaken in this. But, 5th, If he were to judge on a question not raised, and which cannot be decided, he should be inclined to do as at present advised, that the provisions were not made real burdens on the unentailed estates, and that what is supposed to be an admission of it is not an admission of any such thing. The estates were indeed conveyed under the burden of the debts and provisions, and the precept of sasine is also under the burden of them. But the question of real burden depends on other considerations. The trustee's plea is upon mora simply. Yet even he does not state either this or other point in the pleas subjoined to his defences. The reverse of the assumed admission seems to be stated in his minute."

and decerniture in regard to any individual heir-substitute who
ced to the said estates when the right of succession may open to
er : Finds no expenses due to any of the parties."
un reclaimed.

E COURT being of opinion that the defence of mora, and every
ther defence, except such as arose from construction of the en-
tuler's settlements, were reserved to the heirs-substitute by the
st finding in the Lord Ordinary's interlocutor, adhered.

JAMES MALCOLM, S.S.C.—WARREN H. SANDS, W.S.—Agents.

— ELPHINSTONE, Petitioner.

No. 137.

Roll.—The certificate of poverty, in support of an application for the
st, requires to be attested by the minister and elders of the parish where
licant resides, and a certificate by the minister and elders of a dissenting
tion is not sufficient.

moving the petition of — Elphinstone for a remit to the Feb. 11, 183
for the poor, the LORD PRESIDENT observed, that the certi-
produced was not by the parish minister and elders, but by the
r and elders of a dissenting congregation : that this was not in
pnce with the Act of Sederunt regulating this subject, which ex-
requires a certificate " under the hands of the minister and two
of the parish where such poor person resides : " and that a new
ste was requisite.

1st Division

No. 138. WILLIAM THOMAS CARRUTHERS, Pursuer, Advocate, and Defender.
D. F. Hope—Ivory.
 b. 11, 1836. JOHN THOMSON, Defender, Respondent, and Pursuer.—*Keay—*
G. G. Bell.
 Carruthers v. Thomson.

Lease—Rei Interventus.—A minute of lease for nineteen years was executed 1825; it contemplated the subsequent extending of a fuller minute or agreement and it also contemplated a certain rise of rent in 1831, and a new mode of computing that rent; in 1828 a fuller minute was extended, specifying, *inter alia*, precise mode of computing the increase of rent in 1831; the tenant signed this minute and took a copy of it: he made no objection to its terms till 1831, when averred that it materially varied from the minute 1825, and had been unwarrantably impetrated from him; but his averments were held only to amount to "that he had not sufficiently adverted to the precise terms of the document;" Held, that the minute 1828 was binding, and irreducible, in respect, *inter alia*, that the tenant had signed it, and took a copy of it as his title of possession, and possessed under it for several years without objection.

Arbitration.—Question as to the effect of an obligation in a minute of lease, which either party was empowered to apply to the Judge Ordinary to name an arbiter, in the event of the other party failing to name an arbiter, notwithstanding a written requisition to do so.

b. 11, 1836. On the 5th of April, 1825, William Thomas Carruthers of Dormont became a party to the following minute of set to John Thomson:—
 ST DIVISION. " I, John Thomson, agree to take the farm of Hardgrave, &c., from
 L. Fullerton. W. T. Carruthers, &c., for the term of 19 years, from and after
 D. term of Candlemas, 1825, as to the arable land, and Whitsunday thereafter as to the houses and pasture, at the following rents, viz. £100 a-year for the first three years; £200 a-year for the next three years; and £320 a-year for the remainder of the lease, subject to a rise or fall of rent, according to the fair prices, on the same plan as L. Mansfield's, and under and subject to the conditions, &c. which have been agreed upon. The proprietor binding himself to build a new farm-stead; to make march and other fences; to cut the drains (that require filling up), but which shall be filled and covered in time, and to allow me 200 bushels of lime each year for the first five years.

(Signed) " JOHN THOMSON

" I accept of the above offer.

" (Signed) W. T. CARRUTHERS

" It is agreed that the above shall be properly written out, along with the conditions of lease referred to above, and signed by us at some future opportunity.

" (Signed) JOHN THOMSON.
 W. T. CARRUTHERS

" Dormont, April 5, 1825."

to say, from and after Whitsunday, 1831, but subject at the same time to a rise and fall, according to the fair prices of grain as struck for the county of Dumfries; that is to say, when a Winchester bushel of barley, potatoe oats, and common oats, shall amount together in value to 16s. 3d., then the rent shall be £320, and the rise and fall of the rent shall be regulated by the fair prices of each year, as they shall be above or below the said sum of 16s. 3d., until it shall reach 20s. 6d. or 2s., but beyond which maximum and minimum there shall be no rise or fall of rent. And further, the said John Thomson do take the farm, under and subject to the following conditions and covenants; viz. 1st, The proprietor reserves the power of searching for and carrying off, all kind of minerals," &c.

There followed a reservation of right by Carruthers, to hunt on the lands, with obligations on the tenant as to keeping the houses, &c. and, observing a certain rotation in cropping, &c., together with an agreement to refer differences on the subject of cropping, to arbiters, and in case of failure of either party to name an arbiter, after a written requisition, power was given to the other party "to apply to the Sheriff Ordinary to name an arbiter, or oversman, who shall have the same powers as if he had been appointed in the usual way."

The minute was signed by both parties, before witnesses, but it did not contain the writer's name, or the number of pages of which it consisted. It was written bookwise, and exceeded four pages.

The following obligation was subjoined to it:—

In consideration of the above agreement, I, W. T. Carruthers do hereby agree to build a farm-steading on the lands," &c.

No. 138. not to fall with them. In point of detail, and application of the principle, however, the minute varied from Lord Mansfield's leases, which (as Thomson alleged) fixed the stipulated rent when three bushels, of wheat, barley, and oats, amounted together to 16s. 3d., and increased the rent in proportion as their price approached to 20s. 6d., when it was at the maximum, and lowered it till they fell to 12s., the minimum. Whereas this minute specified four bushels of wheat, barley, potatoes, and common oats, as fixing the stipulated rent, when they amounted together to 16s. 3d., and raising it to a maximum when they amounted to 20s. 6d., and not letting it fall to a minimum, until the whole was brought as little as 12s.

Carruthers v. Thomson.
Jan. 11, 1836.
The possession of Thomson continued, after signing the minute of 1828, and, in August, 1829, he applied for a copy of this minute, and obtained it. In 1831, when a considerable increase was to take place in the rent, a difference arose as to the mode of estimating the amount of it. Carruthers contended that it must be computed in terms of the minute of 1828, and Thomson alleged that this minute had been imputed from him unwarrantably, and that the minute of 1825 should be regarded. Other differences arose respecting Thomson's alleged overcropping of his farm, and Carruthers, in August, 1832, presented a petition to the Sheriff of Dumfriesshire, craving the appointment of an arbiter to fix the extra rent now due for miscropping, in terms of the provision quoted in the minute of 1828, as Thomson, though called on by written requisition, refused to name an arbiter. This process resulted in an interlocutor by the Sheriff, in February, 1833, finding that the Sheriff "had not power to name an arbiter," and therefore dismissing the petition.

In June, 1833, Carruthers raised an action before this Court, claiming for the rent since 1830, calculated in terms of the minute of 1828, also concluding for a certain sum as due on account of miscropping lands, and injuring the fences. Thomson lodged defences, denying that he had miscropped the lands, or injured the fences, and offering to pay the rent, in terms of his construction of the minute of 1825, which was accordingly consigned.

In December, 1833, Thomson raised an action to reduce the minute of 1828, as unwarrantably imputed from him, and signed by him in error and ignorance; and also to have the true import of the reference to Lord Mansfield's plan, as made in the minute of 1825, fixed and declared. The summons farther concluded for damages on account of the alleged non-fulfilment, by Carruthers, of his obligations to build sufficient fences, and to make certain fences.

Thomson's statement as to the signing of the minute of 1828 (which was contradicted by Carruthers) was made in these terms:—

"Thomson received notice from Carruthers to come to Dumfries on the morning of the 24th of June, 1828. When he arrived at Dumfries

immediately after the minute was signed, and then went, as a merchant-stander, to Edinburgh, preparatory to his proposed voyage to America. Though he subsequently returned to Dormont, he only re-
there for a single day or so, having left for Madeira, with his
on or about the 16th of July."

In January, 1835, Carruthers raised a supplementary summons, con-
for the rents which had fallen due since the date of the pre-
summons at his instance, and also for future rents, as they should
due. In the mean time, he obtained interim decree for the
rent consigned by Thomson. He also brought an advocacy
Sheriff-Court process.

whole four processes were conjoined, and a record was made
which

others pleaded—

the amount of rents due must be regulated by the minute
the full and finished agreement of parties, followed by Thom-
subsequent possession, which must be attributed to that minute,
that he had signed it at the time, and got a copy of it in 1829,
so possessed without objection; especially as the first minute of
a gremio, referred to the subsequent extending of a fuller
as was done in 1828. And there was no incompatibility be-
the two minutes, as the first provided for "a rise and fall of rent,
ag to the fair prices, on the same plan as Lord Mansfield's:" and
as plan and principle as Lord Mansfield's, in place of Lord
Berry's, or any other landlord, had been adopted, though the
in applying that principle were different. The extended minute

No. 138. out, at length, (but without any material change,) the stipulations referred to, or contained in, the minute 1825. If the rise and fall had been regulated in terms of Lord Mansfield's leases, by adopting three bushels in place of four, as fixing the maximum, the average, the minimum rent, his rent would be from £50 to £60 per annum less, than if it was computed under the minute of 1828. And the question whether three, or four, bushels should be taken as the standard of computation, was an essential part of Lord Mansfield's plan, which a tenant would not give up, cognizantly, without some adequate cause. He has positively averred, that his signature to the minute 1828, had been unwarrantably obtained from him in ignorance of its import, and the fact of the case afforded real evidence in support of this averment.

Other points were raised in the pleadings, but not decided.

The Lord Ordinary pronounced this interlocutor :—" Finds, that John Thomson, the pursuer of the reduction, has not set forth, either in the summons or record, grounds relevant to reduce the missive of lease, dated the 24th of June 1828; and therefore assoilzies the defender, William Carruthers, from the reduction and declaratory conclusions of that action and decerns: Finds, that the rent, payable by John Thomson, is regulated by the foresaid missive of lease; and therefore, in the actions for rent at the instance of the said William Carruthers, decerns against the defender, the said John Thomson, in terms of the libels for the rents there pursued for, and now liquidated, agreeably to that missive of lease, according to the fiars of the county of Dumfries; being the rents for the years 1831, 1832, and 1833, and amounting in all to the sum of £814, 12s. sterling, with interest as libelled, under deduction of the three payments of £150, £103, 3s. 3d. and £118, 3s. already made to the pursuer; allows the decree to go out, and be extracted as an interim-decree: And then, and in regard to the remaining matters in dispute in these conjunctions, being the claims of damages on both sides, appoints the cause to be called to-morrow, for the purpose of determining how those points may be most speedily and conveniently disposed of: Lastly, reserves to William Carruthers his right to claim further the rents of crop 1834, and other rents competently sued for in these actions, when the same are liquidated by the fiars of the county of Dumfries; and to the said John Thomson his claim of retention, in regard to these rents, when so liquidated, of the damages alleged by him to be due by the landlord; and to the other party, his objections to such claim of retention." *

* " The original offer of the tenant, John Thomson, for the farm of Hardie was dated 5th April, 1825, and was, of the same date, accepted by the landlord, William Carruthers. By that minute, the rent is declared to be ' £100 for the first year; £200 for the next three years; and £320 a-year for the remainder of the lease, subject to a rise and fall of rent, according to the fiar prices on the same as Lord Mansfield's, and under and subject to the conditions which have been

17. The tenant took possession on that minute; but on the 24th of June, 1828, a formal and complete minute of lease was executed by the parties between the landlord and the tenant. It had been drawn out by the landlord, and it is admitted by the tenant that the object of the parties in so signing it, was to carry into effect the declaration, as to having the original minute and conditions properly put. The last writing was 'on the plan' of Lord Mansfield's leases, in so determined the fluctuations of the rent by the fair prices of grain; though it differed from the exact terms of those leases in one particular, as instead of three bushels of wheat, it specified four; a variation which, to a certain extent, operated in so gross price, by which the fluctuating rent was to be estimated. But the minute of 1828 is quite explicit in this particular; and though the fact admitted in the record, it was admitted at the debate, that a copy of that minute was received by the tenant immediately, or very soon after its execution. No objection was made to its terms until the year 1831. In these circumstances it can hardly be reasonably disputed that possession followed on that minute. It is true that the clause as to the fair prices did not come into operation till 1831, and then it is admitted by the tenant, that his attention was, for the first time, called to the difference between the terms of his lease and those of Lord Mansfield's leases. Accordingly the minute of 1828 is now sought to be reduced. But it appears to the Lord Ordinary, that the tenant has offered no relevant grounds of reduction. The minute of 1828, though not in the exact terms of Lord Mansfield's leases, is fairly said to be on the plan of those leases. Secondly, The parties having, in the execution of the minute, a sufficiently formal writing, executed for the very purpose of putting into effect the terms of their bargain, applied that plan in a particular way, and on conditions distinctly expressed, and those terms remaining unobjected to for 3 years, it is impossible to listen to the demands of the tenant to reduce the rent, on grounds which truly resolve into the mere averment, that he had not duly adverted to the precise terms of the document which he had signed and taken a copy of, as his title of possession.

The Lord Ordinary, therefore, holding the minute of 1828 to be conclusive of

MEADOWS.—THIS WAS A JUDICIAL REFERENCE WHICH NEVER TAKES THE CASE TO COURT. The want of an interlocutor, or the signature of the Court to the award, is of no consequence, as it was homologated by the appearance of the parties before the referee.

S GLENLEN and MEADOWBANK having concurred, the Court interposed their authority to the award.

Objection was taken to the auditor's taxation of the account of examination so far as he had not allowed the expense of counsel attending examination of havers previous to the trial, which, the pursuer contended, ought to have been allowed on the principle, that, at this stage of the case, the interests are very critical and important.

Court remitted to the auditor to report as to the practice on this point, who accordingly reported, "that, by the practice of the Court for many years, fees to counsel have not been allowed for attending examination of havers, except in such cases as, from some particular circumstances, the presence of counsel may have been necessary."

THE COURT, in respect of the circumstances of this case,* allowed the fee in question.

W. HUNT, W.S.—

Agents.

WATSON v. Watson, Dec. 15, 1827 (ante, VI. 256).

In the examination referred to, the parties were examined as havers, and it was urged by the pursuer that there had existed an evident desire on the other part to convert this into a judicial examination.

No. 140.

JAMES HOME RIGG and OTHERS (Ramsay's Trustees), Raisers of
PETER RIGG RAMSAY, Claimant.—*Walker*.Feb. 12, 1836.
Rigg v.
Ramsay.GEORGE RAMSAY and MARGARET RAMSAY and OTHERS (I
Younger Children), Claimants.—*Neaves*.Christie v.
Harley.

Competing.

Expenses — Trust. — Where a question arises out of the construction of a trust-settlement, and litigation is made necessary in consequence of the terms being clearly expressed, the Court award the expenses of the competition out of the trust fund.

Feb. 12, 1836.

1st Division.
Ld. Corehouse.
D.

THIS was a question of a special nature regarding the interpretation of a will, relative, mortis causa, trust-dispositions, executed by the late George Ramsay of Ouchtertyre, the last of which had apparently been prepared without the assistance of any regular man of business. The provisions of this deed were not clearly expressed, and their extrication was attended with difficulty, in adjusting the relative interests of the eldest son, the second son, and the daughters of the deceased. The trustees were appointed in a multiplepointing, in which the Lord Ordinary, as in an amicus curiæ, ordered cases which his Lordship reported to the Court. The Lord Ordinary, at deciding on the claims, intimated that the expenses of the competing parties should be laid on the trust-fund, as the discussion had been rendered necessary from the obscurity of the terms employed by the truster in making his settlement.

WALKER, RICHARDSON and MELVILLE, W.S.—HORNE and ROSE, W.S.—AGENTS.

No. 141.

JOHN CHRISTIE, Suspender.—*Sol.-Gen. Cuninghame*.JOHN HARLEY, Charger.—*Milne—D. F. Hope—A. McNeill*.

Bill of Exchange—Usury—Proof.—The drawer of a bill indorsed it to a person who paid him a large proportion of its contents, but retained in his hand a sum beyond the legal rate of discount; the acceptors failed during the currency of the bill, and the indorsee having charged the drawer for the whole bill, he defended, alleging that the extra sum was retained in consideration of guaranteeing the solvency of the acceptors, and that, but for this consideration, the bill must have been usurious: the charger denied this, and alleged that the extra sum had been retained for certain purposes which he specified,—Held that in such circumstances, he must prove for what purposes the sum had been retained, and the Court would suspend the charge.

Feb. 12, 1836.

1st Division.
Ld. Corehouse.
B.

JOHN CHRISTIE, machine maker in Dundee, indorsed to John Harley, tanner in Dunfermline, a bill for £90, which was drawn by him

son and son, the acceptors of the bill for £90, issued during its
cy. It had been indorsed by Harley to the National Bank, at
instance it was protested. Harley paid the bank, and took up the
October 1833, and gave a charge for the full amount of it to
ie on 28th October, whose agent wrote on 29th October to Harley
that he had first discounted a bill for £95 for Christie, and "sub-
tly the £90 bill, and the bill for £80, on both of which you retained
of £10 for discount. At the time, Mr Christie understood that
as a premium or commission for guarantee of the acceptor of the
se no one would have allowed such a sum to be taken merely in
of discount. If it was not retained as a premium for guaranteeing,
nsactions clearly fall under the usury laws, and are not only void
ll, but you subjected to penalties. I have to request, therefore, that
ill inform me in writing, whether you made this charge over and
the ordinary rate of discount for guaranteeing the solvency of the
or of the bill. Your answer will determine the course to be fol-
but should you return no answer, I will hold the sums retained to
een discount, and proceed accordingly."

answer was returned to this letter. But in about five months after-
as Harley was proceeding with a poinding and sale of Christie's
under his diligence, Christie presented a bill of suspension and
ict, alleging that Harley was in the habit of discounting bills, and
ining an extra premium in consideration of guaranteeing the accep-
that out of the joint proceeds of the two bills for £90 and £80, he
tained £10; that of this sum only £1, 3s., was the legal rate of dis-
cfeiring to the £80 bill, since retired, and the balance was retained

No. 141. against Christie, amounting to 15s. 6d. ; and that the balance of £9, 4s. 6d. had been retained by him on account of a parcel of Loch Fine herrings, some butter, and a pair of boots, all of which Christie had commissioned from him ; but as these articles had never been supplied he was ready to restrict his charge. The Lord Ordinary (Moncreiff) at passing the bill, on caution, issued the note subjoined.* Under the expedite letters, the same statements and pleas were maintained, and the suspender contended that, in the circumstances, the onus lay on the charger to explain upon what ground he had retained so much more than the legal rate of discount. In particular the suspender denied that he had ever commissioned either the herrings, or the butter, or the boots. The charger maintained that if either the special averment of a guarantee was made, or if the allegation of usury was made, it lay with the party making these averments to substantiate them by conclusive proof.

12, 1836.
Christie v.
Harley.

The Lord Ordinary, “ in respect it is denied by the suspender that the sum retained by the charger, over and above the legal rate of interest on the bill in question discounted by him, was retained for the purposes set forth in the record, allows the charger a proof of his allegations on that point, and to the suspender a conjunct probation.”

Harley reclaimed, and was understood to admit, at the bar, that he could not prove his allegations as to the commission for herrings, &c.

LORD PRESIDENT.—The ultimate restriction of the charge can have no effect in retrieving the character of this transaction, if it was tainted with usury in its origin. A party who retains a sum, in name of discount, at a usurious rate of interest, cannot evade the objection of usury by offering back the extra sum which he had retained. Were it otherwise, the usury laws would be open to constant evasion.

LORD GILLIES.—The party who makes an allegation of usury against another, must prove it. But the circumstances of this case are peculiar. The charger took the bill, and, though he gave a very large proportion of its value to the suspender, he confessedly retained in his own hands a greater sum than was due to him at the legal rate of discount. He admits this, but endeavours to explain it

* “ The charger may in the end be able to explain the matter. But, as the case stands, the admissions put the transaction in the position apparently of a discount upon usurious stipulations, unless the charger shall prove his statements about the transaction for the sale and purchase of herrings and butter, of which there is no evidence and no admission. It may be true, but, prima facie, it is very like a mode of explaining away an awkward exposure, and the matter is not put in a more favourable aspect by the fact, that no answer was made to the pointed letter of the complainer’s agent—which certainly required an answer.

“ But the Lord Ordinary only means that, on caution, the complainer has legal grounds for requiring investigation, and the more so as it stands admitted that, at all events, the charge is wrong, and must be restricted.”

as rate of interest, it is equally clear that the charge should be suspended. the proof allowed to the charger, it is useless to allow a proof to a party who will not undertake it ; and, on the whole, if there be no difficulty in point of law, I think the letters should now be suspended simpliciter.

MR. MACKENZIE.—This is a peculiar case. There were two parties to this action, the charger and the suspender, both of whom know the nature of it. The suspender must know whether there was usury in it or not, and yet he does not say : he avers there was a guarantee, and that, in consideration of that risk, the sum was retained. The charger therefore has some room for saying that he is acquitted of usury, it not being alleged as matter of fact against him. But as another party concerned, in regard to the judgment which ought to be pronounced, I mean the Court itself. If it appears on the facts of the case that the ordinary presumptions of usury are there, and nothing is stated to explain away, I conceive we must suspend the letters. But at present I concur with the Lord Ordinary, in holding that an opportunity should be allowed to the charger to prove these averments about the commission for herrings and other expenses if he can. If he cannot, or if he declines to attempt the proof, I think the suspender will then be entitled to have the charge suspended ; but, at present, the Court should merely adhere.

MR. BALGUY concurred.

THE COURT accordingly adhered.

J. MARSHALL, S.S.C.—C. F. DAVIDSON, W.S.—Agents.

No. 142.

b. 12, 1836.

uce v.
inter.

ROBERT BRUCE, Pursuer.—*Whigham.*
ROBERT HUNTER, Defender.—*Marshall.*

Expenses.—A party against whom a claim of £66 odds was made, to £55, 7s. 4½d. as the amount really due: this was refused, and an action raised for the £66: ultimately the sum due was found to be £55, 14s. 9d.: the Court rejected the pursuer in expenses.

b. 12, 1836.

D. DIVISION.

rd Medwyn.

F.

The pursuer, Robert Bruce of Symbister, in Shetland, had some other transactions with his son-in-law the defender, Robert Hunter of Lunna. Bruce alleged that the sum due him on these transactions was £66, 17s. 7½d. Hunter, after ineffectual attempts to settle the matters amicably, tendered, under form of notarial protest, the sum of £55, 7s. 4½d. This was refused by Bruce, who raised the present action concluding for the £66 odds. A regular litigation followed with a reference to an accountant, a report, and objections thereto. The Lord Ordinary found that the sum truly due was £55, 14s. 9d., for which he decreed in favour of Bruce, but found no expenses due to either party.

Hunter reclaimed, and contended that, in the circumstances, he was entitled to expenses, having offered within 7s. 6d. of what had ultimately been found to be the actual claim, while Bruce had throughout insisted on the full £66.

LORD JUSTICE-CLERK.—There is an observation in a letter of the pursuer's agent, in 1827, before this action was raised, in which I entirely concur,—a pity that such a step should create or keep up any difference between the houses of Lunna and Symbister." The case affords the most melancholy exhibition of litigiousness I ever saw, and all I shall say is, that, having considered what are called the "merits," and seeing that an offer was made by the defender of £55, 7s. 4½d., and that the sum now found due only exceeds this by seven shillings, I think we will do justice by altering as to expenses, and charging these upon the pursuer.

The other Judges concurring,

THE COURT altered quoad expenses, and found the pursuer liable therefor.

WALTER DUTHIE, W.S.—JOHN GIBSON, Sen. W.S.—Agents.

HENRY PATULLO, Pursuer.—*Keay*.
JAMES ANDERSON, Defender.—*A. M'Neill*.

Expenses—Precognition.—In taxing the account of expenses in a jury case tried at the sittings in Edinburgh, a charge for an additional precognition by the Edinburgh agent disallowed, a previous precognition of the same witnesses having been taken by the country agent.

THIS was an action of damages which was tried at the jury sittings in Edinburgh, the witnesses residing on the confines of Perth and Forfarshire.¹ In taxing the account of expenses the auditor disallowed a charge for an additional precognition taken previous to the trial by the Edinburgh agent, a previous precognition of the same witnesses having been taken by the country agent.

The pursuer having objected on this ground to the auditor's report, the Court approved of the report, the Lord Justice-Clerk observing,

It may be for the benefit of the party, and very proper, that an additional precognition should be taken, but the question is, whether it is a fair charge in the account, and I cannot hold that it is.

MACKINTOSH & DUCAT, W.S.—JAMES BRODIE, S.S.C.—Agents.

LOCKHART, HUNTER, and WHITEHEAD, W.S., Pursuers.—*D. F. Hope*
—*Paterson*.

ROBERT ROSS, Defender.—*Keay*.

THIS was an action for payment of business accounts turning entirely on specialties, in which the Lord Ordinary sustained the pursuers' claim as restricted, without allowing interest or finding expenses due to either party.

THE COURT adhered.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—JARDINE, STODART, and FRASER, W.S.—Agents.

¹ Ante, p. 204.

[o. 144.

. 13, 1836.

k v.

wart.

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JAMES DICK, Pursuer.—*Rutherford*.JAMES STEWART, Defender.—*W. Bell*.

Expenses—Jury Trial.—Where a jury, at returning a verdict in favour of a defender, gave a recommendation that the pursuer should not be subjected in expenses, the Court, at modifying the amount of expenses awarded against him, intimated that they kept the jury's recommendation in view, in so doing.

. 13, 1836.

Division.

SEQUEL of the jury trial reported ante, p. 205, which see. The jury, in the special circumstances of the case, gave a recommendation, at returning their verdict for the defender, that the pursuer should not be subjected in expenses. The Court found expenses due to the defender, but subject to modification: and the taxed account being now reported, it was intimated by their Lordships, in modifying it, that they kept in view the favourable recommendation of the jury.

R. NEILL, S.S.C.—J. A. ROBERTSON, Agent.

[o. 145.

ROBERT STOCKS, Suspender.—*D. F. Hope—Marshall*.

MRS WHYTE OF GARDNER and OTHERS, Chargers.—*Maitland—Crawford*.

Diligence—Right in Security—Interest.—1. Circumstances in which, where the holder of a heritable bond for £7000, admitted payment of £1788, and gave a charge for the balance to the debtor, who alleged that only £4752 was due, the Court passed a bill of suspension, in regard to that part of the balance which was in dispute; the suspender paying the £4752 to the charger, and consigning the disputed balance. 2. Heritable creditor ordained, at the same time, to discharge the incumbrance affecting his debtor's lands. 3. Where a bond restricted the rate of interest, for the first five years, to 4 per cent—Question, whether that restriction was proved, by the transactions of the parties, to have been afterwards continued till the creditor's death.

. 13, 1836.

Division.

Cockburn.

Chamber.

B.

ON 25th June, 1826, Robert Stocks of Abden granted a heritable bond to his brother-in-law the late Robert Whyte, Provost of Kinghorn, for £7000. The bond bound Stocks to repay the principal sum at the next term, "and the due and legal annualrent of the said principal sum, from the date hereof to the foresaid term of payment, and half-yearly, termly, and proportionally thereafter, during the not-payment." The bond contained this clause:—"It is hereby provided, that in case I shall, during the five years from and after Whitsunday next, pay to the said Robert Whyte the annualrent of the said £7000, at the rate of 4 per cent per annum, at the terms of Whitsunday and Martinmas, half-yearly, when the same shall fall due, or within the space of thirty days after each of the said terms of Whitsunday and Martinmas, that then, and as often as the said annualrent shall be so paid during the said five years, the said Robert Whyte shall, during the said five years, but no longer, in consideration of such prompt payment, be bound to accept thereof, in li

0: and there were various transactions between the parties, and
to-current passing between them, in which the amount of interest
the bond, after the expiry of the five years, was still stated by
at the rate of 4 per cent. Whyte died in 1834, and a question
between his representatives and Stocks regarding the precise amount
ing due on the bond. Stocks intimated his intention to pay up the
t Whitsunday 1835, and on 16th May he consigned £4752, 5s. 6d.
unk receipt, in his own name, intimating that this was the whole
e under the bond, and that he was ready to indorse it to Mrs
: or Gardner and Others, the children and disponees of Whyte, on
ranteeing him a discharge in full. As they only admitted a sum of
, 8s. 3d. to have been paid to account of the bond, they refused to
discharge on these terms, and they gave a charge of horning for
ance. The chief cause of discrepancy between the accounts, de-
l on the question whether the chargers were entitled to debit Stocks
interest at the rate of 5 per cent, after the expiry of the first five
of the bond. They pleaded, that, independently of stipulation, they
have been entitled to demand the full legal interest of 5 per cent ;
ther, that there was the most express stipulation for interest at that
fter the first five years had elapsed. Nothing but a written dis-
could take off the effect of this provision in the bond ; and, in re-
the accounts-current, alleged to have been rendered by Stocks on
ting of 4 per cent being due, they denied that Whyte had ever ho-
sted or acquiesced in them, or at all acknowledged them. The bill
ension should therefore be refused ; at least consignment of the
sum due. should be required in Court. the lodging of a sum in the

No. 145. counts-current rendered by the suspender, and stating interest at four per cent, had been homologated and approved of by him; but that it would be necessary to have a diligence to recover these, which could not be done in the Bill-Chamber. He therefore craved the Court to pass the bill without caution or consignation, or, at least to order this only in regard to the disputed balance above £4752, contained in the bank-receipt.

b. 13, 1836.
cks v.
yte.

The Lord Ordinary "refused the bill, and found the suspender liable in expenses." *

Stocks reclaimed.

LORD BALGRAY.—I have no doubt, that, under the terms of this bond, the debtor was liable for interest at the legal rate of five per cent, so soon as the first five years had expired. But I do not think this is enough to put an end to all the questions between these parties. There ought to be some clearing up of their accounts, and, in the particular circumstances, I should feel inclined to direct the bank-receipt to be indorsed to the chargers, and to allow the bill to be passed on consignation being made of the balance.

LORD GILLIES.—I incline to dispose of this case in the same way. It is true that, under the terms of the bond, considered by themselves, the chargers were entitled to exact the full legal interest of five per cent. But though that rate was not usurious in law, it is well known that it was exorbitant, and, in equity, usurious, at the period in question, if the security offered was good. The market rate was below five per cent. Keeping that in view, along with the other circumstances which appear to require expiscation, I think the bank-receipt should be indorsed to the chargers and the bill passed on consignation *quoad ultra*.

LORD MACKENZIE.—I take the same view. When the market rate is below five per cent, and parties settle every term at a lower rate, it is still quite common to have their bonds so framed as to bear an obligation for five per cent. Undoubtedly, in regular procedure, a debtor would take care to procure a written discharge of each term's interest, when paid by him. But there may be other competent evidence besides this, and if it can be adduced, the Court may give effect to any reduction of interest thereby established. The case is one depending on its own circumstances, and I think the Court should dispose of it in the way that has been suggested.

LORD PRESIDENT concurred.

On the motion of the *Dean of Faculty*, for the suspender, it was farther approved of, without opposition, that the incumbrance on the lands of Abden should be discharged, on the bank-receipt being indorsed, and consignation of the balance being made.

* "NOTE.—The Lord Ordinary is of opinion, 1st, That the suspender's construction of the obligation *quoad* the interest is wrong; 2d, That there has been no consignation by him of £4752, 5s. 6d. These things being fixed, his whole case resolves itself into an attempt to meet his clear and liquid obligations, under a bond, by his liquid and disputed counter claims. Even consignation, though it had been made, could not have warranted this."

Action—Process—Master and Servant—Statute 4 Geo. IV. c. 34.—A work-
ing quitted the service of his master in England, with whom he was regu-
lared, and thereafter come to Scotland and entered into a new contract of
—procedure in reference to his apprehension which held to be criminal and
swable in the Court of Session.

sect. 3. of 4 Geo. IV. c. 34, entitled “An act to enlarge the Feb. 13, 1836.
of justices in determining complaints between masters and ser- 2d Division.
and between masters, apprentices, artificers, and others,” it is Bill-Chamber.
l, that if “any servant in husbandry, or any artificer, calico- Lord Meadow-
bank.
, handicraftman, miner, collier, keelman, pitman, glassman, potter,
s, or other person, shall contract with any person or persons
ever, to serve him, her, or them, for any time or times whatsoever,
ny other manner, and shall not enter into or commence his or her
, according to his or her contract, such contract being in writing,
med by the contracting parties, or, having entered into such ser-
iall absent himself, or herself, from his or her service, before the
f his or her contract, whether such contract shall be in writing or
writing, shall be completed, or neglect to fulfil the same, or be
of any other misconduct or misdemeanour in the execution thereof,
arwise respecting the same, then, and in every such case, it shall
y be lawful for any justice of the peace, of the county or place
such servant in husbandry, artificers,” &c. “shall have so con-
, or be employed, or be found, and such justice is hereby autho-
nd empowered, upon complaint thereof, made upon oath, to him,
person or persons, or any of them with whom such servant in

T.

No. 146. during such period as he or she shall be so confined in the house of correction, or, in lieu thereof, to punish the offender, by abating the whole, or any part of his or her wages, or to discharge such servant in husbandry, &c. from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis.”

b. 13, 1836.
Asbury v.
All.

In September, 1832, the suspender Asbury, entered into a contract of service with the respondent Bell, a flint-glass manufacturer at St Helens, in Lancashire, binding himself to serve as a glass-blower for a term of three years. Towards the middle of April, 1835, Asbury left this employment, and, on the 15th of that month, Bell obtained the following warrant to apprehend him from one of the justices of the peace for Lancashire:—

“ To all high and petty constables, and other civil officers whom it may concern, in the county of Lancaster, and especially to the constable of Wardle, and especially to Henry Leadbetter.

“ Whereas information and complaint upon oath hath this day been made unto me, one of his Majesty’s justices of the peace in and for the said county of Lancaster, by Henry Leadbetter of St Helens, in the said county, agent for and on behalf of John William Bell of Sutton, in the said county, flint-glass manufacturer, that Samuel Asbury, late of St Helens aforesaid, flint-glass blower, did, on the 8th day of September 1832, contract and agree with the said John William Bell, to serve him the said John William Bell, as a flint-glass blower, for the time of three years, at the wages of 19s. weekly; that the said Samuel Asbury hath, during the said period been guilty of diverse miscarriages and misconduct towards the said John William Bell, particularly, in that he, the said Samuel Asbury, did, on the 14th day of April instant, run away, and leave the said service, without the consent of the said John William Bell, and has not returned to the said service. These are therefore, in his Majesty’s name, to command you forthwith to apprehend and take the body of the said Samuel Asbury, and him bring before me, or some other of his Majesty’s justices of the peace, in and for the said county of Lancaster to answer to the said information and complaint, and farther to be dealt with according to law. Given under my hand and seal the 15th day of April, in the year of our Lord 1835.

(Signed)

“ THOMAS MOSS, J.P.”

Asbury, having come to Scotland, remained some time at Portobello and thereafter, on the 30th September, 1835, entered into the service of Messrs Watson, Pellat, and Company, flint-glass makers in Anderson’s Glasgow, with whom he agreed, by written articles, to serve as a workman for a period of four years. Of date the 20th November, at Glasgow

the 23d, in virtue of the original warrant and of the concurrence, was apprehended in his house at Anderston. Without being carried by any magistrate for examination, he was taken on board a steam-ship for the purpose of being conveyed to Liverpool. But in the meantime, Bell, Pellat, and Company, had, on an application to the sheriff, obtained a warrant for Asbury's apprehension, and, having traced him on board the steam-packet, rescued him from the hands of the officers under the English warrant, and carried him before the sheriff for examination. Thereafter, by a private arrangement between Bell and Pellat, and Company, he was allowed to go at large until the issue of the respective warrants should be ascertained.

Under these circumstances, Asbury presented a bill of suspension, liberality, and interdict, with reference to the warrant obtained by Bell, and that in the meanwhile Bell and the officers of the law, and all others, &c. should be prohibited and interdicted from enforcing the warrant already granted, and from granting and enforcing any such in the future, in view of the removal of the complainer beyond the reach of the jurisdiction of this country.

In support of the bill he maintained, inter alia, that the statutes 13th Geo. III. c. 31; 45th Geo. III. c. 92; and 54th Geo. III. c. 186, under which alone it was competent for Scotch judges and magistrates to indorse their concurrence to warrants issued in England, were excluded in the case of proper crimes, that in the present case there was no charge of a criminal nature brought against him, but the proceedings in the instance of Bell was, on the contrary, entirely founded on an

No. 146. or offence,¹ and the warrants of concurrence by the Scotch justices being necessarily of the same nature with the original; and that the Court of Session therefore had no jurisdiction to entertain a process to review these warrants or restrain their operation; moreover that the offence charged in the complaint on which the warrant bore to have proceeded had reference to the statute 4 Geo. IV. c. 34, and was an offence of which the primary punishment was corporeal, and therefore the foundation of criminal procedure reviewable only by the criminal judicature.²

Feb. 13, 1836.
 Esbury v.
 All.

The Lord Ordinary reported the bill and answers, adding the note subjoined.*

THE COURT, being clearly of opinion that the matter in question was a criminal process, refused the bill as incompetent in this Court, and found the complainer liable in expenses.

GIBSON-CRAIGS, WARDLAW and DALZIEL, W.S.—WOTHERSPOON and MACK, W.S., Agents.

¹ Mayhew, 8 T. R., 110; Burns' Justice.

² Lord President Blair in *Berry v. Walker*, Jan. 17, 1809; *Dewar v. Marland*, July 1835 (not reported); *Fife v. Mungall*, Dec. 21, 1835 (not reported).

* "The Lord Ordinary, as the complainer is not incarcerated, thinks it much more expedient that the determination of the whole Court should be obtained in this case than the determination of a single judge, as the proceedings are certainly of an extraordinary kind; and more especially as at present advised, he would have been inclined to have refused the bill as incompetent in the Court of Session. He is clearly of opinion that the statute 4 Geo. IV. c. 34, creates what is to be held and deemed to be a criminal offence, and, therefore, all proceedings taking place in virtue of that enactment must be cognizable in the Court of Justiciary. So, accordingly, the matter was recently determined by that Court; and as far as the Lord Ordinary is able to understand the primary warrant in question, it was granted in virtue of that act. But, 2dly, The indorsation by the justices of peace in Scotland was a proceeding entirely founded on the assumption that the primary warrant was granted upon a charge of a criminal nature. It was therefore itself a criminal warrant; and therefore, the Court of Justiciary is the proper tribunal for the cognizance of questions like the present arising under it.

"The present shape of the case hardly raises the question as to the competency of the complainer having been taken on board a steam-vessel in order to his conveyance to England, as there is no interdict prayed for against that proceeding which, in fact, is abandoned. Had it been otherwise, the Ordinary would have been inclined to have dealt with the case as one of illegal detention and imprisonment without the colour of authority, and granted an interdict in the mean time, as whether the matter with which he stood charged was of a civil or a criminal nature there was no warrant for confining the complainer on ship-board, and conveying him by sea to any part of his Majesty's dominions out of the authority of this Court. In short, he would have, as in the case of illegal imprisonment, granted the remedy, if prayed for, to prevent, in the mean time, the removal of the party by any way which in no way secured his being transferred to the jurisdiction of the country under authority of which the primary warrant was granted."

f a general division of the trust-estate ; and that the effects of predeceasing
iod, had been placed by the testator, on the same footing with predeceasing
and that there was no mala fides on the part of the trustees in delaying the
f division.

late James Thorburn of Kelton executed a trust-settlement in Feb. 16. 1836.
conveying his whole estate, heritable and moveable, to the Rev. 1ST DIVISION.
n Thorburn and others as trustees. The deed proceeded on the Ld. Courthouse.
re of his having no issue, and having an equal affection for all his D.
s and sisters. The purposes of the trust, after payment of debts,
d, To pay an annuity of £20 to his mother, the trustees being
owered" to lend out a corresponding capital sum on heritable
r "bearing the interest thereof payable to my said mother, dur-
life, and thereafter the principal sum to be divided equally among
thers and sisters, or their children, in the same manner as their
of the other funds hereby conveyed, conform to the rules after
d." 3d, To pay a legacy of £105 to the Rev. William Thor-
previous to the general division after mentioned." 4th, "I hereby
my said trustees, as soon after my death as shall be thought most
t and expedient, to separate and divide the remainder of my
and estate into nine equal shares, and to allocate the same among
l Mr William Thorburn, Thomas Thorburn, &c. my brothers, and
ary Thorburn, &c. all my sisters-german, equally and proportion-
ong them, my said brothers and sisters, share and share alike:
ng hereby, that the shares so provided and allocated to each of
l brothers shall be delivered and paid over to them as soon as my
and estate shall be converted into cash, or otherwise brought into

No. 147. before and after specified:" " And also declaring, that if all or any of my said brothers and sisters shall die before me, or before the foresaid period of division, leaving children of their own bodies lawfully begotten, I require and empower my said trustees, and their foresaids, to divide the share hereby intended for the deceased equally and proportionally among his, her, or their said children, provided they be majors at the foresaid periods of division:" But if the children were minors, the trustees were to apply the interest for their behoof during minority and thereafter divide the principal equally among them. There then followed these clauses:—" But in case any of my said brothers or sisters shall die before me, or before the foresaid periods of division, without leaving any lawful child or children, or if all the children of any of my said brothers or sisters so predeceasing shall die without lawful issue, before attaining the age of twenty-one years, it is hereby declared that the share or shares allocated to my said brothers and sisters, and their children so deceasing, shall again accrue and be added to the general fund of division hereby conveyed in trust, and shall be divided among my surviving brothers and sisters, share and share alike, and in case of their death, among their children equally, according to the rules and under the conditions particularly before and after laid down. And further, with regard to the shares hereby allocated to my said sisters, it is hereby in general provided and declared, that if, at any time hereafter, the whole children or heirs of their bodies shall die intestate, and be extinct, then the share or shares so allocated to them shall revert and be added to the funds hereby conveyed in trust, and shall be divided by my said trustees, and their foresaid, among my remaining brothers and sisters, or their children, conform to the rules above specified. And in order to enable my said trustees the better to execute the present trust, I hereby authorize and empower them immediately after my death, to sell and dispose of all or any part of the heritable subjects hereby conveyed, and that either by public roup or private bargain, as may appear most conducive to the benefit of all concerned; but if at that time a sale shall not be thought advisable, I empower my said trustees to let the said subjects upon leases for any term of years they may think proper, the rents to be applied in yearly payments to my mother, and my said brothers and sisters, and their children according to their several shares and proportions above mentioned. And I recommend it to my said trustees to proceed in the mean time with all proper despatch in the sale of the said heritable property," &c.

James Thorburn died in November, 1830. He left an estate consisting of heritage to the alleged value of about £10,000, besides £1500 money in the bank. John Thorburn, one of his brothers, died in February, 1833, before any division or allocation of the trust-estate, or even of that portion consisting of money in the bank, had taken place. He left no issue, but he had executed a trust-settlement conveying his whole estate of every denomination to Robert Thorburn and others his

the trust-estate, had vested in him prior to his death, so as to be fully carried to his trustees, or had lapsed by his decease without so as to be divisible among the remaining brothers and sisters. The case of James Thorburn raised a multiplepointing, in which the trustee John Thorburn made a claim, founding on their trust-conveyance, which was met by the plea that their author's right was never vested.

The Lord Ordinary, "in respect the late John Thorburn died before the period of division specified in the trust-deed, found that his share of the accession did not vest in him previous to his death; therefore preferred the trustees of the late James Thorburn, Esq. of Kelton, to the claimant in medio, and decerned in the preference accordingly, and found no expenses due." *

John Thorburn's trustees reclaimed.

THE PRESIDENT.—I am clear for adhering. We must look at the deed as it is, and I am quite satisfied it is so conceived that no share vested prior to the period of division fixed in the settlement. John Thorburn predeceased that period, and no right had vested in him. There was no improper postponement of the period of division. James Thorburn's trustees took steps without delay to divide the lands, but they did not make the division, in terms of the settlement, until after John Thorburn's death.

NOTE.—Mr Thorburn of Kelton, by his trust-deed, directs, that as soon after his death as may be thought most prudent and expedient, his trustees shall divide the whole of his succession into nine shares, and allocate them among his brothers and sisters. If the deed had stopped there, there would have been room to hold

Husband and Wife—Foreign—Domicile—Principal and Agent.—Alexander Trapaud, an English military officer, was appointed governor of Fort-Augusta Scotland, in 1746, and he lived constantly there, till his death in 1797; during residence, he cultivated a farm and acted as a justice of the peace; in 1771 married a domiciled Scotswoman who survived him; in 1785 a legacy, under English will, and payable out of funds in England, by an English executor, was bequeathed to Mrs Trapaud; it was not realized in any way, nor “reduced into possession” by Governor Trapaud, or his wife: a question arose between the executor of the governor, and the executor of Mrs Trapaud, regarding their respective rights to the legacy: it appeared, from the Opinion of English counsel, that, though the legacy had vested in Mrs Trapaud, during the marriage, yet, as the governor had not reduced it into possession,” no right had vested in him by the law of England: the legacy would be held to have become the absolute property of the surviving wife, and of her representatives:—Held, 1. That Governor Trapaud had lost his English domicile, and was domiciled in Scotland: 2. That, though the law of Scotland might be referred to, to determine whether the character of a fund, situated in England, was heritable or moveable, yet, the law of Scotland alone must determine whether the *jus maritum*, under a marriage which was contracted, and continued to subsist, in Scotland, sufficed to reach a moveable fund which had vested in the wife, during the marriage, though such fund was locally situated abroad. That, accordingly, the legacy fell under the governor’s *jus maritum* and was carried to his executor: and, 4. As the fund had, under a previous arrangement with the parties, been paid into the hands of a person in England, under a power of attorney granted by the executor of Mrs Trapaud,—order pronounced, decerning “to concur with the governor’s executor, in enabling him to uplift and receive the said money, and for that purpose to grant a power of attorney.”

Jurisdiction—Foreign.—Circumstances in which the Court exercised jurisdiction

as to the right to a fund, which was locally situated in England, and had been the subject of certain procedure in the English courts.

Mandatory—Expenses—Title to Pursue.—Where a party appears personally in Court,—held not bound to sist a mandatory or to find caution for expenses, though he was resident in England, and, it was alleged, had come to Scotland expressly to attend the discussion, and thereby avoid sisting a mandatory, and was about to return to England as soon as the hearing of the cause was over.

Process—Advocate.—Intimation by the Lord President that the hearing of a cause would no longer be delayed, merely on account of the absence of senior counsel, unless in very special circumstances, and that the junior must always be ready to go on.

THE late Alexander Trapaud, an Englishman, and an officer in the army, was appointed lieutenant-governor of Fort-Augustus in Scotland, about the year 1746. From that date he constantly resided in the lieutenant-governor's house there, until his death in 1797. He occupied a farm in the neighbourhood, and he was in the commission of justices of the peace. In 1779 he married a domiciled Scotswoman. There was no written contract of marriage. In 1785, a legacy of £600 was left to Mrs Trapaud by Mrs Dorothy Campbell, who was domiciled in England. Mrs Campbell's will was in the English form and executed in England. Mr Robinson, the executor named by her, resided there, and the funds, out of which the legacy was payable, were situated there. This legacy was not realized, or in any manner "reduced into possession" either by Governor Trapaud or his wife, who survived him. There was no issue of their marriage; but, by a previous marriage, Governor Trapaud had a daughter, who left a son, John Luduvez Newmarsh, in whose favour Governor Trapaud bequeathed the fee of the residue of his whole effects under burden of Mrs Trapaud's liferent. On the death of Mrs Trapaud she bequeathed all her effects to her two nieces Mrs Clarke and Mrs Grant, whom she appointed her executors.

In these circumstances a question, regarding the legacy of £600, arose between Newmarsh, as in right of Governor Traupaud, and the two nieces who were in right of Mrs Traupaud.

Newmarsh contended that the right to the legacy vested in Mrs Trapaud as soon as Mrs Campbell, the testatrix, died, and it therefore fell under the *jus mariti* of Governor Trapaud, so as to be carried by his settlement: the two nieces of Mrs Trapaud contended that the question must be determined by the law of England, and that as Governor Trapaud had not "reduced the legacy into possession" during his life, it became, by that law, the absolute property of his surviving wife, and was wholly carried to them as her testamentary executors.

But while these parties were at issue on this point with each other, it became the common object of them all to recover the amount of the legacy out of the hands of Robinson, Mrs Campbell's executor. For that purpose Mrs Clarke and Mrs Grant, as executors of Mrs Trapaud, along with the guardians of Newmarsh, then a minor, filed a bill, as co-

No. 148. plaintiffs, in the English Court of Exchequer, against Robinson, an
 16, 1836. compelled him to pay £544, 10s. to account of the legacy, into Court.
 Clarke v. The Barons of Exchequer made an order that the consigned sum should
 Newmarsh. be paid to Mrs Clarke and Mrs Grant, "being the executors and personal representatives" of Mrs Trapaud the legatee: and these ladies granted a power of attorney to one Bowyer, in virtue of which he uplifted the consigned money. Mrs Grant then executed an assignation of her share in the fund, on the narrative that these proceedings had been held by agreement with the guardians of Newmarsh, merely for the purpose of having the fund deposited in a Scottish bank to await a judicial determination of the claims of parties in regard to it. Mrs Clarke refused to grant a similar assignation, and certain farther proceedings in the English Courts ensued between Newmarsh and her.

It appeared, that, as early as 1799, Mrs Clarke had obtained an Opinion from Sir W. Grant which, inter alia, stated that the legacy of Mrs Trapaud would, by the law of England, vest in her during her husband's lifetime. And the proceedings in the English Courts were afterwards held to establish this also.

In 1814 Newmarsh raised an action of count and reckoning before the Court of Session against Mrs Clarke, who resided in Scotland, in which he concluded, 1st, That Mrs Clarke should be decerned to count and reckon as to a separate legacy of £700, not requiring farther notice here, as it did not enter into the judgment of the Court: and, 2d, That she should be decerned "to concur with the complainer (Newmarsh) in uplifting from the said William Bowyer the money in his hands, and paying it over to him by granting a power of attorney for that purpose to such person as he shall appoint, and that at his expense."

Mrs Clarke pleaded, in defence, that the action was incompetent, as the proceedings in the English Courts amounted to *res judicata* in her favour.

After some procedure, Newmarsh obtained a judgment from the Lord Ordinary, finding, that Mrs Trapaud's legacy "became due in the Governor's lifetime, and of course fell under his *jus mariti*:" that the English proceedings did not decide the question of right to it; but merely transferred the sum to Bowyer, as attorney for Mrs Clarke: "that, if the money had been paid to Mrs Clarke it would have been competent to Newmarsh to have demanded it from her as being part of the estate of Governor Trapaud: and, consequently, as it is admitted that the money is in Mr Bowyer's hands, for behoof of those having interest in it, there is nothing unreasonable or incompetent in Mr Newmarsh demanding a decree against Mrs Clarke to the effect of her granting an order on Mr Bowyer to pay that money to him." In regard to this, his Lordship "decerned against Mrs Clarke in terms of the libel."

Afterwards Mrs Clarke obtained the benefit of the poor's roll, and

raised a reduction of this decree, in which action the Court “repelled the plea of *res judicata*, sustained the reasons of reduction, and reduced, decerned, and declared accordingly, to the effect of allowing the pursuer to be heard for her interest in the action in which the interlocutors and decrees pronounced were sought to be reduced; and remitted to the Lord Ordinary to hear parties both upon the competency of that action and also upon the merits of the same.”¹

In the reduction,

Pleaded by Mrs Clarke—

1. *On the point of competency.*

The proceedings in England amounted to *res judicata* in her favour; or at least they raised the exception of *lis alibi pendens*; or made it expedient, in point of judicial propriety, that parties should have their rights finally extricated in the Courts of England, where they had already been under discussion, where Newmarsh resided, and where the funds were situated.

2. *On the merits.*

(1.) Governor Trapaud had never lost his English domicile. He was an Englishman, and was merely stationed here as Governor of Fort-Augustus: he only came to Scotland in consequence of his appointment, and as he held it till his death, he had never given any indication of a purpose of remaining in Scotland, apart from the obligation incumbent on him to reside where his appointment, while it lasted, required: he thus had never lost his English domicile, or acquired a Scottish one, in regard to any question except that of liability to the jurisdiction of Scottish Courts. But as the wife's domicile followed that of the husband, Mrs Trapaud and he were both possessed of English domiciles at the time when Mrs Trapaud's English legacy was left to her. But if so, then the law of England should be let in, to determine the rights of the spouses in the legacy, just as much as it would have been in the case of two English spouses, one of whom received a legacy, during the period of a temporary sojourn or visit paid to Scotland. And, by the law of England, Mrs Clarke averred that this legacy never fell under Governor Trapaud's power of disposal, but became the absolute property of the surviving wife, whom Mrs Clarke now represented, to the extent of one-half, her sister Mrs Grant being in right of the other.

(2.) The fund bequeathed was left by a domiciled English lady, under an English will, and was locally situated in England. It formed an interest under an English deed, which could only be taken up according to the forms of the law of England. It was immaterial, in this view,

¹ Nov. 17, 1825 (*ante*, IV. 182, or 184, New Ed.), which see.

Jo. 148. where Governor Trapaud was domiciled: because, by the law of England, the legacy had never vested in him, and therefore it could not be conveyed by his settlement. In the case of Brown* the same doctrine as now contended for had been expressly held.

Pleaded by Newmarsh—

1. *On the competency.*

The proceedings in England had not the effect of deciding any question as between the pursuer and defender, who, on the contrary, were co-plaintiffs. Neither was it possible, under these proceedings, to adjudicate between them. And as the Courts here were competent to decide all the questions now at issue, Newmarsh had a right to insist for a decision from them, and could not be compelled to go and institute a new suit in England.

2. *On the merits.*

(1.) The domicile of Governor Trapaud was conclusively rendered Scottish by his uninterrupted residence of 51 years in that country; especially when accompanied by the circumstances of his marrying a Scotswoman, his cultivating a farm, and his being in the commission of Justices of the Peace for the county where he lived. Though he held a military appointment, and that was undoubtedly an important consideration, it was not enough to counteract the weight of all the other circumstances which demonstrated that the permanent home of the Governor, where he dwelt *animo remanendi*, was in Scotland. And as the marriage, which was with a Scotswoman, was contracted, and continually subsisted to its close, in Scotland, the rights of the spouses arising out of it, must be determined by the law of Scotland. But the legacy of £600, as it fell due, during the marriage, vested in Mrs Trapaud both by the law of Scotland and by that of England: and being thus vested, the law of Scotland made it fall under Governor Trapaud's *jus mariti*, and it was therefore conveyed under his settlement to the defender. Though the farther step of "reducing into possession" might be necessary to make the fund fall under the power of a husband in an English marriage, no such additional step was necessary where both spouses were domiciled in Scotland, and the marriage permanently subsisted there.

(2.) Though the fund was situated in England, that only let in the English law to the effect of saying, whether such fund was of a heritable or moveable nature. By that law the fund was moveable; and, as moveables follow the person, it was the law of Scotland alone, being the place where the contract of marriage permanently subsisted, which could

* Not reported.

urke, as one of the executrixes of Mrs Trapaud, deceased, she
larke) being then legally domiciled and resident in Scotland, ac-
to the conclusions expressed in the summons: 2do, That the
ons of the summons, in the said action, were legal and competent
ve effect in this Court: 3tio, That the said Alexander Trapaud,
ne Governor of Fort-Augustus, who died there in the year 1796,
iving been constantly resident in Scotland for 50 years, must,
ll the circumstances of the case, be held to have been legally do-
in that country at the time of his death: 4to, That the said
der Trapaud, having, in the year 1779, he being then resident in
d, married Miss Anne Campbell, a native Scotchwoman, also
ident and domiciled in Scotland, the legal effect of that marriage,
d to any property then belonging to her, or which might become
n her thereafter during the continuance of the parties to reside in
d, must be regulated by the law of Scotland: 5to, That it is ad-
by both parties, and fully established by the proceedings in the
f Exchequer in England, that the legacy of £600 bequeathed by
of Mrs Dorothy Campbell, who died in 1785, did, by the law of
d, become vested in the said Mrs Anne Campbell or Trapaud,
the lifetime of her husband Governor Trapaud; and found that it
so vested according to the law of Scotland: 6to, That the legacy
vested in Mrs Trapaud, it did, eo ipso, according to the esta-
rules of the law of Scotland, pass to the said Alexander Trapaud,
band, by the force of the legal assignment of the wife's personal
implied in the marriage of the parties celebrated in Scotland, as
d, and become part of his personal or moveable estate at his

No. 148. of money, part of the said legacy, is now in the custody of William Bowyer in the summons mentioned, under, and in consequence of, the proceedings instituted jointly in the names of the pursuer and her sister, Mrs Grant (who is no party to this action, but has assigned her interest to the defender), and of the present defender, finds that the pursuer is bound to concur with the defender in enabling him to uplift and receive the said money, and, for that purpose, to grant a power of attorney as required by the summons in the said action; therefore, in the original action, at the instance of the said John Luduvez Newmarsh, repels the defences, and finds and decerns for count and reckoning against the said Mrs Anne Clarke, in terms of the first conclusion of his summons, and finds him entitled to require a special order for rendering accounts, if so advised; and finds, decerns, and declares in terms of the second conclusion thereof; and, to this effect, on the merits of the present action, sustains the defences, assoilzies the defender, and decerns; and finds no expenses due." *

Feb. 16, 1836.
Clarke v.
Newmarsh.

* "NOTE.—This case is important, and not without difficulty. 1. The opinion which the Lord Ordinary has formed as to the competency of the action at the instance of Mr Newmarsh, coincides with that which was expressed by Lord Newton, after a full hearing, in a note on the 13th November, 1827. He pronounced no interlocutor, only because the parties had not been heard on the merits, and he thought that the whole points should be decided together.

"It appears to the Lord Ordinary that the plea of *res judicata* is untenable; because, although the suit in the English Exchequer was raised in the joint names of the pursuer and her sister, and of the guardians of the defender, then an infant, it was clearly raised for the sole purpose of compelling Mr Robinson, the executor of Mrs Campbell, to pay up the legacy; and because, though the question which might exist as to the claim of the pursuer and her sister, on the one hand, or of the defender on the other, to the legacy, was indeed stated by the defendant, as a pretence for withholding the money; and though the Remembrancer of Exchequer did, in his report, take it for granted that, because the legacy had not been in the husband's possession, it must belong to the executors of the wife, the question never was discussed at all, nor was any appearance even made for the guardians of the defender, and that subsequent order for paying the money to Mr Bowyer was also made on the single motion of the pursuer and her sister without any discussion whatever. On the other hand, the intervention of the defender, at a later period, by a mere caveat to prevent the money being paid to the pursuer, did not take place till after not only the multiplepoinding had been raised and dismissed as incompetent, but the present defender's action for count and reckoning, and for compelling the pursuer to concur in uplifting the money, had been instituted in this Court. The action was raised on the 29th December, 1814, and the order in Exchequer to their cause, upon the pursuer's demand of judgment against Mr Bowyer for payment to herself, was made on the 15th February, 1815, after hearing counsel for the pursuer and Mr Bowyer only, and not for the defender. Nothing more took place. The idea, therefore, of there being any *res judicata* seems to be out of the question.

"With regard to the plea of *lis alibi pendens*, it is to be observed, that the defender is domiciled in Scotland. The jurisdiction of this Court therefore is clear.

ation of the whole proceedings in England, and the judicial statements of her regarding them, the Lord Ordinary is perfectly satisfied that the sole object of them was to get the money out of the hands of Robinson, Mrs Campbell's husband. The defender was an infant, and the very fact of the pursuer and her attempting to proceed in their own names, but taking the concurrence of the defender's guardians, shows that that was the purpose; while, there being no concurrence for the defender or his guardians, and no discussion on his right, it is clear that there was no intention of bringing that question before the English courts, or doing any thing more than forcing payment of the money by the pursuer or both of the parties.

It is a point that can be more clearly settled than that the circumstance of the subject of the action being personal funds, having been recovered in England, and brought before the courts of equity there, does not bar an action in this Court, for determining the rights of the parties to that subject, if they are so situated that this Court has jurisdiction; February 27, 1705, *Cunningham* (8287); January 2, 1728, *York Building Company*; March 8, 1769, *Coutts and Co.* (8292); June 25, 1771, *ibid.* (8293); *Queensberry Executors v. Hislop*, November 13, 1822 (2 S. and 7. New Ed.) Neither does it appear to the Lord Ordinary to be at all material for establishing the plea of *lis alibi*, to say that the question might possibly have been discussed and determined in the English suit. This might have been the case in every one of the above cases. If parties had joined issue on the questions, they might have been tried in Chancery, as in the *Queensberry* case, though resort to the law of Scotland would have been necessary.

It may be doubtful whether, or to what extent, the question as to the domicile of the husband is essential to the merits of the case. It can only be so, in view of the operation of the marriage; that is, if it depends not on the law of the locus contractus, but on that of the domicile of the husband, or if it is modified by the latter. The Lord Ordinary is inclined to think this view, if taken broadly, is destructive of domicile, incorrect. But as it may affect the question, more or less, he has given his judgment on the point of domicile. The question as to what is a man's legal domicile is, is always a question of circumstances. The

No. 148. as to the propriety of further procedure here, until the nature and effect of the proceedings in the English Courts should be definitively ascertained.

b. 16, 1836.
arke v.
swmarsh.

Pothier in the passage referred to by both parties, *Cont. d'Orleans*, p. 5. It has been recognised in all the cases of authority, and is particularly marked in that of Sir Charles Douglas, who was nearly all his life in service, and when on shore constantly shifting his residence, yet was held to have lost his Scotch domicile and acquired an English one, chiefly because he had a house for his wife and family at Gosport. In the present case, without inquiry whether the appointment of Governor of Fort-Augustus was strictly *ad vitam aut culpam*, or whether Governor Trapaud was subject to the military act, and liable to be called into service or not, it is surely enough for the point in question, that he had been in the place for fifty years, and constantly resident; and that there is no averment either of an intention to remove him, or of an intention on his part to resign, or to leave Scotland. That he occupied and cultivated a farm, is also material, whether it was attached to the office or not. In either view it implies permanency. That he acted as a Justice of the Peace is still more important; and it is not averred in the record that he did so as Governor; and, on the whole, the Lord Ordinary cannot conceive a stronger case of change of domicile. And, having formed this opinion upon principle, it is certainly very satisfactory to him to find that it is confirmed by the opinion of such a lawyer as Sir William Grant. In a case laid before him on the part of the pursuer and her sister in 1799, the question of domicile was brought distinctly under his notice, and Governor Trapaud was described as 'Governor Trapaud, an English gentleman, residing in Scotland merely in his capacity of an officer in his Majesty's service, happening to die in that country;' and, with reference to this, Sir William Grant says, 'I think it will be difficult to contend that it is not the law of the domicile that must govern the case, and I do not see any ground for disputing that Scotland was Governor Trapaud's proper domicile.' Yet the facts, as stated in the case, were not nearly so strong in favour of the Scotch domicile, as they are now admitted to be on the record.

" 3. But the question does not exclusively depend on the domicile, though it may be affected by it. This is not properly a question in the succession of Governor Trapaud. It is as much a question in the succession of Mrs Trapaud, who survived her husband, and was certainly domiciled in Scotland. But the real question is, what was the effect of the marriage in Scotland, on the rights of Governor Trapaud and his wife? Was the legacy, which was vested in Mrs Trapaud, legally transferred to the husband before his death? That it was, by the law of Scotland, there can be no doubt. But the Lord Ordinary apprehends that it is a question which must be determined by the law of Scotland. In the same opinion of Sir William Grant, after stating that, by the law of both countries, the legacy vested, he adds, 'But a subsequent question arises, whether a legacy thus vested falls under the husband's *jus mariti* so as to pass by his will, though he die before his wife, and before the legacy is paid. Now that question must be determined by the law of the country in which the relation of husband and wife has been contracted and subsists.'

" If, at the time of the marriage, Governor Trapaud had been, in the ordinary sense, a domiciled Englishman, and only accidentally married in Scotland, the *locus contractus* might not regulate the effect of the marriage; or if, before the legacy became vested in 1785, the parties had removed from Scotland and been properly domiciled in England, there might be room for a similar construction as to the effect of their marriage as subsisting. But, in a case in which the

that there could be no adjudication as between co-plaintiffs; that proceedings in the English Courts were not conclusive of the rights of the parties; and that the right of Newmarsh could not be prosecuted in England without a new suit.*

had been thirty-three years resident in Scotland, before the marriage, his wife was a native Scotchwoman, in which they were still resident in 1796; while the legacy became due, six years after, and in which the marriage was contracted, in Scotland alone, till the death of the husband in 1796; it would be a monstrous stretch of principle to say, that, upon any idea of a change of domicile, in consequence of the husband's appointment being of a military character, the effect of that marriage should be regulated by the law of England; if the legal domicile was in Scotland, there can be no question in it, but if that were doubtful, there can be no question that it was in Scotland at the time that the marriage was contracted, and did continually subsist.

The Court shall concur in the opinion of the Lord Ordinary, the effect of which is, that the present pursuer must grant the power of attorney, and may be allowed with horning to that effect. But the Lord Ordinary conceives that it is competent to Mr Newmarsh, to demand payment from Mr Bowyer, in pursuance of the decree, and, if necessary, to apply to the Court of Exchequer in order to compel payment."

* "QUESTIONS TO COUNSEL.

How far, according to the law and practice of England, the proceedings of the Court of Exchequer referred to, are conclusive on the question of right to the legacy between the parties in the present process, so as now to bar the pursuer at the instance of Mr Newmarsh?

How far the proceedings, if not conclusive on the point of right, now before the Court, are a proper and competent means for still trying the question of right to the legacy between said parties, co-plaintiffs therein; and if these proceedings could be revived or renewed for this particular effect?

Will Counsel also be good enough to furnish to the Scotch Court any additional information which he may, after a perusal of the proceedings, deem proper or useful, for the information of the Scotch Court, in regard to the facts and circumstances in England?"

"OPINION OF MESSRS BIKERSTETH AND C. H. MACLEAN.

The legacy in question being given to Mrs Trapaud; her husband was in

* December 20, 1833 (ante, XII, 255).

No. 148. On this Opinion being returned, and parties being again heard length,* the Court proceeded to decide the cause.

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her right entitled to reduce it into possession; and if he had done so, the would have become his own absolutely. In fact, he neither reduced it into session, nor released it, but died leaving Mrs Trapaud surviving him; and these circumstances, the legacy, by the law of England, became the ab property of Mrs Trapaud, the surviving wife, and upon her death, became property of her executrixes, as part of her estate, to the exclusion of the exe of her pre-deceased husband.

"The proceedings in the Court of Exchequer, were in accordance with law of England in this respect; and if the question raised by Mr Newmarsh now to be litigated in England, the legacy would be adjudged to the execut of Mrs Trapaud.

"But between co-plaintiffs, there can be no adjudication; and notwithstanding the joint allegations in the bill, and the several orders obtained upon the application of the plaintiffs, including the executors of General Trapaud incline to think, that the mere proceedings in the Court of Exchequer would be considered conclusive of any right, so as to bar any just or substantial of Mr Newmarsh: The right, however, could not be tried as between the plaintiffs in that suit. If Mr Newmarsh should be advised to prosecute his in England, it would be necessary for him to institute a suit of his own, to explain not only the long delay which has taken place, but the circumstances which he and the executors of General Trapaud were induced to join in proceedings, now alleged to be at variance with their rights. But Mr Newmarsh as executor of his mother, the residuary legatee of General Trapaud, cannot the law of England, establish any title or claim to the legacy in question. cases, *Gayer v. Wilkinson*, 1 *Brown's Chancery Cases*, 50, note.—*Bec Becket*, 1 *Dicken's Reports*, 340.—*Mitford v. Mitford*, 9 *Vesey's Reports*, *Baker v. Hall*, 12 *Vesey*, 497.—*Pierce v. Thomely*, 2 *Simons*, 167.—*Adams Lavender*, 1 *MacClelland and Younge*, 41."

* On the motion of Mrs Clarke, that Newmarsh, who was a clergyman of the Church of England, and resident in England, should sist a mandatory, he came down from England, and appeared in Court, at one stage of this pleading, for the purpose of superseding the necessity of sisting a mandatory, as there had been a great amount of expense incurred in the judicial proceedings, and he found it difficult to procure a mandatory.

The *Dean of Faculty*, on this occasion, before pleading to the merits, objected that, as Newmarsh was a clergyman of the Church of England, and resident in England, and would probably return home as soon as the debate was over, Mrs Clarke had a right to insist on a permanent mandatory being sisted, or at least on a mandatory being found for expenses.

Keay answered, that where a party was personally present in Court, there was no precedent, and no principle, for calling on him for a mandatory; and there was not there any ground for demanding caution for expenses, where the party was not divested of his estate. In this instance, the demand was made by a party on the poor's roll, whose claim of caution for her expenses, was in a less favorable position than where a litigant was exposed to the ordinary costs of litigation.

LORD GILLIES.—It would be a very serious matter, indeed, if the Court were to call on this gentleman, who is now present in Court, to sist a mandatory before allowing him to be heard.

at the same result with the Lord Ordinary.

GILLIES.—I am of the same opinion. The whole question admits, I think, of being disposed of in very few words. The essence of it is expressed in the opinion of Sir W. Grant, in which, after stating that the legacy vested in Mrs Trapaud, both by the law of England and of Scotland, during the husband's lifetime, he adds—"But a subsequent question arises, whether a legacy thus vested, falls under the husband's *jus mariti*, so as to pass by his will, if he die before his wife, and before the legacy is paid. Now that question is determined by the law of the country in which the relation of husband and wife has been contracted and subsists." I concur in every word of that decision, as it contains the whole case, it is unnecessary for me to say more.

MACKENZIE.—I concur. In regard to domicile, there is no strict or inflexible rule for determining any such question. Its nature excludes this, for it is always a question of circumstances. It is true, that residence is of less weight in this question, where it is connected with military service, or a military appointment; but it cannot be held that such residence is to go for nothing, whatever be its duration, or however it may be affected by accompanying circumstances. If the residence be of a temporary kind, and is necessary for the performance of official duty, it will not infer the *animus remanendi*, and will not divest an officer of his previous domicile, and clothe him with a new domicile; but, on the other hand, if the appointment be of a permanent nature, such as the station of governor of a fort, continued during the lifetime of the governor, and lasted above fifty years, this forms a most important ingredient in showing domicile was acquired there. And when there are accompanying circum-

BALGAT.—When a party appears in Court, I think we cannot call on him for a mandatory. If he leaves the country after this day's discussion, he will undoubtedly be here again at the next step which is made in the process. As he is here, a mandatory cannot be required.

MACKENZIE.—I am of the same opinion in this case. Yet it is perhaps doubtful whether Mrs Clarke might not insist on caution being found for the money. But I desiderate authority or precedent for such an order.

PRESIDENT.—As Mr Newmarsh is here in Court, and is entitled to plead a case, if he chooses, his opponent cannot call for any mandatory to be

Court intimated that Mr Newmarsh's counsel might proceed.

It was then stated, on the part of Mrs Clarke, that his personal attendance was not again to be insisted on.

No. 148. stances of the nature here stated, such as the governor's marrying, and occupying himself with other duties indicative of a fixed residence, the whole may produce as in this case I think they do produce, an irresistible conviction on the mind that the party was domiciled in the place where his residence was thus established, and that his previous domicile was lost.

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In regard to the effect which is due to the *jus mariti* of Governor Trapaud I think there is no room to let in the English law that "reducing into possession" was necessary to make the legacy fall under the *jus mariti*. That may affect the husband's right which arises under an English contract of marriage; but not in this instance. Suppose the English rule had been that legacies left to a wife, or moveables accruing to her, during marriage, were her own exclusive property, out and out, and did not fall under the *jus mariti*, could it be maintained that a Scottish husband had no interest in such moveables, in so far as they accrued to his wife under English settlements? I certainly think it could not. And as little can it be maintained that his *jus mariti* is suspended till the step of "reducing into possession" is taken. It is enough for the law of Scotland, if the subject be moveable, and vests as such in the wife. That being the case, the law of Scotland immediately applies to the effect of bringing it under the *jus mariti*. I decided the case of Newlands on this principle, and I perceive that it was on this precise ground that Lord Glenlee gave his opinion when concurring with the Inner-House, adhering to my judgment. The English law is to be referred to for the purpose of determining whether the character of a particular subject was heritable, moveable; but so soon as that is fixed, the law of Scotland decides what is the right of a husband, under a Scottish contract of marriage, in moveable effects which have accrued, during the marriage, to his wife.



LORD PRESIDENT.—I am entirely of the same opinion. An officer in a marching regiment who is quartered for a time in Scotland, acquires a residence there which is very different, as an element in the question of domicile, from the residence arising out of a more permanent cause, such as the governorship, in this instance, of Fort Augustus. Residence may be connected with the appointment to a civil, as well as to a military office; and wherever it is of a permanent kind it forms an important ingredient in the question of domicile. Take for example the case of the late Baron Norton, who was an Englishman, and came to Scotland in consequence of his appointment as one of the Barons of Exchequer. It would be difficult to hold, considering his long residence here, with his family, that he had not lost his English domicile and acquired a Scottish domicile, though his residence arose out of an official appointment. And it may equally happen, though a military appointment be the cause of residence, that the residence be of that fixed and permanent sort which excludes the idea of any other domicile remaining, and necessarily induces a new domicile in the country where the residence is established. Looking to the whole circumstances in Governor Trapaud's condition, I hold that the fact of his occupying a military post does not entitle me to disregard all that he has been doing throughout his life; and, on attending to that, I am satisfied that he acquired a domicile in Scotland.

Dean of Faculty, for Mrs Clarke, asked—

Whether it was the intention of the Court to affirm the seventh finding of Lord Ordinary, "That the pursuer is bound to concur with the defender in all

essentially the same thing, and, in decerning her to grant a power of attorney it uplifted, we are just ordaining her to make delivery of it. Her attorney is in England, but she is truly the holder of the fund, through his instrumentality, and we may decern her to cause the fund to be delivered to its holder.

THE PRESIDENT.—I take very much the same view. I cannot see why we should have adjudicated between these parties, if we had not the power to ordain the fund to be delivered to the party, whose it is, and to ordain the other party to execute the requisite power of attorney for carrying our judgment into effect. As to the circumstance of the funds being in England, Mrs Clark is there, and she is the holder of the fund through her attorney. We can decern to surrender the custody of the fund, and, of course, by directing her to require her attorney to surrender it.

MR MACKENZIE.—I am not prepared to dissent from these views; but before the order required, I could wish to know whether it is necessary. It is uncertain whether the decree, finding the defender entitled to this fund, may itself be a sufficient warrant to the holder of the fund to pay it over to the pursuer.

MR GILLIES.—When I consider the great length to which this litigation has been carried already, I do not hold myself at liberty to postpone granting this decree to the pursuer, if I think the defender has a right to demand it. If the decree be unnecessary, he will not use it; but if it be necessary I think him entitled to it.

The Court then intimated that they would adhere to this finding.

On the motion of the *Dean of Faculty*, assented to by *Keay*, the Lordships altered as to the decerniture “for count and reckoning against Mrs Clarke, in terms of the first conclusion of the sum-

No. 149.

MRS SMITH or ROSE, Pursuer.—*D. F. Hope—G. Grant.*

Feb. 17, 1836.

MRS TAYLOR or ROSS, and HUSBAND, Defenders.—*Rutherford—Milne.*Smith v.
Taylor.

Testament—Clause—Faculty.—Terms of a holograph testamentary writing, by a wife, which, when viewed in connexion with certain relative deeds, by her husband, were held to establish (1.) that he had placed a sum of £2000 of his, at her disposal; (2.) that she had effectually bequeathed £500 of that sum to the pursuer; and (3.) that the defender, who took up an estate as heir of provision under a deed executed by the husband, which burdened such heir with the said sum of £2000, was liable to the pursuer for her legacy, whether the defenders might, in the circumstances, have any claim of relief against the husband's general representative or not.

Feb. 17, 1836.

First Division.
J. Fullerton.
B.

IN 1805, the late Walter Ross, of Nigg, granted a heritable bond of annuity for £100, in favour of his wife, payable to her after his death. In 1806 he executed a trust-disposition and settlement, conveying, inter alia, the lands of Nigg with powers of sale, to his trustees, and containing this clause:—

“As I have already executed a bond of annuity over the said lands of Nigg, in favour of my said spouse, for the sum of £100 sterling yearly, I recommend my said trustees to leave a sum in the hands of the purchaser of Nigg, which will yield that annuity, and at her death to pay over the principal sum to such persons, and in such proportions, as she may direct, by a writing under her hand; it being my wish that the sum of £2000 should be always at her disposal, either among her own friends, or others whom she may think entitled to her attention; and failing of her leaving such writing, then I direct that the said sum of £2000 sterling be equally divided among her nieces, Smiths and Murrays, share and share alike.”

On the 30th March, 1810, Mrs Ross executed this holograph writing:—

“In the name of God, amen. Know all men by these presents, that my husband, Walter Ross of Nigg, said that he would give me, his wife, Barbara Ross, £2000 sterling money, to be at my disposal after death, and my testament and will is, in manner following: For and from the love and affection I bear my three sisters, namely, Mrs Smith, Mrs Murray, and Mrs Taylor, to each of them, or to any, either, or whosoever of their children who most require that aid, £500 sterling, making in all £1500. To the parishes of Cromarty, Nigg, and Tain, £100 each, &c. Still there is £200 to dispose of; which sum I do propose to give, or to will away, to needy relations, &c. Unto a just and equal division and disposal of the above sum of £2000 sterling, so help me God.

(Signed)

“BARBARA ROSS.

(Signed)

“ WALTER ROSS.”

1815, Ross executed a disposition and entail of the lands of Nigg, giving them “ to myself, and Barbara Ross, my spouse, in conjuncture for life, or to our heirs-male or female in fee ; whom failing, to the heirs of my body by any subsequent marriage ; whom failing, to the heirs of the body of the said Barbara Rose by any subsequent marriage ; whom failing, to Flora Ross, my sister, spouse of James Taylor, &c., but subject with and under the conditions, &c. after-mentioned. 1st, That so long as I shall live. 2d, That any person, &c. And further, with the burden of the said sterling, which shall be at the disposal of the said Barbara Ross, in the event she dies without having any children to succeed

The deed also contained a legacy of the household furniture, &c. to my wife.

Ross died about the year 1825, without issue, and Walter Ross died in 1830, also without issue. His sister, Mrs Taylor or Ross, then possessed the titles to Nigg, as heir of provision under the entail 1815.

In 1834, Mrs Smith or Rose, widow of the Rev. Robert Smith, and the three sisters of Mrs Ross, mentioned in her testamentary writing, raised an action against Mrs Taylor or Ross, founding on that writing ; on the relative holograph writing of the late Walter Ross of the same date ; and on the disposition of Nigg in favour of the said Mrs Smith, containing the provision already quoted, as to Mrs Ross's power of sale of £2000.

The Court concluded for payment of £500, with interest from the first

No. 149. And 3d, That Walter Ross had left a considerable amount of move estate to his general representative, who was primarily liable for the pursuer's claim, and should be first discussed.

Feb. 17, 1836.
 Smith v.
 Taylor.

The pursuer answered—

1st, That the intention of Walter Ross was clearly expressed to his wife a power of disposal of the sum of £2000, whether she predeceased him or not; that he had actually given her such power of disposal; he had even destined that sum, in the deed of 1806, to her relations, for any writing under her own hand disposing of it.

2d, That the holograph writing of 1810, was a testamentary deed, actually and definitively exercising the power of disposal over the £2000 at least to the extent of £1800, including the legacy now sued for; that Walter Ross, by his relative holograph writing, of the same date, approved of that deed, and concurred in it: and that Walter Ross, by his further ratification of that writing, had executed, in 1815, the disposition under which the defender now had right to the lands of Nigg, which disposition expressly burdened her with payment of the sum disposed of in Mrs Ross's testament.

And 3d, That the burden of satisfying the pursuer's claim, and the payment of the bequests, out of the £2000, had been specially laid on Mrs Taylor. Even if she had a claim of relief, she was liable directly to the pursuer.

The Lord Ordinary “repelled the defences, and decerned in terms of the conclusion of the libel; and found expenses due.”

The defenders reclaimed, and contended chiefly that Mrs Taylor was not the general representative of Walter Ross, and that the burden of paying this provision lay primarily on the general representative, and ought to be first discussed.

The pursuer's counsel were not called on by the Court.

LORD BALGRAY.—I think this case is attended with no difficulty whatever. The whole deeds of the parties must be viewed in connexion with each other, and then it is quite clear that Mrs Ross intended to make the bequest in favour of the pursuer which is now claimed, and that this intention was duly carried into effect. As early as 1806, Walter Ross, in disposing of his lands to trustees to be sold, declared it to be his wish “that the sum of £2000 should be always at her (Mrs Ross's) disposal,” and failing of her leaving any writing which disposed of that sum, he directed it to be divided equally among her nieces. Then, by the testamentary writing of 1810, by which Mrs Ross expressly referred to her power of disposal of £2000, conferred on her by her husband, and then bequeathed it, to the extent of £500, to the pursuer, besides other legacies to other persons. Her husband, of the same date, ratified and approved of the disposal of this sum, and directed it to bear interest, from the first term after the survivor's death, it should be paid out of his funds. This was afterwards followed by the disposition of the lands of Nigg in 1815, conveying that property to the defender, and the burden of £2000 to be at Mrs Ross's disposal, if she died without issue.

...is a question not now before the Court. The only question here is
ability of the defender to the pursuer. On that subject I entertain no doubt,
concur with the Lord Ordinary.
RD MACKENZIE concurred.

THE COURT adhered, and awarded additional expenses.

A. STORIE, W.S.—G. TAYLOR, W.S.—Agents.

ALEXANDER CAMPBELL, Pursuer.—*Penney*.
COLIN ARROTT, Defender.—*Keay—Whigham*.

No. 150

On Reference—Proof.—Circumstances in which, held, that a party, to whose
reference had been allowed, was not in a state of mind in which an oath
properly be administered to him; and his deposition therefore ordered to
be withdrawn from process.

QUEL of the case reported February 26, 1835 (ante, XIII. 557), Feb. 17, 1835
see. The Court then sustained a plea of prescription stated by 1ST DIVISION
it in defence, against the account for business claimed by Alexander Ld. Corehouse
Campbell, writer in Glasgow, “but allowed the pursuer to prove that the S.
debt is resting-owing, by the writ or oath of the defender.” A minute
reference was put in, and commission was granted to Archibald Alison,
, Sheriff of Lanarkshire, to take the oath.
When the commission was accepted of by Mr Alison, it was objected on
part of the defender, that he (defender) was not in a fit state to have
an oath administered to him, and evidence of this by witnesses, was in-
completely tendered.

The pursuer answered, that the proposed evidence was incompetent.

No. 150. permit him, unless he is satisfied that he knows what he is deponing to be subjected to that species of examination; and that the only way of ascertaining that important matter is to examine such witnesses acquainted with the mental condition of the party, and himself personally examining and conversing with the individual in question; repelling objection, and allowed the examination of the proposed witnesses received; and declared that he would himself visit and converse with the party to whom the reference is made, after the examination of the witnesses on this point has been concluded."

. 17, 1836.
Campbell v.
Arrott.

Harry Rainy, M.D., then deponed that he thought the defender "could not understand some simple questions, but that it is very doubtful whether he could comprehend any which were at all complicated. Depones, That the defender is of opinion that the defender's intellects are all impaired, both his judgment and his memory, insomuch that the deponent, who attends the defender pretty regularly twice a-week, or thereby, cannot rely upon his giving a correct account of his symptoms or health, in the interval between one visit and another, but he sometimes gives correct answers, and remembers the matters regarding which he has been interrogated, but no reliance can be placed upon his answering correctly in every instance; and the deponent may mention, as an example of his forgetfulness, that he has frequently asked him whether he had been out 'to-day,' or remain at home, and received from him an answer, which the deponent ascertained from the family was incorrect. Depones, That if Mr Arrott was called as a witness, in a civil or criminal case, he, the deponent, would feel himself bound, if called on in a court of justice, to give it as his opinion, that the defender was not in a fit state of mind to be examined as a witness, and he would not do so, not merely from the defect of judgment and memory already mentioned, but from his liability to mistake his imaginations for realities. Of this the deponent may mention an instance, in the belief which the defender entertains to-day, and expressed to the deponent, that he had been at Douglas Mill yesterday, which was not the case, and he sometimes imagines himself on a journey, when, in fact, he is in his own house. Depones, That sometimes he has said to the deponent that he was waiting for the Glasgow mail, by which he was to be taken up, and seemed offended when he was told that he was still in his own house: That the defender sometimes can discriminate these illusions from realities, but not always. Depones, That he cannot say whether these illusions would or would not affect his answers on matters of business, relating to his money and estate. As the deponent, so far as he recollects, has not conversed with the defender on such matters, excepting yesterday; but he yesterday declared to the deponent, that, on the morning of that day, he had imagined he was on his way to Manchester to buy goods, which he stated he was now aware was not the case, and he then stated to the deponent, that he had formerly been in the practice of going to buy goods at Manchester, which the deponent understands to have been the fact. Interrogated by the counsel

d not conceive himself justified in putting him upon oath, even
l to a simple matter that had lately come under his observation,
his imbecility of judgment and defect of recollection : Depones,
deponent would not rely upon the account the defender might
on a business transaction such as that involved in the present ac-
which he had been engaged between the years 1823 and 1826,
magistrate, he would not feel himself justified in putting him on
eference to any such matter.”

Reverend Thomas Brown, D.D., deponed, That he had been in
of visiting the defender and his family during the last seven
That his faculties are now very much impaired, so far as memory
ned : That the deponent thinks he is still fully sensible of the
n of an oath, but he does not think he could be relied upon as
ive any distinct or accurate account of a business transaction
ccurred six or eight years ago : That the deponent is of this opi-
t merely from his, Mr Arrott’s defect of memory, but from his
g illusions for realities :” and that, a few days before, when the
t happened to remark that the defender’s wife was dead, before
nent’s acquaintance with the family began, which was the fact,
nder said, “ O no, she died last season.”

nurse who had attended the defender for the nine weeks preceding
nination, gave similar evidence, and deponed that the three pre-
witnesses were the persons who most frequently saw the defender.
ommissioner then proceeded to a personal interview with the de-

He reported that “ he found him sitting up, and though frail,
rable state of bodily health. Upon conversing with him, which

No. 150. trial had originated, in general that he had been successful, that Campbell and Barlas were the country agents employed, and that to the best of his recollection their account had been settled, although his recollection was very indistinct in regard to the details of the mode in which the settlement had taken place. In answer to a great many questions put to him by the commissioner, in regard to the subject-matter of the present dispute, he stated that 'he did not recollect,' and that his memory had been much impaired of late years. In all his answers he evinced a desire to give as much information as he could, and his answers had all the appearance of candour and sincerity.

17, 1836. Campbell v. Scott.
 " Upon considering the whole matter, with the deposition of the witnesses, and particularly adverting to the fact that the defender evidently understood the sanction of an oath, the commissioner was of opinion, that he was not at liberty to decline taking the defender's oath, leaving the Court to attach such weight to it, as in the whole circumstances of the case it may appear entitled to receive; and, in the mean time, appointed it to be sealed up, to await the decision of the Court in this particular."

When the sealed deposition was reported to the Lord Ordinary the pursuer craved authority to open it up. The defender opposed this, in respect that the deposition ought not to have been taken from him, as he was not in such a situation as to make him fit for examination, and the rights of parties would be exposed to the greatest hazard if they were made to depend upon what might be extracted from persons who laboured under such an infirmity as his.

The Lord Ordinary "having considered the report of the Sheriff of Lanarkshire, found that the defender was not, at the time he was examined by the sheriff, in a state of mind in which an oath could properly be administered to him, and therefore ordained the deposition which was sealed up to be withdrawn from process, and appointed parties to be further heard."

The pursuer reclaimed.

LORD GILLIES.—I am decidedly of opinion that this gentleman ought not to have had an oath of reference administered to him.

Keay, for defender. We apprehend that Mr Sheriff Alison merely considered it to be, on the whole, the safer course to take the oath and seal it up; because, if he had refused to take any deposition, and if this Court had afterwards altered that judgment, and found that the deposition should be taken, the defender might have died in the interval.

The other judges concurred in the opinion expressed by Lord Gillies, and

THE COURT, therefore, unanimously adhered.

J. YOUNG, S.S.C.—J. FORRESTER, W.S.—Agents.

parate parishes quoad sacra, and that the ministers should possess all the
and privileges competent to parish ministers in Scotland. 3. Question,
that date, the present class of these ministers should be subjected in pay-
[annual rates to the Widows' Fund.

Ministers' Widows' Fund was instituted, and trustees of the fund Feb. 18, 18
appointed, by 17 Geo. II., c. 11. The act was entitled, "An act 1st Divisi
ing and establishing a fund for a provision for the widows and chil- Ld. Fullert
of the Ministers of the Church of Scotland, and of the Heads, Prin-
and Masters of the Universities of Saint Andrews, Glasgow, and
burgh." The ministers, entitled to the benefit of its provisions, were
held as "ministers, ordained and admitted to a benefice in the
h of Scotland." It was provided, § 11, "That such ministers
Church of Scotland as are or shall be ordained or admitted as-
s and successors to the ministers having right to the benefices,
as to all the purposes of this act, be held as admitted to a benefice
Church of Scotland, only from the time that any such assistant is
ll be married, or when he shall have come to have right to the full
ce." The same act directed (§ 59) every presbytery to transmit
lly to the clerk to the trustees, "lists of all ministers admitted to
ces, with the dates of their admissions," &c. Four rates of contri-
were fixed, which rose from £2, 12s. 6d. per annum to £6, 11s. 3d.
ct was amended and explained by 22 Geo. II, c. 21, which included
iversity of Aberdeen along with the other three universities of
nd. It described the ministers in the same terms as before,
y minister who shall be ordained and admitted to a benefice in the
h of Scotland." At this time, and until the passing of the Small

1. 151. On the application of the General Assembly, an act was passed, 19 Geo. III., c. 20, “for the better raising and securing a fund for a provision for the widows and children of the ministers of the Church of Scotland, and of the heads, &c. of the universities,” &c., and for repealing the acts of 17 and 18, 1836. Geo. II. This act enacted,—§ 1, “That every minister who was possessed of a benefice in the Church of Scotland, on or before 29th September 1778, &c., shall continue to pay (his annual rates) at each term of Candlemas during his life, notwithstanding he may have ceased, or shall hereafter cease, to be a minister of the said church by resignation, deprivation,” &c. : § 2. “That every minister who has been ordained or admitted since 29th September, 1778, or who shall hereafter be ordained or admitted to a benefice in the Church of Scotland, shall be subject to one or other of the annual rates,” &c. :—§ 3. “provided always that what herein above enacted, shall not comprehend any person who shall hereafter be ordained or admitted to a benefice in the said church of a temporary nature, or to a precarious office, in any of the universities aforesaid where there is no security for the continuance of such benefice or office, and that it shall not be competent for any such person to claim the benefit of this fund, it being intended only for a provision to the widows and children of the ministers, heads, principals, and masters holding fixed benefices in the said church, and permanent offices in the universities aforesaid.”

The contributors were ordained to notify the rate of contribution selected by them, within a certain time, after obtaining right to the benefice, failing which, they were to be held contributors at the lowest rate but one, which was £3, 18s. 9d. : and it was provided, § 9, “That such ministers of the Church of Scotland, who have been ordained, or admitted assistants and successors to the ministers having right to a benefice, and who are not already subjected to one or other of the annual rates, or who shall hereafter be ordained or admitted assistants or successors to ministers having right to the benefice, where there is no real vacancy in such benefice, shall, as to all the purposes of this act, be held as admitted to a benefice in the said church only from the time that such assistant shall come to have right to the full benefice.” The act also enjoined presbyteries to return lists of ministers admitted to benefices, as before. It repealed the previous acts.

By 54 Geo. III. c. 169, the preceding act was amended, and the former several rates of contribution increased, the lowest rate being made £3, 3s. per annum, and the highest £7, 17s. 6d. This statute described the clergymen who were entitled to the fund in the same terms as before “every minister who was possessed of a benefice in the Church of Scotland.” It enjoined every minister “who has been admitted since the 15th day of May, 1814, or who shall hereafter be admitted to a benefice in the Church of Scotland,” to make an election within a certain time of the rate of contribution which he chose to pay, failing which, he should

erned and adjudged to have made his election of the increased No. 151.
 ate of £4, 14s. 6d.," which was now the lowest rate but one. Feb. 18, 1839
 appropriated the vacant stipends, after satisfying the Ann to Gordon v.
 ows' Fund. Trustees of
 Ministers' Widows' Fund.

second ministers, in collegiate charges, existing at the institution
 Widows' Fund, were admitted, without question, to the benefit of
 subsequently to that period, a considerable number of additional
 have been disjoined, and erected in Scotland; and in several
 collegiate ministers have been appointed where there was pre-
 in uncollegiate charge; in all which cases, the new minister has
 nitted to the Widows' Fund, on the same footing with those
 existing at the date of its institution.* A considerable number
 chairs have also been founded in the universities, the professors
 , to the number of twelve, have been admitted to the fund, on
 e footing with the other professors. During the same period a
 able number of benefices, and also several chairs in universities,
 n suppressed.

Geo. IV. c. 90, an act was passed, repealing a previous statute,
 V. c. 79, except as to the appointment of commissioners which
 made under it; and making new provisions, for the same object
 t act, which was "for building additional Places of Worship in
 lands and Islands of Scotland."

declared lawful (§ 3) for the commissioners "to erect or set
 ildings for additional places of worship, to make fit and suit-
 vision for the residence of the minister officiating at such places
 ip, and to exercise the other powers for the accomplishment of
 oses of this act, within such parish or parishes in the Highlands
 s of Scotland, from which application shall be made to the com-
 rs by any heritor or heritors" possessed of land valued at £100

e commissioners determined (§ 6), on inquiry, that an addi-
 lace of worship should be "provided for the parish or parishes
 ich such application shall have been made, then the said com-
 rs are hereby empowered and directed to require the heritors,
 such application, to settle and agree with the presbytery of the

o. 151. or parishes, for behoof of which district, such additional place of worship
 18, 1836. is to be erected or provided, and to which the labours of the minister
 lon v. be appointed, as hereinafter directed, to officiate at such additional place
 stees of of worship, shall be confined." Failing an agreement between the heri-
 tors' Fund. tors and presbytery, the commissioners were to determine as to this, on a
 report from the sheriff. The commissioners were also empowered "to
 ascertain and settle the proper situation for, with access to, and the size
 and description of, the building which shall be erected or purchased and
 fitted up pursuant to this act, as an additional place of religious worship,
 to be and become an additional place of religious worship in full com-
 munion with the Church of Scotland, with a churchyard or place of
 burial (if such shall be deemed necessary); and of the dwelling-house,
 with such offices and appurtenances as it may be proper should be af-
 forded to the minister thereafter appointed, pursuant to this act, to offi-
 ciate at such additional place of worship."—(§ 7). The commissioners
 were empowered to alter the district, and define a new district, on the
 representation of the presbytery of the bounds: and by a subsequent sec-
 tion they were empowered to accept any donation of ground from a heri-
 tor in name of glebe.—(§ 11). They were to fix as to the size and
 description of the building for the place of worship, the minister's dwel-
 ling-house and offices, and ground, but so as not to exceed £1500 in all:
 —(§ 12). It was declared, that, after the erection was completed "the
 same is hereby, and shall for ever continue to be, appropriated to
 the purposes of this act."—(§ 13). It was enacted that the commis-
 sioners, "upon being satisfied in respect of the completion of any addi-
 tional place of worship, and of a dwelling-house and appurtenances for
 the minister, shall ascertain and fix the stipend which shall be paid to the
 minister" from the term preceding his admission, "and which stipend
 shall not exceed the sum of £120 per annum in any case, including the
 sum necessary for communion elements, which shall be provided by,
 and at the expense of, the said minister."—(§ 14). The patronage of
 these churches was vested in the Crown, under the condition, that
 unless a minister was nominated within six months, the *jus devolutum*
 should accrue to the presbytery as in other cases.—(§ 15). It was
 enacted "that such nomination shall be laid before the presbytery within
 whose bounds the said place of worship shall be situated, along with a
 letter of acceptance by the person so nominated, his licence and testi-
 monials, and a certificate of his qualifications, to Government, if such per-
 son shall not have been previously ordained, and if previously ordained,
 an extract of such previous ordination; and thereupon the person so no-
 minated, if found, on trial, to be qualified, shall be admitted to be mini-
 ster of the said place of worship by the said presbytery of the bounds,
 according to the law and practice and the accustomed forms of the Church
 of Scotland; and when the person so nominated shall be admitted and
 ordained as aforesaid, he shall be thereby entitled and bound to discharge

the district for the behoof of which the said place of worship shall be erected or provided, all the duties of a minister of the Church and, save and except the right and duty of church discipline, and in all respects subject to the discipline and government of the Church of Scotland, by presbyteries, provincial synods, and general assemblies, as by law unalterably established.”—(§ 16) It was enacted to be lawful “for the minister and kirk-session of the parish or to which the district, attached to any such place of worship, be- to make such provision for the attendance of members of the said session or kirk-sessions (being inhabitants of the said district) to as elders at the said place of worship, as to them shall seem ne- and expedient, and as is customary by the practice and forms of Church of Scotland, for the attendance of elders at parish churches: the minister of the district, together with these elders, shall give in all things relative to the additional church of the district.”

) It was provided that the minister and elders officiating at the of worship, should apply the weekly collections, and voluntary is, to “the poor of the district,” but “subject to the same rules ulations, as is now competent to the ministers and kirk-sessions of hurches, and subject also to the control and direction of the kirk- and heritors of the parish or parishes to which the said district :” provided that the poor of the district, if the collections, &c. “insufficient for their relief, shall retain their claim upon the o which they may belong.” They were enjoined also to keep a of receipts and disbursements, and exhibit it when required, to the : and kirk-session of the parish in which the district was situated, the presbytery of the bounds.—(§ 18) Provision was made, ia, for applying the pew rents towards repair of the church and r’s dwelling-house, and making those heritors who had applied for ection, subsidiarily liable, to a certain annual amount.—(§ 19) , free of rent, was ordained to be set apart for the officiating r; another for the elders; and a third for the heritor who under- e chief liability for repairs. One third part of the seats was de- to be free, unless the commissioners, on special cause, ordered ae: and the maximum of rent for any single sitting was limited to illings and sixpence.—(§ 23) The rights and interests of the m and their executors, and their future successors, were appointed nence and determine, respectively, “at the same terms of Whit- or Michaelmas, and in the same manner as the rights and interests parochial clergy of Scotland in their parochial stipends.”—(§ 24) vance of the stipend was provided, in name of annuity, to the and next of kin of a deceased minister “in the same manner as is by the law of Scotland, with respect to the parochial stipends of of Scotland.”—(§ 25) It was enacted that all questions ay “respecting the rights of the ministers appointed to offi-

No. 151. **h. 18, 1836.** **rdon v.** **utes of** **minsters'** **idows' Fund.** ciate, &c. or regarding their civil and patrimonial interests, &c. shall be determined according to the law of Scotland respecting the rights and interests of parochial clergy, &c. regard being always had to the consideration that the district set apart for the duties of such minister, is not disjoined from the parish or parishes to which it belongs, or erected into a separate parish : and that the elders officiating at such place of worship do not, along with such ministers, form any separate and distinct kirk-session, and cannot derive any authority as such from the provisions of this act, but are merely members of the kirk-session or sessions of the respective parish or parishes in which the district has been set apart," &c.—(§ 26) It was provided, that "nothing contained in this act shall interfere with, or be construed to interfere with, the discipline and government of the Church of Scotland by kirk-sessions, presbyteries, provincial synods, and general assemblies, as by law unalterably established, and the ministers appointed to officiate at the places of worship erected or set apart under authority of this act, shall be in all respects subject to the ecclesiastical superintendence and government of the Church of Scotland, according to the laws of that church."

Under this statute forty-two parliamentary churches (as they were termed) were erected or fitted up, at each of which a minister was appointed, and officiated, in terms of the statute just quoted. None of these ministers had applied to be admitted to the Widows' Fund, when, on 25th May, 1833, an act of the General Assembly of the Church of Scotland was passed which enacted and declared "that the whole districts in Scotland, now or to be hereafter provided with places of worship and ministers, in terms of the acts 4 Geo. IV. cap. 79, and 5 Geo. IV. cap. 90, shall be, and are hereby, from and after this date, erected into separate parishes quoad sacra; and to that effect are hereby declared to be disjoined and separated from the parishes of which they at present constitute a part.—And that all ministers already inducted or settled as ministers within the said districts, or who shall hereafter be inducted and settled in the same, shall, and are hereby authorized to exercise and enjoy, within their respective districts, the whole powers and privileges now competent to parish ministers of this church; and that, as fully and freely in every respect, and without molestation or interference, as if their respective districts had been ordinary parishes, and they had been regularly inducted as ministers thereof. Moreover, the General Assembly hereby declares, that the said ministers are and shall be constituted members of all presbyteries, synods, church courts, and judicatories whatsoever, and shall enjoy every privilege as fully and freely, and with equal powers as parish ministers of this church; hereby enjoining and requiring all presbyteries, synods, church courts and judicatories, within whose bounds the said churches are or shall be situated, to receive and enrol the said ministers as members thereof, and put them in all respects on a footing of presbyterian equality with the parish ministers of this church."

ted to the clerk of the trustees of the Widows' Fund, returned
ne of Mr Gordon, with a special statement of the circumstances of
ation : and, on 20th November of that year Mr Gordon transmit-
notice to the clerk of the trustees making an election of £6, 6s. as
s of contribution. The trustees declined to admit him, and in
; 1834, he raised a summons of declarator against them, libelling
on the statutes 19 Geo. III. c. 20, and 5 Geo. IV. c. 90, and the
Assembly. He concluded for declarator " that he has the un-
d right and privilege of becoming a contributor to the said fund :
has given the said trustees, defenders, the requisite notification
annual rate," &c. : and that he was entitled to be admitted on paying
s other items not requiring notice) the annual rate " from and
e date of the decree of our said Lords to follow hereon." There
o a conclusion, that, independently of any notice he was " entitled
admitted as a contributor to the said fund at such rate as he may
and that within the period of one year from the date of the judg-
r decree to be pronounced in this action ; and in the event of his
ing to give notice, or of the notice already given being held insuffi-
ie is entitled to be so admitted, and to enjoy the whole privileges
ntributor to the said fund, on payment of the rate of £4, 14s. 6d.
ly, being the rate fixed for persons failing to give notice, and that
id after the judgment or decree to be pronounced, ordaining his
on to the benefit of the said fund, and not sooner, and annually
his lifetime thereafter ; and also, that the pursuer is entitled to
be foresaid notice, and to change his rate of contribution, and fail-
giving notice of any new rate, and abandoning the notice already

No. 151. enjoined that “every such minister” should be admitted. But the pursuer was a minister holding a permanent benefice in the Church of Scotland. The word “benefice” was not used in a strict signification, or it would exclude almost all the clergymen of the church: as very few had proper benefices, and many, as in burghs, drew their stipends not even out of the teinds. The pursuer had a fixed public stipend: he had a precise district allotted as the scene of his labours: and though this was not made by statute a distinct parish, yet the want of this was not important, as it had equally occurred wherever a second minister was appointed without making a new parish for him. His church was erected expressly “to be and to become an additional place of worship in full communion with the Church of Scotland,” and it was declared to be for ever “appropriated to the purposes of the act.” He therefore truly possessed a permanent benefice; and the want of a kirk-session, or of admission as a member of church courts, could not debar his claim upon a statutory fund, as the statute had only required the possession of a benefice in the Church of Scotland.

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2. But if any difficulty had existed prior to the act of Assembly, it was now removed. The district attached to the church was declared a parish *quoad sacra*; the pursuer now had a kirk-session of his own; he was a member of church courts; and he was possessed of every power and privilege as fully and freely as parish ministers of the church. As this enactment related entirely to the spiritual government and discipline of the church, it was within its province to pass the act. Its provisions were not in opposition to the statute, but in supplement of it. The statute enacted, *quoad civilia*, and the act of Assembly declared *quoad spiritualia*, that he was in all respects possessed of the same status as any parochial minister in Scotland. And therefore his right to the fund was established.—As to the smallness of his stipend, it was much larger than that of many clergymen at the time when the fund was instituted: and as to any argument, *ab inconveniente*, against admitting a large class of new contributors unexpectedly on the fund, it could be of no avail, if the pursuer possessed the statutory right of admission.

Pleaded by the Defenders—

1. Independently of the act of Assembly, the pursuer belonged to a class of non-parochial clergymen who were not possessed of “benefices in the church.” All beneficed clergymen in the Church of Scotland were on a footing of presbyterian parity, and possessed of equal privileges, among which the right of being a member of church courts, and being moderator of a kirk-session, and exercising church discipline, were highly important. But as the pursuer had none of these, he was not truly within the purview of the statute. And it was both the understanding of the legislature and the country that the parliamentary ministers should not come on the Widows’ Fund. The legislature, which bestowed the vacant stipends of all other clergymen on the fund, had not bestowed the

stipend of the parliamentary ministers, as not being connected with the understanding of the country, and of all the ministers of parliamentary churches themselves, was evinced by the fact that they had no claim for admission till after the act of Assembly.

The act of Assembly was ultra vires and therefore illegal. The union of so many parishes, though only quoad sacra, was a proceeding attended with important civil effects, and it was only by an act of the legislature, or by a process before the Teind Court, in which all concerned might appear, that such a proceeding could competently be held. Not that if any church court possessed the power, it was the presbytery, the radical court, and not the General Assembly. But even if it would otherwise have been valid, it was ineffectual in this instance, as it conflicted with the statute 5 Geo. IV. c. 90, which clearly contained that the "district" annexed to a parliamentary church, should be a part of the original parish and not form a separate parish by itself, and had not only enjoined courts of law to treat the ministers accordingly, but had induced heritors to make donations, and incur expenses, in reliance on all its provisions.—But esto that the act of Assembly was valid, it could not impose this large class of ministers upon a fund which was truly instituted for behoof of others, and was administered upon principles of life-insurance, the calculations of which would be entirely disturbed by the introduction of contributors in circumstances which were not contemplated at its institution. In addition to these circumstances, as the maximum stipend under 5 Geo. IV. c. 90 was only £120, while the minimum stipend of all other clergymen was £150, it would be an intolerable hardship to require of the parliamentary ministers, to subject them as contributors to the Widows' Fund.

Another point was argued, but not decided, regarding the date from which the annual rates must be payable by the pursuer, and other similar matters; and also regarding the rate exigible.

Before deciding the cause, it was suggested on the part of the defence, that, as the right of admission, and the liability to pay rates, were in question, it would be expedient to ascertain whether the ministers of parliamentary churches generally concurred in the views of the pursuer, or were opposed to them. A circular was therefore directed to be sent to all of them, amounting to forty-two, and, in a short time, answers were received from twenty-five, of whom only two expressed an objection to become contributors. After this report was returned, the case resumed consideration of the case.

PRESIDENT.—This is an important case, and the statutes bearing on it are to be attentively considered. By 5 Geo. IV. c. 90, provision was made for the erection of buildings to form places of worship, and also dwelling-houses, and ministers appointed to officiate there. Money was voted for

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No. 151. these purposes, and also to provide a stipend for the minister. All this was properly within the province of Parliament. But the statute also declares "that the district set apart for the duties of such minister is not disjoined from the parish to which it belongs." The Legislature might have disjoined, if it had seen cause, but as there already existed a proper court for this proceeding, they left any such question to be there disposed of. The statute also provided that the minister should not have a separate kirk-session, which indeed could not be without disjoining the parish; and it also provided (§ 15) that the minister should be entitled and bound to discharge within the district "all the duties of a minister of the Church of Scotland, save and except the right and duty of church discipline." There could of course be no church discipline as he had not a kirk-session of his own. Things were on this footing when the act of Assembly 1833 was passed, which enacted and declared that these ministers "shall exercise and enjoy, within their respective districts, the whole powers and privileges now competent to parish ministers of this church." This was a matter within the proper province of the Assembly. They had the power to pass such an act, and they exercised that power. And I see no conflict between the provisions of this act and those of the statute. The Parliament on the one hand, and the Assembly on the other, each being supreme in its own province, passed their respective enactments, both tending toward the same end, and the last being in supplement of the first. The Assembly made no disjunction of parishes *quoad civilia*, but it declared the ministers to be members of all church courts; and it also declared them to possess all the privileges of the parish ministers of Scotland, and that the Assembly alone could do. I do not think the Assembly exercised a new power in declaring a minister to be possessed of such privileges. I conceive the same power to have been exercised in analogous cases, such as when second ministers were appointed, or in any of the numerous instances where new ministers were appointed in Scotland.

The words of the statute in describing the clergymen who are to be contributors to the Fund, state them merely as "ministers ordained and admitted to a benefice in the Church of Scotland," and "every such minister" is laid under the liability to pay rates and has a right to become a contributor. The words employed are quite universal, and are not qualified by any restriction either as to the mode of election to the office in a university, or a benefice in the church, or the kind of patronage connected with them: and accordingly, it was not only the ministers and professors who then held benefices, or chairs, to whom the statute applied, but all ministers in benefices of subsequent creation, and all professors in chairs of subsequent foundation, have been admitted from time to time to the Fund. Indeed the professors were admitted originally, only as being comprehended under the word "masters," though that word had gone into desuetude in all the universities but that of Aberdeen. It might have been said, as to all these late additions to the contributors, that they tended to derange the calculations on which the security of the insurance Fund, which the Widows' Fund is, was rested. Yet their right of admission was held unchallengeable. And I have no hesitation in adding, that the right to become a contributor, and the liability to do so, are co-ordinate. The pursuer, and the class of ministers like him, can be compelled to join. And the smallness of the stipend cannot be listened to as an argument against this liability. It does not affect the principle of the case, and the stipend of £120 is much larger than many stipends in Scotland were

at the date when this Fund was instituted. I am sure there were scores of ministers at that time and long after, whose stipend was under £120. Yet they were forced to join. And in this case all those, but two, who have expressed their opinion on the subject, have stated their willingness to join, so that, even if more weight had attached to this objection, it would thereby have been greatly obviated.

I am therefore of opinion that the pursuer has a right to become a contributor to the Widows' Fund. But there is a question remaining as to the term from which his liability to pay annual rates should commence. I should wish to consider this point farther; but at present I think it could not go back beyond the act of Assembly, and perhaps should not, in equity, have any retrospective effect, prior to the date of the decree to be pronounced in this action.

LORD GILLIES.—This is a case of a peculiar nature, and I think it is not free of doubt. There is only one individual pursuing here, and of course it is only his rights that we can directly determine under this action. But the pursuer represents a class of men, and if we decide in his favour, there seems to be little doubt that the trustees of the Fund will and must immediately have recourse to legal measures to compel all the others, of the same class with the pursuer, to join the Fund. For I concur with your Lordships in thinking, that the right to become a contributor, and the obligation to do so, are reciprocal. It is the duty of the trustees of the Fund to compel all the ministers of this class to become contributors without delay, if our judgment to-day determines that they have a right to be admitted as contributors. But I own that I entertain very considerable doubt whether the ministers at Parliamentary Churches are entitled to become contributors. They do not seem to have been placed by statute on the same footing with parochial ministers of the church; and they have not proper benefices, but merely stipendiary. I doubt therefore whether the statute which gave rise to the Parliamentary Churches, entitled the ministers to contribute to this Fund: and, if they had not the right independently of the act of Assembly, I do not think they could acquire it in virtue of that act. Indeed I entertain very great doubts as to the power of the Assembly to pass any such enactment.

LORD MACKENZIE.—The consequences of our decerning in terms of this libel may be very perplexing, and I apprehend will be so; but if the pursuer's demand be well founded in law, there is no help for it, we must give decree in terms of law, and any consequent embarrassments will just be such as always occur when any public law has been for some time misunderstood by the country. Suppose, for example, that some of the clergymen of the same class with the pursuer have died since the act of Assembly; their widows will claim against this Fund, on merely paying up the arrears. And many other embarrassing effects may result from our decision sustaining the conclusions of the summons. But, notwithstanding all this, we must decide according to law in the mean time, and leave all future questions to be disposed of when they arise. And in proceeding to decide this case, I feel that it is attended with very considerable difficulty in point of principle. I have not been able to form an opinion so clearly as I could wish, but I incline to concur in the opinion delivered from the chair. I cannot see how the Parliamentary ministers are not possessed of every qualification which is requisite to bring them within the description of those clergymen to whom the statute gives the right of becoming contributors. It is clear

[o. 151. that they are "ordained and admitted ministers," and "in the Church of Scotland." My chief difficulty was whether they could be held to have "benefices. But it must be remembered that very few ministers indeed, in the Church of Scotland, are possessed of proper benefices. In most instances they are merely stipendiary, and the stipend is by no means always paid out of the tithes. In Edinburgh, for example, the clergymen of the city are paid by means of a Parliamentary tax. When this is attended to, I am at a loss to discover on what ground a Parliamentary minister, with a fixed stipend, is to be viewed as being less a beneficiary, in the sense of the statute, than if his stipend were derived from any other source. I think it more correct to hold that the term "benefice" was not strictly used in the statute, and that it is not possible to construe it as importing that a proper benefice is indispensable to qualify a clergyman for being a contributor; because if such a rule was applied, very few parochial clergymen could have claimed the benefit of this Fund. Then it will be observed that there is a dwelling-house appropriated to the minister, and a special district assigned to him. It is said he has no separate parish: but neither did any second minister, when a charge was made collegiate, receive a separate parish. The pursuer has made another answer to this objection, and has pleaded, that the act of Assembly gave him a separate parish. I demur to that position. Parliament, no doubt, thought that there was a mode of making a new parish where necessary, and they left the erection of such new parish to the proper court. But Parliament, I apprehend, did not conceive it was the General Assembly, but the Teind Court, on whom the duty of erecting new parishes, when necessary, would devolve. If the act of Assembly were to be pushed so far, as to be construed to have the effect of erecting new parishes, I should entertain great doubt whether it was not *ultra vires*. But it is necessary to go into this for even if Parliamentary ministers have not parishes to themselves neither do the second ministers in collegiate charges get separate parishes made for themselves: and, on the whole, I think the Parliamentary ministers possess the requisite qualifications to enable them, under the statutes in that behalf, to become contributors to the Ministers' Widows' Fund.

LORD PRESIDENT.—It was only *quoad sacra*, that the General Assembly declared the districts to be erected into separate parishes. But even supposing that the act was *ultra vires* of the Assembly, the pursuer's action would still be well founded, for he is still a minister having a permanent benefice in the Church of Scotland. He could baptize, or marry, and perform all the duties of an ordained minister, except that of exercising church discipline. And I do not think that this disqualified him from becoming a contributor under the statute.

LORD BALGRAY intimated, that he considered the pursuer entitled to become a contributor to the Fund.

LORD MACKENZIE.—But there is a point of considerable importance remaining. I mean the determination of the date from which the pursuer's liability for the annual rates is to commence. I wish to have farther discussion on this but at present I rather incline to think his liability, being co-ordinate with his right, to contribute, must draw back to the date of his ordination and admission in 1829. He may select the lowest rate if he chooses; but when he demands the benefit of this insurance Fund, he must pay the price of it.

LORD GILLIES.—Whatever date may be shown to be the proper period

J. ROBERTSON, W.S.—H. INGLIS, W.S.—Agents.

WILLIAM DEMPSTER, Pursuer.—*H. J. Robertson.*

No. 152.

WILLIAM POTTS, Defender.—*Sandford.*

—*Mandatory.*—A commissioner cannot appoint a mandatory for a prin-
of the country.

IL of the case noticed ante, p. 189. Mr Humphrey Graham, Feb. 18, 1836.
aving produced a commission granted to him by the pursuer, 2^D DIVISION.
r, before leaving this country, containing the usual powers to Jury Cause,
efend, &c., proposed to authorize a responsible party to be sisted R.
tary for Dempster. This was objected to by Potts, as beyond
ers of a commissioner whose own authority was delegated.

E COURT, holding that Mr Graham might sist himself but not
nother party as a mandatory, refused the application.

HUMPHREY GRAHAM, W.S.—A. M. ANDERSON, S.S.C.—Agents.

IN and WILLIAM MARCHBANKS, Claimants.—*R. Thomson.*

No. 153.

GEORGE BROCKIE and OTHERS, Claimants.—*Monteith.*
Competing.

No. 153. tioned in the deed) and shall apply the yearly interest thereof as an annuity to Walter Colville, my nephew, during his life, payable, the said
 Feb. 18, 1836. annuity, at two terms in the year, Whitsunday and Martinmas, by equal
 Marchbanks v. portions, and commencing at the first of these terms that shall occur after
 Brockie. my death; and declaring, that on the death of the said Walter Colville, and at the first term of Martinmas or Whitsunday thereafter, the said sum of £1000 shall be divided and applied by my said trustees in manner following: that is to say, they shall pay and deliver £400 thereof to Robert William Hamilton, merchant in Leith; £400 to Mrs Brockie, wife of Thomas Brockie, farmer at Belville; £100 thereof to James Marchbanks, farmer at Crosshall; and the remaining £100 to Miss Janet Ord, residing at Portobello, and to their respective heirs in case of their death."

Mrs Hutchison died in 1819, being survived by Mrs Brockie, in whose favour the £400 above mentioned was provided, and by Walter Colville. Mrs Brockie died in 1823, leaving a mutual disposition and settlement executed between her and her husband in 1815, whereby she conveyed to him, in the event of his survivance, all the moveable property belonging to her, or which might be belonging to her or in communion between them at her death, and also appointed him her executor. Mrs Brockie was survived both by her husband and Walter Colville, the former of whom, however, died in 1826, and the latter in 1833. On this event a question arose as to the disposal of the £400 provided to Mrs Brockie, for having which determined, Aikman, Mrs Hutchison's surviving trustee, brought the present process of multiplepinding. The sum was claimed, first by George Brockie and Others, as executors of Mrs Brockie's husband, on the ground that the fee of the £400 had, on the testator's death, vested in Mrs Brockie, and that it accrued to them under the mutual settlement executed by her and her husband. It was claimed secondly, by John and William Marchbanks, nephews of Mrs Brockie by a brother deceased, on the ground that they, as the representatives of the legatee, were alone entitled to the sum in question, in terms of Mrs Hutchison's settlement. These parties also claimed the sum of £100 provided to their father by the same settlement and given up as part of the fund in medio.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined*:—"Imo, Finds, that by the conception of the trust

* "There has been no competition as to the £100, and it ought perhaps not have been given up as part of the fund in medio in a multiplepinding. But as parties entitled to it are claimants on the £400, and have been put to no trouble in discussing this part of the case, there seems no ground for subjecting the claimants to any part of their expenses.

"The other part of the case belongs to a class of questions, as to which there is often great difficulty; and resolving, as they do, in a great measure into questions of voluntatis, it is not easy to deduce from the decisions any rule or canon."

tlement of the deceased Anne Haig or Hutchison, the fee of the sum of £400 sterling did vest in the also deceased Jane Marjoribanks, wife

No.
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March
Brook

vision of universal application, or even, at first sight, to reconcile some of those decisions with others. On considering the whole series of authorities, however, a Lord Ordinary thinks the present case sufficiently clear.

* He is of opinion, in the first place, that the trust-settlement of Mrs Hutchison only provided the liferent of this £400 to Colville, and the fee to Mrs Brockie. He does not use these technical words indeed, but that the substance of the provision is to this effect there can be no doubt. In the next place, he thinks it fully clear, that under such a provision, if made without the intervention of a trustee, the fee would vest immediately on the death of the testator, and might be actually conveyed by the heir, although ultimately predeceasing the liferenter. The only real difficulty, therefore, is as to the effect of the trust—a contrivance which it is no doubt possible to suspend the vesting of any beneficial interest in such a property, either during the subsistence of a liferent, or even for a longer period, if such should appear to have been the wish and intention of the granter. It by no means follows, that such a wish and intention is to be presumed from the mere fact of a trust having been constituted; and the practical rule that appears to the Lord Ordinary to be this—that wherever the fee is finally paid (on the expiration of the liferent) to a certain individual, or to a single definite class or description of persons, without any ulterior provision or destination whatever, the right will vest from the death of the testator exactly as if there had been no trust; but that where the destination is to a succession of persons beyond a first named as heirs, the right, if there be no speciality, will not vest in any one of them, but remain in the trustees, till it appears, on the termination of the liferent, to which of them it truly belongs. In the first case, there is in truth no legal agency, and no intelligible motive for suspending the vesting or postponing the power of disposal, there being from the beginning no doubt of the person by whom the fee must be taken, and the testator having no views or wishes as to that person; whereas, in the latter, it is natural to suppose, that having made a succession of persons, one or other of whom is to take on the termination of the liferent, he did not mean to give any of them a power to disappoint that urgent right of succession, by exercising a power of disposal by anticipation, and therefore he fairly presumed to have left the fee in the trustees, on purpose to prevent such a disappointment. In the other case, the presumption would be, that the trust was meant only to secure the interest of the liferenter, and to protect the funds till its termination.

Such, accordingly, appear to have been the principles which have governed the decisions, both those in which the fee was found to have vested before the death of the liferenter, and those where it was found not to have vested. The case of *Right and Dallas*, 27th January, 1824 (F. C.), is very remarkable in the first class, because the fee was there destined (through trustees) not (as in the present case) to a specific individual, but to children nascituri, and because an absolute power of distribution was given to the liferenters. The case of *Russell and M'Dowal (Crawford's Trustees)*, 6th February, 1824 (F. C.), which was very elaborately considered, involved the very same principle, and is a case a fortiori to the present, since the fee (which it was found George Crawford could dispose of, before the termination of the liferent) was not destined simply to him and his heirs (as in the present case), but falling there, to his two younger brothers and their heirs nominatim. It may be said of the more recent case of *Leitch's trustees*, 1829 (3), which was affirmed on appeal in February, 1839 (3)

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of Thomas Brockie, by and upon her survivance of the said Andrew Hutchison, and was conveyed to the said Thomas Brockie by mutual disposition and settlement executed by the said spouses in July and by the nomination therein contained of the said Thomas Brockie her executor; and therefore ranks and prefers the claimants,

Shaw and Wilson, 366), where though there was an ulterior destination beyond that to Andrew Leitch, viz. to the sisters and nieces nominated testator, it was still found that the fee vested in Andrew, and might be disposed of by him during the subsistence of the liferent, in consequence of the marked meaning of certain words in the clause relating to him, which were anxiously interpreted in all the previous destinations. The case of *Mirrlees*, 17th May, 1826 (4 Shaw, 110) is also a very remarkable one, as assuming the fact of the vesting (and consequent power of disposal) in a *fiar* during the subsistence of the liferent, in circumstances peculiarly favourable for the opposite conclusion; and the Lord Ordinary accordingly observes, that it is a case much relied on at the last advising (in the case of *Leitch*).

“In all the cases, again, which have been decided the other way, there is a series of conditional institutions beyond that of the parties first named as *beneficiaries*; the whole structure of the deed has been such as to raise an irresistible presumption that the trust was created mainly for the purpose of keeping the beneficiary without a substantial right of the fee, from vesting anywhere (but in the trustee) during the subsistence of the liferent. Nothing can illustrate this better than the case of *Mowbray or Walker's Trustees*, 9th July, 1834 (12 Shaw, 910), where there was not a very long and complicated series of conditional institutions of the fee, but an express provision, repeated at three different stages of this destination, that the trustees should take certain parts of the subject to themselves in fee, as trustees for certain ulterior, variable, and contingent purposes. In substance there are three separate and successive trusts created in connection with an anxious provision that when these events occur, though long after the death of the truster, the fee shall again be taken, in express terms, to the trustees themselves, who might as well have been different persons, as the same to whom the whole estate was to pass on the death of the granter; and the provision is quite inconsistent with the notion of any substantive interest being vested in the trustees at the occurrence of that death.

“In the present case, the destination is simply and once for all, to ‘*Mrs Brockie and her heirs* :’ and as Mrs Brockie survived the testator, there seems no room for doubting that the property then vested in her, and was from that time at her disposal. The mere mention of her heirs, it is humbly conceived, cannot, after the cases of *Crawford* and *Leitch*, warrant the supposition that the trust was created in any degree for the purpose of protecting the conditional institution in favour of unknown parties, by depriving the only named *fiar* of the power of disposing of the property. It is manifest, in the Lord Ordinary's apprehension, that these words were introduced, not with any view of suspending the vesting, but solely to meet the contingency of Mrs Brockie herself predeceasing the testator, and the legacy consequently lapsing. The addition, in short, was made, not out of any jealousy of her, but out of favour, and not to restrain her full right subsequent to the testator's death, but to secure the benefit of it (if she died before that event) for her representatives.

“None of the other objections to the claim of her husband's executors is at all tenable.”

a, John Brockie, and Adam Brack Boyd, as executors of the said No. 153.
s Brockie, now deceased, primo loco upon the fund in medio, to
ent of the said sum of £400 sterling, with interest thereof from Feb. 18, 1836.
er the term of Whitsunday, 1833, till paid: Grants warrant to, Marchbanks v.
ses and ordains the British Linen Company and their Manager, Brockie.
e payment to the said claimants of the sum of £350, part of the
onsigned in the bank, in obedience to interlocutor of 11th July,
nd bank interest thereon since consigned, as in payment to the
its pro tanto of the said sum of £400 sterling and interest thereof,
h they are hereby preferred, and for this purpose authorizes the
ustodier of the bank's receipt to deliver up the same to the said
its or their agent in this cause; decerns against the raisers of the
epointing for the balance resting due to the claimants of the said
nd interest thereof, after deducting the said consigned sum and
; and decerns ad interim accordingly. 2ndo, Ranks and prefers
ments, John and William Marjoribanks, and their curator, on the
id in medio, to the extent of £100 sterling (being the whole ba-
r remainder of the said funds), with interest thereon from the said
'Whitsunday,' 1833, till paid, and decerns in the ranking and pre-
accordingly."

and William Marchbanks reclaimed.

ie first advising, on 3d December last, the Court expressed great
as to the fee of the legacy having vested in Mrs Brockie, prior to
Colville's death, and ordered Cases.

Brockie's Executors it was pleaded—

intervention of a trust, in the case of a provision of fee and
to different parties, has not necessarily the effect of suspend-
vesting of the fee until the death of the liferenter. When there
ulterior substitution to the fee, trusts are held to prevent the
n vesting, but when the fee is finally destined, on the expi-
of the liferent, to a certain individual, without any ulterior
n or destination, the right vests from the death of the testator, as
had been no trust.¹ The absence of the technical words "fee"
ferent" is of no consequence in reference to the nature and legal
of the provision; for, looking to the terms of the trust-deed,
nd actually used truly and substantially import the same thing.
is this being a questio voluntatis, it is plain that Mrs Brockie was
anna predilecta, and that the mention of her heirs was not intend-
ed but to strengthen her rights, by precluding the possibility
ed being construed to mean that the bequest of the £400 was
the event of her predeceasing the liferenter. Whether these

¹, 27th Jan. 1824, ante, II. 643 (new ed. 543); *Leitch's Trustees*,
 V. 659 (new ed. 665), in H. of L. 3 W. and S. 366.

No. 153. words are used or not in a provision such as the present, the trustees are
 Feb. 18, 1836. equally vested with a fiduciary fee; for a subject can not be held in
 Marchbanks v. trust, without the existence, actual or possible, of persons for whose
 Brockie. beneficial interest the trust is held, and if the trustees hold for others
 and not for themselves, what they hold must be a fiduciary fee.¹ In as
 far as analogies are to be derived from the law of legacy, they go to show
 that, if this had been the case of a simple testamentary deed, in which
 the testator's executors had been appointed to pay the interest to Walter
 Colville, and the principal sum, on Colville's death, to Mrs Brockie, the
 latter would have had a vested right immediately upon the testator's
 death, capable from the first of being transmitted by her, and in no re-
 spect depending on her surviving Walter Colville.²

For John and William Marchbanks it was pleaded—

The only direct right to the sum of £1000 is given, by Mrs Hutch-
 son's settlement, to the trustees, in whose hands it is to be set apart; or
 in other words, they are to remain fiars of it, for the special purposes ex-
 pressed in the deed. The whole sum is to remain, till Walter Col-
 ville's death, an unum quid vested in the trustees; and neither expressly
 nor by implication is the £400 in question vested in them for behoof of
 Colville in liferent and Mrs Brockie in fee. If, then, the right to the
 sum did not emerge till after Colville's death, the fee could vest in a
 party who did not survive that term; and it was to provide for the event
 of some of the parties not surviving it, and thus never acquiring the fee
 of the portion conditionally destined to them, that the provision was
 alternatively made—"or to their respective heirs." Mrs Brockie, there-
 fore, could have no vested right in the fee of the £400; but the right
 as soon as it emerged, must have opened to her heirs, as conditional
 substitutes, called directly in consequence of her predecease, and alone
 capable of taking it. From the fact of the testator having vested the
 fee in trustees, with directions to give the interest to one party, and
 on his death, the principal sum to another party, or to that party's heirs,
 it must be presumed to have been her intention to *suspend* the ultimate
 claim to the principal sum till the proper period arrived for apportioning
 the whole fund.³ From all which it follows that the claimants, as Mrs
 Brockie's heirs and nearest of kin, have right to the fund in medio.

The Case was this day put out for advising.

¹ Macdowall v. Russell, Feb. 6, 1824, ante, II. 682 (New Ed. 674); Mirrleton v. Mathie, May 17, 1826, ante, IV. 591 (New Ed. 599).

² Fouke v. Duncans, March 1, 1770, M. 8092; Nisbet, June 27, 1809, F.C.; Scott v. Lauder, May 30, 1834, ante, XII. 646; Wallace v. Wallace, Jan. 28, 1807, M. App. Clause 6.

³ Duncan v. French, June 27, 1809, F.C.; Nisbet, ut supra; Gleadon v. Walker, Nov. 30, 1825, ante, IV. 237 (New Ed. 241); Mowbray v. Scougale, Jan. 1834, ante, XII. 960.

GLENLEIGH.—I have come to hold that the interlocutor is right, though not without some difficulty. I am chiefly moved by the case of Wallace¹ in which I cannot distinguish from the present, except that there is here an asset to an alternative payment to the party's heirs. That cannot prevent the sum from vesting, for it might have vested in themselves as conditional legatees instead of Mrs Brockie; and if it vested in her, then she had the disposal. I cannot, however, adopt the whole reasoning in the Lord Ordinary's note, nor can I think the cases referred to by his Lordship so very dissimilar. This is not a case of life interest and fee, but a conveyance in trust, *in solutionis causa*; and the settlement must be so understood as that it gave an immediate right to the fee of the legacy, but suspended the vesting until a certain event. On the whole, I cannot go against the doctrine of Wallace.

MEADOWBANK.—I have come to the same conclusion, though with some difficulty. The purpose of the testator was merely to suspend the term of payment; and as the party having right to the legacy, by its vesting, acquired the fee over it, she has validly disposed of it to her husband.

MEDWYN.—I have had great difficulty in forming an opinion. I concur in the principles laid down in the Lord Ordinary's note as the guiding principle in deciding such cases as this. The cases of Russell v. Macdowall, and of Trustees v. Macdowall, do not apply, as in them there were ultimate destinations, according to the principle assumed, the fee ought not to have vested. I do not think I can reconcile all the cases, or understand their principle. The case of Wallace is the nearest to the present, though not exactly the same. This is not a case of life interest and fee; the whole sum of £1000 is not to be paid to Mrs Brockie but only a portion, and that portion to her and her heirs. In Henry v. Macdowall the fee of a legacy was held not to vest in the party to whom it was payable, but only intended to be carried by the testator's will. But every question of this kind is a *questio voluntatis*, and leads to an apparent conflict of decisions. I am inclined to follow the Lord Ordinary, but with some hesitation.

JUSTICE-CLERK.—After considering this question with attention, I find no solid reasons for altering the Lord Ordinary's interlocutor, though I think some of the decisions referred to are very applicable. The case of Wallace, where the language of the settlement is nearly the same as in the present case, has had considerable weight with me; for there, although the question was not raised, it was assumed in all the arguments, and in the opinions of the Lord Ordinary, that the right to the provision had vested in the individual who was in possession of Mrs Brockie in the present case. On the whole, putting a fair construction on the terms of this settlement, and looking to the situation in which the parties stood, I agree in the result arrived at by the Lord Ordinary, and adopt his reasoning.

THE COURT accordingly adhered, but found no expenses due.

WILLIAM HUNT, W.S.—J. STORMONTH DARLING, W.S.—Agents.

No. 154.

Feb. 18, 1836.
Baird v. Ross.

WILLIAM BAIRD, Suspender.—*Monteith*.
 . ROBERT ROSS, Respondent.—*D. F. Hope—Patterson*.

Property—Servitude.—A and B purchased two lots of the same property taken bound to allow a cart-way from B's lot along the east boundary of also to leave unbuilt upon, a certain area into which two doors from a tenement B's lot opened, and which area it was declared should be "mean property for the preservation of light:" B, on the other hand, had, inserted in his titles, the part privilege of cart entry—Held that this area was not common property, while A had right to a cart-way along the east side of it, he was not entitled to occupy the area for the purpose of loading or unloading carts thereon.

Feb. 18, 1836.

2d DIVISION.
 d. Moncreiff.
 R.

THE suspender Baird, and the respondent Ross, in 1824, bought adjoining lots of the same property situated at the Calton Mount. Ross's lot (No. 8) was to the south of Baird's (No. 7), and was conveyed "with free ish and entry to the said area of ground hereupon, by a cart entry to be formed alongst the east boundary of lot, No. 7; and which entry the said William Baird, and his heirs and assigns, proprietors of the said last-mentioned lot, are bound to give to the said Robert Ross and his foresaids, in all time coming, as expressly in the disposition to be granted by me in favour of the said William Baird."

In the titles to Baird's lot again (No. 7), it was specially provided "that the said William Baird and his foresaids shall be bound to be obliged to make an arched close of eight feet wide, and ten feet high, at the east end of the piece of ground hereby disposed, for a cart entry to the said lot, No. 8, as well as free ish and entry to the lots Nos. 7 and 8 inclusive, of the said property;" and Baird was further restricted from building farther south on his lot than a prescribed line, it being provided "that the remainder of the said piece of ground, south from the said line of back wall, shall be mean property for the preservation of light."

Baird erected, on the north end of his lot, a house extending to the south as the stipulated line, and leaving an open space or court between his house and Ross's lot, on the verge of which lot stood a tenement having doors opening into Ross's court. Baird also formed at the east end of his house an arched cart entry, in terms of the provision in the titles, into the court above mentioned—directly opposite to which entry on the other side of the court, was a corresponding archway into an inner court forming part of Ross's lot, and from which court there was an entry into the tenement above mentioned as situated on the north boundary of Ross's lot. In 1829, Baird, alleging that Ross had assumed to exercise the privilege of using his (Baird's) court, not merely for the purpose of a cart entry along the east boundary of it to his own lot, as provided in the titles, but as if it were common property, loading and unloading carts upon it, and using for this purpose the whole area of the court, presented a bill of suspension and interdict, to have him interdicted

ly warranted by the titles, or at all events do not interfere with
jects for which the area was declared common; refuses the bill;
he suspender liable in expenses, of which allows an account to be
in, and when lodged, remits to the auditor to tax the same, and to
"

Court having adhered to this interlocutor (June 17, 1829),¹
appealed. Of date July 16, 1832, the House of Lords reversed
mitted to pass the bill.² Thereafter the bill was passed, letters
, and a record made up. In addition to his plea of common pro-
Bross contended, that, having a right to the cart-way through
court for the use of his lot generally, that privilege extended to
part of his lot, and having two doors opening directly into the
rom the tenement looking into that court, with ish and entry into
from, as was decided in a previous litigation,³ he was entitled to
arts on the area to be loaded and unloaded at these doors, to
he alleged, access was in use to be had by carts before the sale in

To this it was answered that the servitude was expressly limited
i's own titles to a cart entry "to be formed along the east bound-
f Baird's lot, and accordingly that he had no right to any further
ter use of the court, which was expressly included in Baird's title,
ich was undoubtedly his exclusive property, the declaration as to
g "mean property for the preservation of light," being of neces-
be construed solely with reference to that object, and not as con-
ng the express terms of the titles conveying that part of the area
property to Baird; and that the construction of these titles could
affected by the state of matters prior to their date.

. . .

No. 154. of the parties respectively, any right to load or unload carts in the open area included within the boundaries of the suspender's property; there-
 Feb. 18, 1836.
 Baird v. Ross.

and the arguments of the counsel in his presence. And, on the best consideration he can give to the matter, he is of opinion that the respondent has not a good case for establishing a right to load or unload carts in the disputed area.

"It is clear that the area marked a. a. b. b. in the plan, is part of the property A. B. C. D. sold to the suspender, and that no part of it is within the boundaries of that marked E. F. G. H. sold to the respondent. The Lord Ordinary therefore thinks there can be no doubt, that the only right of property in it is fully vested in the suspender: For the declaration in the suspender's title (which is not in the respondent's) that it 'shall be mean property for the preservation of light,' cannot be construed as giving a right of property to one party to whom it is not conveyed, and taking it from another to whom it is expressly conveyed by the specified boundaries. It can only be taken as a reservation, or imposition, of a servitude for the particular purpose and benefit specified, viz. 'the preservation of light.'

"The question, therefore, is on servitude simply. With a view to this let the titles be examined.

"In the disposition to the respondent, there is only one servitude conferred, viz. 'free ish and entry to the said area or piece of ground hereby disposed, by a cart entry to be formed along the east boundary of the said lot, No. 7; and which entry the said William Baird, &c. are bound to give to the said Robert Ross.' By the reference to the disposition in favour of William Baird, the respondent may be taken as having right to all that is there expressed. But the right, by his own title is no more than ish and entry in the form described, by a cart entry 'to be formed, and to be formed 'along the east boundary' of the lot No. 7, which comprehends the entire area A. B. C. D. and the east boundary of which is the line C. D.

"The disposition to the suspender, strictly speaking, imposes three servitudes of distinct legal denominations—a servitus actus or viæ—a servitus non edificandi—and a servitus luminum. The obligation imposed as to the first, is, that Baird shall be bound 'to make an arched close (meaning alley), of eight feet wide, and ten feet high, at the east end of the piece of ground hereby disposed, for a cart entry to lot No. 8, as well as for the accommodation of lots 1 to 6.' Although this refers particularly to the part of the east boundary, up to which the suspender was entitled to build, it is implied, in connexion with the disposition and articles of roup as to lot No. 8, that there was to be free ish and entry all the way to the north boundary of lot No. 7, a cart entry along the east boundary of No. 7. The respondent assumed in argument, that the access to his own premises, intended by this provision, was simply access into the open space disputed, and then to the doors which are in the north wall of his house; and in the record, he has asserted, that 'since the remit by the Lord Chancellor, in the present case, the respondent has been driven to the necessity of striking out a new door, which he has formed in the east side wall of his house, about two feet from the area in question, into the covered entry under his house, leading to the back part of his subjects.' This is pointedly denied by the suspender, who says, that that door has 'all along been there, and was the only one used by the tenants and others who occupied these subjects.' But the material fact is, that the cart entry, which begins on the east boundary of lot No. 7, is unquestionably continued, and was so, long before the judgment of the House of Lords, in the property of the respondent, so as to make a complete access into his court, which, by the plan, the principal entrance to his house appears to be. For the respondent has himself produced the report and plan made by Mr Moir, the sheriff in the earlier process; and on that plan the continued passage is marked very conspicuously through

MEADOWBANK.—I am not quite satisfied with the case. One thing is at the respondent acquired the property with free ish and entry along side of the suspender's property. The suspender had no right to build a certain line, and it is admitted by the suspender that he was thereby

rough tenement into Ross's Court.' That report is dated 10th June, 1829. no doubt, therefore, that the respondent had, and has full access by the y into his own court, by proceeding along the east boundary of No. 7, till (that) his own passage or close. One thing is clear, that the clause in the r's title contains no express reservation of any servitude of 'loading and g carts' in the suspender's court.

two other servitudes reserved are simple; viz. :—1. The suspender is pro- om building farther south than a certain line, under a particular exception; is declared, that the remainder of the ground to the south shall be mean for the preservation of light, which the Lord Ordinary conceives to be no a servitus luminum.

, holding it to be clear, that the entire property of the area is in the r, the Lord Ordinary cannot discover in these titles any reservation of a oad and unload in that area. From the short note of the case in Shaw, VII. pears that the view taken by the Court was, that the right of ish and entry into the Court implied a right to load and unload in it. What right the re- may have generally to ish and entry to his house by the doors stated to north wall of it, is a matter not properly comprehended in the subject pension. But the only right to a cart entry expressly reserved is the right cart entry 'to lot 8,' along the east boundary of lot No. 7. That, the re- has, and it is neither expressed nor implied in such a reserved right, that merely to take the passage, but to be entitled to use the area generally for nd unloading carts.

respondent insists on the state of the use of the subjects previous to the nentia. But the Lord Ordinary does not think that any use of the area

No. 154. prohibited from doing any thing that would enclose lot No. 8. Then, as to the lot, the proprietor is entitled to a cart way through the entry, not only to his own court, but to every part of lot No. 8, where there was an entry before. The ish and entry stipulated was by carts, but it was free ish and entry by carts to every part of No. 8. Then there are two doors opening into this court, and by the suspender's own titles that court is to be kept open, and is not the respondent entitled to prove that, at the time of the purchase, free ish and entry by carts was in use to those doors entering in the north wall? I cannot say the case is so clear that the previous actings of the parties is not a competent way of explaining the meaning of the servitude in the titles. The words certainly admit of doubt, and may be cleared by previous practice. As to the interpretation of "mean property" for preserving light, though that is the prominent object, it is not confined to that. He is entitled to walk on it; that is admitted, as he has a right to doors, and so the reservation is not limited to the preserving of light.

LORD MEDWYN.—I have no difficulty in adhering. When this subject was sold in 1824, the part to the east was not built on, as appears from the respondent's own statement, Art. 5. The servitude is not in Ross's titles, but only in Baird's, which is material. The title of Baird includes this area; and if there had been nothing in his titles limiting it, he would have been absolute proprietor. Servitudes are not to be extended beyond the words or the intention of the party, and when we see in the servient tenement a servitude for preserving light, I am not for extending it to any other purpose whatever. I hold that to be a limitation of the servitude, and the use of the words "mean property" do not, I think alter the nature of the right from being a mere servitude, and of the kind then expressed. Then, as to the point before us, I think the Lord Ordinary quite right. The respondent is not entitled to load or unload nor to turn carts there unless he can do so in the cart way, and it is clear that no usage prior to the purchase can affect the construction of the titles.

LORD GLENLEE.—I am for adhering to the interlocutor, which does nothing more than prohibit loading or unloading in that area, reserving all questions as to the general right of ish and entry. There may be some difficulty as to the right of ish and entry. In the former process, the court assumed that the respondent had a right of passage into that area by the door, but the only question here is as to loading and unloading carts, which is a right of a very different nature from mere ish and entry; and the respondent has shown no right to this area whatever. The provision is that it is to be common property for the preservation of light. That is not a very technical law phrase, but the only meaning I can put on it is, that the property is conveyed to the suspender with this limitation for the preservation of light. But even if it were mean property, would not one of two joint proprietors be entitled to say, you shall not make a particular use of it without my consent? I think he would.

LORD JUSTICE-CLERK.—I concur in the result, and am for adhering to the interlocutor; though I could not have done so without the reservation at the conclusion as to ish and entry, which is effectual to preserve every claim to ish and entry as to the tenement generally. The matter is much better explained than when it was before us on the bill.

THE COURT accordingly adhered.

J. J. DARLING,—JARDINE, STODART, and FRASER, W.S.—Agents.

...of emphasis there was no warrant in the letters themselves, the Court
l their disapprobation of such a practice as being irregular.

late Sir John Marjoribanks of Lees left a trust-disposition of his Feb. 19, 1836.
n favour of David Anderson and others, who appointed Charles
gham, partner of Cunninghams and Bell, W.S., their factor and
sioner. Part of the trust estate consisted of the lands of Simprim,
Sir John had bought for £37,000, shortly prior to his death. He
le up no titles, and his right stood on a minute of sale.

1st DIVISION.
LD. FULLERTON.
S.

14th January, 1834, the trustees being desirous to wind up the
serted a minute in the trust sederunt-book, directing their com-
er to prepare a state of the whole affairs, to be laid before them
Wednesday next (15th), and to be prepared to advise as to the
bility of denuding of the trust, &c.; and in doing so, to have in
sale of Simprim."

is meeting, the name of Sir David Milne, K.C.B., who was pro-
of the estate of Milne-Graden, adjoining to Simprim, was men-
s a person who might desire to buy the estate, as he had made
quiries with a view to a purchase, at the time when Sir John
banks had bought it. On the 14th of January, Adam Anderson,
dvocate, one of the Marjoribanks trustees, mentioned, in the
ent-House, to David Milne, Esq., advocate, eldest son of Sir
Milne, the probability of a sale of Simprim, and requested him,
a, to ascertain what were Sir David's sentiments respecting a pur-
f it. He also referred Mr Milne to Messrs Cunninghams and
W.S. as the parties from whom he might obtain all requisite in-
m.

No. 155.

Feb. 19, 1836.
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Anderson.

“ Simprim is rented at £1490, 9s. 8d. per annum, and the above price is under 25 years' purchase of the rental, and is a most eligible bargain.

“ The estate was entailed, but a defect in the entail having been discovered which was thought to be fatal to it, the property was sold in order to try the question, and the following arrangement was made:— A law-suit was immediately to be instituted to try the question, which has been done, and the Courts here have confirmed the sale, but an appeal has been entered to the House of Lords, which is waiting to be heard. This appeal has been entered, not with the view of getting the decision altered, but merely to get a decision from the highest Court, confirming the sales. The point at issue is quite clear, and there is no chance of a reversal.

“ During the dependence of this suit, the purchaser was to get possession of the lands, and pay $3\frac{1}{2}$ per cent interest on the price. The purchaser therefore draws of rents, as before . . . £1490 9 8
And pays of interest on £37,000 at $3\frac{1}{2}$, . . . 1294 0 0

Clear annual profit, . . . £196 9 8

“ Should the decision of the Court here be reversed, provision is made that the seller is to pay the whole expenses on both sides, and every thing is to revert as before the sale.

“ The price can, in no event, be demanded before Whitsunday (15th May next), and probably not till Martinmas, 11th November next, or the first of these terms which shall happen after the decision of the House of Lords.

“ The transaction stands at present on a minute of sale, and Sir John's trustees would place any one in his shoes, by just assigning it over.”

On the same day (January 14th), Mr David Milne, after communicating with his father, addressed this letter to Mr Bell, partner of Cunninghams and Bell:—“ Mr Adam Anderson spoke to me to-day regarding the wish of Sir John Marjoribanks's trustees to dispose of Simprim, and stated, if Sir David Milne were still inclined to become the purchaser of that estate, the trustees would wish to transfer it to him. My father, to whom I have spoken on the subject, is not indisposed to enter into the proposed transaction—if the terms are unobjectionable; and therefore I will be obliged by your sending here the papers, which may enable Sir David to come to some resolution on the subject.”

On receiving this letter, Alexander Cunningham, W.S., partner of Cunninghams and Bell, wrote this answer of the same date:—

“ In terms of your request, I beg to enclose an outline of particulars of the estate of Simprim, which will give you an idea of how it stands. I can furnish more particulars if required;—and I may mention, that

more especially when they consider that a possibility still
the seller not being entitled to sell; Mr D. Marjoribanks,
having stated, that he thought it proper to offer this transac-
the members of Sir John's family, before closing with any
and that he had accordingly written to Mr Campbell Marjori-
the subject, and expected an immediate answer; the meeting
proved of Mr D. Marjoribanks's suggestion, and agreed to de-
n answer from Mr Campbell Marjoribanks."

the same day (15th January), Mr Milne wrote to Alexander
ham :—

father has perused the statement sent by you as to the estate of
which Sir John Marjoribanks's trustees have offered to transfer
and he desires me to say, that he is willing to enter into the pro-
nsaction.

will, therefore, be so good as send to him a note of the paro-
public burdens, &c., and the missives which passed between
er proprietor and Sir John Marjoribanks.

course, after this intimation, Sir David will understand, that
tiation you may have opened with other intending purchasers
drop."

ingham answered, of the same date :—

favoured with yours of this date, but have not by me a copy
minute of sale of Simprim, otherwise I should have sent it. In
time, however, I think it right to mention that a meeting of
es of Sir John Marjoribanks was held this forenoon. At this
Mr D. M. stated, that he had thought it right to bring the matter
ation of some members of the family and the trustees were of

No. 155. made a proposal for the sale of Simprim, which proposal the trustees had approved and accepted. Some farther correspondence followed, in the course of which, it was intimated to Milne that Simprim was finally sold to a third party, in terms of the proposal already mentioned.

Feb. 19, 1836.
Milne v.
Anderson.

Sir David Milne then raised an action against the trustees, and Charles Cunningham, W.S., their commissioner, to compel implement of the alleged contract of sale of Simprim, or to subject them in damages if they failed to implement it. The summons libelled the correspondence already quoted, and also certain verbal communing between Mr Milne and Mr Adam Anderson. But the alleged import of this communing was contradicted, in its more important details, and no proof of it was offered.

In these circumstances, the pursuer pleaded, that there had been a concluded contract. The defenders were desirous of effecting a sale of Simprim, and had drawn up a note of particulars of price, &c. expressly to form the basis of a treaty with any purchaser. And that note concluded with a statement, that "the transaction stands at present on a minute of sale, and Sir John's trustees would place any one in his shoes, by just assigning it over." This amounted to an express offer to the party to whom such note was addressed, if he chose to agree to the terms stated in the note of particulars. One of the trustees had previously applied to Sir David, through the medium of Milne, as a probable purchaser; this was followed up by submitting to him the offer of the estate, in answer to Milne's letter; and Sir David's acceptance was transmitted next day, before any obstacle whatever was interposed, and thus the transaction was definitively closed, and all resiling was barred.

The pursuer farther offered to prove, that the sale, which only took place subsequently to the proposal of Mr D. Marjoribanks, on 16th January, was truly an irregular and collusive sale by the trustees to one of their own number, though ex facie it was made to a third party. The defenders were therefore liable to implement the sale, or to pay damages for non-implement.

The defenders pleaded that there was no concluded contract whatever. Milne's letter of 14th January merely stated that the pursuer "was not indisposed to enter into the proposed transaction, if the terms are not objectionable." The answer, of the same date, containing a copy of a note of particulars, expressly intimated that the trustees were in communication with another party, which was the fact. And the clause, at the end of the offer, relative to assigning over the minute of sale to any purchaser, merely referred to the most eligible mode in which a purchaser could get his title completed. There was not an offer of the estate, at a given price, from beginning to end of this communication. Its object was merely to supply materials of a nature preliminary to a definitive offer, being made on either side. But even if it had been an actual offer, the

letter of Milne next day, was not a definitive acceptance. It stated Sir David to be "willing to enter into the proposed transaction," and requested a note of parochial burdens, &c., and of the missives of sale to Sir John. Notwithstanding this letter, Sir David might have objected to the transaction if he was not satisfied with the missives of sale, &c., and it was impossible that the defenders could be bound, if he was free. And on the same day on which this letter was received from Milne, an answer was sent, intimating that there was no concluded bargain, and that the family of Sir John were to have the first offer, which was duly followed up by the sale of the estate to a different party from the pursuer.

In regard to the allegation that the sale was truly for behoof of one of the trustees, though a third party was colourably interponed, it was *ius tertii* to the pursuer to inquire into this. As there was no concluded contract with him, he could neither claim implement nor damages for non-implement.

The Lord Ordinary found, "that there was no concluded bargain for the sale of the lands of Simprim between the pursuer and the defenders, and therefore sustained the pleas of the defenders; assoilzied them from the conclusions of the action, and decerned; and found the defenders entitled to expenses." *

* "NOTE.—The alleged conversations between Mr Milne and Mr Anderson must be thrown entirely out of view. The only inference that can be drawn from the opposite statements on this point is, that there was a misapprehension on one side or the other, but on which side, it is now confessedly impossible to ascertain; and, indeed, considering the subject in dispute, incompetent to investigate by parole proof, even if that were attainable. The question must be determined by the correspondence, and on that the Lord Ordinary entertains no doubt.

"The case of the pursuer must rest on the assumption, that the letter of Mr Cunningham of the 14th of January, constituted an offer of the estate to him on the terms contained in the enclosed paper, and that the transaction was concluded by his acceptance of that offer, in the letter from his son of the 15th January; and his case would have been a strong one, if he had made it out as laid in the summons. It is there averred, that at the meeting of the trustees on the 11th of January, 'it was resolved to apply to the pursuer to become the purchaser of the estate,' and that, 'for the purpose of making an offer of the said estate to the pursuer, a minute or missive was drawn out by the said trustees, or under their direction, setting forth the terms on which they were willing to convey it to the pursuer,' and the said minute or missive was accordingly transmitted to the pursuer in the above-mentioned letter of Mr. A. Cunningham. But this statement is not only unsupported, it is in some essential particulars disproved, by the written evidence. First, It does not appear that the trustees had come to the definitive resolution of parting with the estate, and certainly there is no proof that they had formed even an intention of offering it to the pursuer. Secondly, it is proved that the 'note of particulars,' furnished by the pursuer 'a minute or missive,' was not drawn up by the direction of the trustees for the purpose of making an offer to the pursuer, but was drawn up by their agents for the information of another party who had some intention of purchasing. Thirdly, The letter of the 14th January was addressed to the pursuer by

No. 155. The pursuer reclaimed.* The Court did not call on the defenders' counsel to support the judgment.

b. 19, 1836.
lne v.
derson.

LORD BALGRAY.—The merits of this case lie within the compass of a nutshell. If we were to touch the interlocutor under review, we should be subverting some of the best established principles of the law of Scotland. This was a transaction relative to the sale of heritage, the sale of a considerable estate in land. In such a transaction there must be a consensus in idem placitum duly reduced into a written form: and I see nothing of that sort here. The letters on 14th and 15th January, contain the whole essential part of this transaction. (His Lordship read them) The question is, then, whether these amount to a concluded bargain. Is there a definite offer of the estate, on certain fixed terms, by the one party, and an unqualified acceptance of it, on these same terms, by the other? Now although the letter of 14th January might be viewed, as I think, in the light of an offer, it is clear that Mr Milne's letter of the 15th was not an unqualified acceptance. He merely says that Sir David Milne "is willing to enter into the proposed transaction," and then he asks for a note of the burdens, and of the missives of sale to Sir John Marjoribanks. It is evident that farther information was desired before coming to a final resolution, and that Sir David was not definitively bound by that letter to accept, before such information was received. It is true that the letter of Mr Milne requests the trustees to drop any farther treating with other purchasers; but I conceive that was a request, which, at that stage of the transaction, he had no right to make.

LORD PRESIDENT.—I am of the same opinion, in regard to the law of this case; and there is nothing else before us as judges. As to the allegation that the sale of this estate which has been effected, is irregular in so far as it is truly made by the trustees to one of themselves, it is a plea which Sir David Milne has no interest or title to state. Unless there was a concluded contract with him, it is *jus tertii* to him, whether the trustees sold it to any other party or not. And I hold it clear that there was no concluded contract between the defenders and Sir David. I do not acquiesce in the whole reasoning of the Lord Ordinary's

Mr A. Cunninghame, who was only the agent of the trustees, and who had no power to make an offer. Though enclosing the 'note' already referred to, that communication was described as 'an outline of particulars which will give you an idea of how it stands.' And the letter clearly imported that a similar communication had been made to, and was then under the consideration of, another party.

"In these circumstances, the Lord Ordinary is of opinion, that the letter of the 14th of January must be viewed, not as an offer of the estate on the terms contained in the enclosed 'note,' but merely as the communication by an agent of the information which he possessed respecting it. He conceives that the first letter which admits of being construed as an offer, is that of the 15th of January, and it is clear that that offer never was accepted by the trustees."

* In appending the correspondence of parties to the reclaiming note, portions of the letters were printed in italics, though these portions had not been under-scored or marked with any emphasis, in the original. The defenders complained of this as an irregularity, and the Court intimated their decided disapprobation of such a practice as being irregular.

is Lordship seems to hold that the letter of 14th January, by Mr A. Cunningham, was not binding on the trustees, and I am not prepared to assent to it. But it is a point not requiring to be judicially determined.

No. 155.
Feb. 19, 1830.
Milne v.
Anderson.

JILLIES.—I think the case is not free of difficulty, though, on the whole, I am prepared to adhere. That sentence at the end of the note of particulars of Simson enclosed in Mr A. Cunningham's letter of 14th January, which stated that the trustees "would place any one in Sir John's shoes" by assigning over the sale to him, appears to me to be very important in this question. Taken in connection with the whole communication, it brings the matter very near to an admission that you are in Sir John's shoes, on the terms contained in that note. I feel I should regard it very much in that light. Then it is clear enough that there was no other person undoubtedly, in the field at that time; but the sale which was ultimately effected was not to him, but to a totally new party, and under a different action. But although I mention these doubts which have occurred to me, I am not prepared to alter.

MACKENZIE.—I think that the treaty between these parties approached very near to a definitive offer on the one hand, and a definitive acceptance on the other, but that it did not actually come up, either to such an offer, or to such an acceptance. I am therefore of opinion that the interlocutor is right. The letter of Mr A. Cunningham did not express any definite offer in itself. No offer was enclosed a note of particulars; and it also offered farther particulars if required.

But it is on the enclosed note, a copy of which had been also sent to the pursuer, that the pursuer mainly founds. The concluding sentence of it, "that any one in Sir John's shoes, merely means, I conceive, that any purchaser would receive an assignation to the minute of sale in Sir John's favour, and this would be the best way for such purchaser to proceed in making up and getting a conveyance to all right which was in the trustees. This appears to me to pick out an offer, so as to make up on the whole any actual offer of the estate. Then I think, that, even if there had been a conclusive answer of Mr Milne on 15th January, is of too cautious a character to amount to a binding acceptance. If he meant to bind the trustees on the one hand, he should have bound his constituent, so as to bar all resiling on his part, on the other. One party cannot be bound if the other keeps himself free. Now Sir David was "willing to enter into the proposed transaction." Does it follow that Sir David has concluded the transaction? So far from that, Mr Milne goes on to ask for a note of the burdens, and for a sight of the missives of Sir John Marjoribanks. This last particular, I consider to be highly important. It was perfectly open to Sir David, after seeing the missives, to have

No. 155. apprehension, occurring between parties, who were mutually desirous of doing only what they conceived to be right.

19, 1836.

Henderson v.
Mackenzie.

GREIG and MORTON, W.S.—CUNNINGHAMES and BELL, W.S.—Agents.

No. 156. Miss JANET HENDERSON, Pursuer.—*Ivory*.
JAMES MACKENZIE and OTHERS (Henderson's Trustees), Defenders.—*Monteith*.

Fee and Liferent—Superior and Vassal—Sasine.—Infeftment reduced, in respect that it was passed under a precept of clare constat, flowing from a superior who merely held a liferent right by constitution.

19, 1836.

DIVISION.
Corehouse.
S.

THE late John Maxwell of Fingalton disposed to Mrs Logan or Mitchell “in liferent only, during her lifetime, after me, and to the second son to be lawfully procreated of her body, and the heirs to be lawfully procreated of his body; whom failing, to the next youngest son, &c.; whom all failing, to my own nearest heirs and assignees whomsoever, all and whole the lands and barony of Fingalton.” The procuratory of resignation granted warrant to resign these lands “in favour of, and for new infeftment of the same, to be given and granted to the said Margaret Mitchell in liferent, during her lifetime after me, and the second son to be lawfully procreated of her body, and the heirs to be lawfully procreated of his body; whom failing, to the next youngest son; whom all failing, to my own nearest heirs and assignees whomsoever in fee.” The precept of sasine equally corresponded with the restriction of Mrs Logan's infeftment to a liferent only. Mrs Logan made up titles under this disposition. Part of the lands contained in it consisted of a right of superiority the dominium utile of the lands having been feued out. In 1804 the late Richard Henderson, W.S., being son and heir of the party last infeft in the dominium utile of these lands, obtained a precept of clare constat from Mrs Logan, as superior in virtue of the disposition above quoted. Henderson died without issue, after having executed a trust-conveyance of the lands of Middleton to James Mackenzie and Others, who entered to possession after his death. His sister, Miss Janet Henderson, then obtained a precept of clare constat, as heir to her father, and was infeft; after which she raised a reduction of the right of the trustees, as flowing a non habente potestatem, in respect that her late brother had never been duly infeft in the lands, having obtained a precept of clare constat from Mrs Logan who was only a liferentrix, by constitution, in the superiority. She concluded for declarator of her own right, and for an accounting as to intromissions. The trustees lodged defences, pleading, that, in the dispositive clause of the disposition by John Maxwell, there were no words expressly giving the lands “in fee” to any party: and therefore Mrs Logan's right was not so restricted as to disable her from granting an effectual entry to an heir.

by reservation. I have no doubt that the interlocutor is right.

BALGRAY.—There is no difficulty whatever in the case. The disposition conveys the lands to Mrs Logan in liferent only : and though it does in the precise words “ in fee,” when destining the lands to her second and the other disponees, it nevertheless disposes the lands themselves to these under the burden of Mrs Logan’s mere liferent. And accordingly, on the entry of resignation, authority is granted to resign the lands for new infeftment to Mrs Logan in liferent only, and to her second son and others “ in fee ;” the very words “ in fee ” actually occur.

MR GILLIES and **MACKENZIE** concurred.

THE COURT adhered.

PATRICK and **CRAWFORD**, W.S.—**J. C. REDDY**, W.S.—**Agents**.

GEORGE WALLACE, Pursuer.—*Robertson—G. G. Bell.*

No. 157.

ROBERT GRAY and **OTHERS**, Defenders.—*D. F. Hope—More.*

Trial—Process.—1. Where a trial broke down, and a verdict was found for the pursuer, in consequence of a document being rejected for the want of a stamp : the circumstances, that it was essential to the ends of justice to allow a new trial, on the pursuer’s paying the defender’s frustraneous expenses of the preliminary ; though the objection on the stamp laws did not take the pursuer by surprise.

2. Question, Whether a bill of exceptions is competent against a judgment of the court allowing a new trial.

5 Geo. IV. cap. 42, § 6, it is provided, that a party who is dissatisfied with the verdict of a jury, may apply for a new trial on the ground

Feb. 19, 1836.

No. 157. bar, by the defenders, and not denied, that, before the trial began, they had specially intimated to the pursuer their intention to object to the want of a stamp on the missives of agreement.

Feb. 19, 1836.
Wallace v.
Gray.

Pleaded by Pursuer—

The statute which introduced jury trial into Scotland did not give a power of non-suit, to the judge, as in England: but, in order to provide a remedy for such cases as required the interposition of a similar power, express authority was granted to allow a new trial upon any ground which was essential to the justice of the case. In the present instance, it must be assumed that the pursuer could have proved his case but for the omission to stamp the agreement. From that omission the trial had completely broken down; the case had never been truly before the jury; and therefore, even supposing this event to have occurred in consequence of a blunder of the counsel or agent, there ought to be the remedy of a new trial, at least, on paying all the expenses which that blunder had caused to the defenders. Such a remedy had been allowed in similar cases both in Scotland and England. Thus in the case of Clark,¹ a trial broke down in consequence of the copy of a registered bond being produced in place of the original or an extract: a new trial was granted: and in Cadzow,² where the pursuer had opened his case, and the Court found that a trial could not proceed, in consequence of a missive not being stamped, the jury was discharged of consent, and a new trial followed. Though no consent had been given by the party, in the present instance, it was in the power of the Court, exercising a sound judicial discretion on the subject, to prevent the defeat of justice by granting a new trial. This proceeding was warranted by other precedents.³

Pleaded by Defenders—

As the pursuer was certiorated before the trial began that the obvious objection on the stamp laws was to be taken, he could not plead surprise either in point of fact, or in point of law. And as he, *sciens et prudens*, chose to take his risk of a trial without stamping the missives, it was not essential to justice to give him a new trial now. It would indeed be a precedent, *pessimi exempli*, to do so, as a party might equally claim a new trial whenever he chose to hazard a first trial, without having all his evidence ready, and then abandon his case in the middle, on seeing that a verdict would in the end go against him. There was the less occasion in Scotland to grant a new trial on such a ground as the want of a stamp, because there was ample time for previous preparation; and in this case the cause had depended above four years before the trial: and the terms of the issue forced upon the defenders the knowledge that they must be put to prove

¹ Nov. 8, 1816 (1, Murr. 161).

² Jan. 4, 1830 (5, Murr. 98).

³ Skene, Nov. 27, 1820 (2, Murr. 353). Young, July 15, 1818 (1, Murr. 375). Smith, Jan. 10, 1828 (4, Murr. 411).

trial is neither more nor less than a particular mode of taking a proof. Had a proof been taken in the Court of Session, prior to the Jury Court, and objection on the stamp laws been taken to the production of a document, it would just have sisted procedure until the document might be stamped. But if the Court proceeded to assoilzie a defender without giving time to the pursuer to stamp the document he wished to found on, they would proceed more to work than I ever saw them do: and even then, the pursuer would have sought a remedy by stamping his document and instituting a repleading of the decree of absolvitor. But on allowing a new trial the pursuer is subjected in the expenses which have been occasioned by the previous trial to the defenders.

D MACKENZIE observed that this was a case of the utmost importance to the country, especially as every idea of actual surprise either in fact or in law, was expressly excluded. His Lordship was not understood to concur in the granting of the Lord President.

D GILLIES.—I incline to allow the new trial. There is no power of non-venue to the judge in Scotland, as there is in England; but I conceive it was on account of this circumstance that we were authorized to grant a new trial, and it is essential to the justice of the case to do so; and I think the pursuer should be deprived of a remedy to which he is entitled, if we were to refuse the motion.

D BALGRAY concurred in granting the motion for a new trial.

D of Faculty.—I beg to intimate that I am to tender a bill of exceptions to this judgment, and I request that this may be minuted.

D PRINCE objected that no such bill could be competently tendered.

D PRESIDENT.—Let the bill be presented if the defenders are so advised, and the Court will then dispose of the question of its competency.

THE COURT allowed a new trial on condition of the pursuer paying to the

No. 158. DR ROBERT WHITEHEAD, Pursuer.—*Rutherford—Patterson.*
 Feb. 19, 1836. JAMES HENDERSON and JEAN HILL, Defenders.—*D. F. Hope—Russell*

Whitehead v.
 Henderson.

Bill of Exchange—Proof.—In an action on a bill of exchange vitiated in the date where an averment “that the vitiation proceeded from a mistake of one of the acceptors when writing the bill, which was corrected with consent and in presence of the other acceptors,” was considered relevant to elide the nullity arising from the vitiation—evidence which held insufficient to substantiate this averment.

Feb. 19, 1836. In 1814, the pursuer Whitehead, as drawer of a bill of exchange for £100 accepted by the late James Henderson and his son, and by the late John Hill, raised action against the two Hendersons, and the defender Jean Hill, as representing John Hill, her father. The action libelled exclusively on the bill which was of the following tenor:—

1st Division.
 Lord Jeffrey.
 R.

“ Hamilton, May 18, 1808.

“ £100 sterling.

“ One day after date hereof, pay to me or order, at the post-office in Hamilton, the sum of one hundred pounds sterling, received in cash from the heirs of the deceased John Henderson of Peasebanks. (Signed) Robert Whitehead. (Addressed) To James Henderson, clerk to the Brewery, and James Henderson, junior, baxter in Hamilton, and John Hill, portioner in Stonehall. (Signed) James Henderson, James Henderson, John Hill.”

The last figure, “8,” of the year in the date was written on an erasure having been superinduced over the figure “7.” The defence was that the bill, being vitiated, was not a legal document of debt, and also that the pursuer had inserted his own name as drawer by an ex post facto operation, although he was in reality not the drawer. After some procedure the action was allowed to lie over till 1834, when a record was made up.

It appeared that the late John Henderson of Peasebank, had, in 1807, made an advance of £100 to James Henderson, senior, and John Hill for which these parties granted a bill, dated 18th May, 1807. In July of that year Henderson of Peasebank died, leaving a widow and children. To the children, one Rowatt was appointed factor loco tutoris, and he continued to act as such till September, 1810. In January, 1809, the pursuer Whitehead married the widow.

Whitehead averred in his condescendence that the bill founded on was a renewal of the former bill granted to Henderson of Peasebank, the defender, James Henderson, junior, having been taken as an additional acceptor, and that the new bill was granted on the 3d March, 1809, having been at first left blank in the name of the drawer and subsequently filled up with Whitehead's name as acting for the family of the deceased. It

ent in the fifth article of his condescendence was as follows:—"In No. 15
 the bill libelled Mr Hill (one of the acceptors) by mistake made Feb. 19, 1807
 1807 instead of 1808. But the mistake was observed while the Whitehead
 was in his hand, and the ink was yet wet, and he corrected it by Henderson
 striking the figure '8' as the proper date. It was after that correc-
 tion which was made with consent of the other two acceptors, and in
 presence of them and Mr Rowatt, and James Weir, a clerk employed on
 the date, that the bill was signed." The counter averment of the de-
 fendants, in their fourth statement, was as follows:—"The bill libelled
 as having been vitiated and erased in essentialibus. Its true date is 18th
 May 1807. It was prescribed before the present summons was executed
 on 1st April, 1814. But the date of the bill has been altered to the
 18th May, 1808, in the view of attempting to save it from
 rejection."

Court having allowed an examination of Whitehead's and Rowatt's
 with a view to a proof of the allegation contained in the pursuer's
 title, there appeared, 1. In a private ledger of Mr Henderson of
 Glasgow an entry dated 18th May, 1807, of the bill granted of that
 date by Henderson and Hill, which was noticed likewise in the factor
 Rowatt's inventory of bills, &c. 2. An entry in Rowatt's cash-book
 dated in a ledger at the end of the cash-book) to the following
 —

19.	Dr.
3. To James Henderson and John Hill, received from	
them interest on their bill from 18th May, 1807,	
to 18th May, 1808,	£5 0 0
Got a new bill for £100, dated the 18th May, 1808,	
and accepted by James Henderson, senior, and	
James Henderson, junior, and John Hill, at"	

entries in Whitehead's cash-book for 1811 and 1813 of "James
 Henderson and John Hill's bill of 18th May, 1808." 4. In a scheme of
 partition of the late Mr Henderson, prepared by an accountant in
 Glasgow as a list of unpaid bills, amongst which was stated the £100 bill
 Henderson and J. Hill and interest from 18th May 1811."

No. 158. altered in the date, and that the pursuer does not undertake to inst
by direct proof, or otherwise than by inferences from the document
process, which are quite inconclusive, the averments in the fifth ar
of his revised condescendence, viz. that the bill, being written by the
John Hill, one of the acceptors, was at first dated, by mere mistake
1807, instead of 1808, but was instantly corrected by him, while the
was still wet, in presence and with the consent of the other accept
finds that no action can lie upon this vitiated instrument, and, there
sustains the defences, assoilzies the defenders, and decerns."

b. 19, 1836.
Hitchhead v.
Henderson.

Henderson of Peasebank (the creditor in the original bill, of which that now libelled on, is said to have been a renewal) died in July 1807, and as the bill now in question bears to be for value received 'from the heirs of the deceased John Henderson of Peasebank,' it was contended, that this proved that the true date could not have been 18th May, 1807, as the defenders have positively averred on the record (their statement of facts, art. 4), and that this alone should be held as establishing that the alteration was made merely to correct an error, and should not be regarded as a vitiation.

"The case of Henderson and Hay, 20th February, 1802 (M. 17059), though referred to by the pursuer, certainly gives some countenance to this argument that was a far stronger and a very peculiar case. There, a bill, drawn in October 1799, had been first made payable at Martinmas, 1780, and then to correct this posthumous date, had been altered (the Court thought instantly, and by the acceptor himself, who was the writer of the bill) to 1800. The particulars of the case are very shortly reported, but it does not appear that the acceptor seriously denied the explanation so probably given, but stood entirely upon the naked and extreme fact that the document being *ex facie* altered, could not be looked at in judgment. In the present case, it seems enough to say, that there is no relevant offer or attempt to prove what was the true date of the bill, and even supposing that alleged by the defenders to be impossible (as was palpably the case in Henderson and Hay), the most that could be made of it would be, that the date should be held *proscripto*, which the Lord Ordinary rather apprehends would be a nullity. On the point of fact, it appears to the Lord Ordinary, to be by no means impossible that the true date of the bill was 18th May, 1807, as alleged by the defenders, though it were established that Mr John Henderson was then alive. The pursuer admits that there was a bill of that date, for the same sum, which does not, however, appear to be now forthcoming; and if that bill was blank (as this is admitted to have been) in the drawer's name, there would be no great difficulty in adding 'heirs, &c.' to that original document and by vitiating its date, converting it into the bill now libelled on, with an additional year's currency. In fact, it is impossible to look at the bill produced without being very forcibly struck with the probability of this suggestion. The words, 'the heirs of the deceased John Henderson of Peasebank,' being evidently written in a constrained hand, and crowded into the last line, with what the Lord Ordinary would call the most palpable appearance of an *ex post facto* operation. But without actually assuming this to be the case, it seems enough that the pursuer cannot prove the distinct and relevant averment in the fifth article of the condescendence. It is quite plain that the onus of proof is on him, and equally plain that the entries in John Henderson's books, or Rowatt's books, or any statement made in a separate action by James Henderson senior (one of the original acceptors, but now dead, and not represented by an heir) can be no evidence against the present defenders."

Whitehead reclaimed.

The Court having ordered minutes of debate,

It was argued for Whitehead—

An alteration in the date of a bill, which is made for the purpose of correcting a mistake, and in furtherance of the original intention of the parties, does not invalidate a bill.¹ The evidence afforded by the books of Whitehead and Rowatt, taken in connexion with the terms of the bill, is sufficient to show that there were two bills, one granted before, and the other after the death of Mr Henderson; that the true date of the second or renewed bill was 18th May, 1808; and that the alteration in question must have been made by Hill, the acceptor and writer of the bill, in correction of a palpable mistake: and Rowatt's books are competent evidence, as being a record regularly kept by an officer appointed by the Court, who had no personal interest in the matter.

The defenders answered—

The vitiation in the date of the bill in question being admitted, the rule of law is, that the bill is not an actionable document of debt:² If there be any legal means by which the document can be saved from the consequences of this nullity, as that the alteration was made before acceptance, or with the consent of all the parties, it lies with the party pleading on the bill to establish this in evidence:³ The only instances in which the rule of nullity is relaxed, are cases which resolve into a personal objection against the party pleading on the vitiation, where, having proposed or consented to it, he has become bound to waive the objection;⁴ and the present is not such a case. Assuming the averments of Whitehead to be relevant in law to elide the nullity, they are not supported by the evidence of his own and Rowatt's books, but, on the contrary, disproved: Besides, the proof adduced is incompetent, arising, as it does, from entries taken from what must be considered as the books of the party made evidence in his own cause.

¹ Chitty on Bills, c. v. p. 206; Attwood v. Griffin, Ryan and Moodie, 425; Rowatt v. Picard, Ryan and Moodie, 37; Sherrington v. Jermyn, Oct. 28, 1828, Carleton and Payne, 374; Peacock v. Maxwell, Starkie, II. 558; Bell's Com. I. 392; Henderson v. Hay, Feb. 20, 1802, Mor. 17059; Fairweather v. Alison, Feb. 12, 1817, F.C.; Sutherland v. Morrison, July 1, 1823, ante, II. 442 (N. E. 394).

² Murchie v. M'Farlane, July 1, 1796, F.C.; Hamilton v. Monteith, Dec. 1, 1824, ante, III. 345 (N. E. 245); Bryce v. Dickson, Nov. 16, 1810, F.C.; Lord Justice-Clerk, in Callender v. Kilpatrick, Dec. 10, 1812, F.C.

³ Human, V. Bingham, 183; Bishop, I. Moodie and Malkin, 116.

⁴ Fairweather v. Alison, supra; Sutherland v. Morrison, supra; M'Lean v. Morrison, May 20, 1834, ante, XII. 613; Bell, I. 392.

No. 158. The cause was this day put out for advising.

b. 19, 1836.
Whitehead v.
Anderson.

LORD JUSTICE-CLERK.—I was at first disposed to differ from the Lord Ordinary, but I have now no doubt as to the propriety of adhering. The action is laid on the bill alone, so that the bill must be such as to be legal evidence of the debt. Now here the bill is vitiated in the date, in which case it is indispensably necessary for a party founding on the bill, and trying to get the better of the vitiation, to show that it arose from mistake. But has this party proved that there was a mistake in the present instance? In the first place, we are asked to proceed upon the evidence of the pursuer's books—for whether they are his own or Rowatt's, it is the same thing—which, although they may be decisive evidence against him, he cannot bring forward to prove his own case. Then, even looking to these documents, there are some things very reconcilable with the idea that this bill was the bill of 1807; for it always appears to be the bill of "Henderson and Hill" which is entered; and in the scheme by Mr Kay in 1812, when the bill must have been laid before him, he states amongst the unpaid bills, that of "J. Henderson and J. Hill, 18th May, 1807." Thus there is no evidence to support the pursuer's action, which is founded exclusively on the bill.

LORD MEADOWBANK.—I had formerly some doubts, originating probably in the feeling that this was a debt truly due; but, in the circumstances, it would be inconsistent both with principle and precedent to sustain this claim.

LORD GLENLEE.—I agree. There is no evidence whatever to show that the alteration was made at the moment the bill was accepted, and in presence of all the parties. The entry in Rowatt's books in 1809 does not afford such evidence. If the bill was altered by Hill outwith the presence of the other parties, he had no title to make the alteration.

LORD MEDWYN.—I was inclined to think that this was a true debt; and I can hardly consider the books of Rowatt, a factor loco tutoris and an officer of this Court, to be exactly in the same situation as the books of the party. I think there must have been two bills, and, when the new bill was granted, it had been desired to have some additional security. As to Kay's scheme, it disproves the theory of the bill having been altered to save prescription; and, in other respects, I do not think it so conclusive against the pursuer. If the case had rested on the theory that the bill had been altered to save prescription, I could not have agreed with the Lord Ordinary. But the bill is vitiated, and it must be proved that the alteration took place in presence of the parties, which has not been done.

THE COURT accordingly adhered, with additional expenses.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—WOTHERSTON and MACK, W.S.—Agents.

various questions arose under a petition at the instance of Baxter, merchant in Glasgow, the cautioner for the composition, and John Macarthur, accountant in Glasgow, who had been trustee of the estate. The petition craved the Court, inter alia, to ordain Macarthur to lodge a full state of his intromissions; to remit to the auditor to examine it and report the sum due to him in name of commission, and amount of trust-funds in his hands, and to ordain payment thereof, &c. A previous petition, in similar terms, had been presented in name of Hugh Morris and Baxter. Under the petition at Baxter's sole instance, after discussion, the parties consented to a judicial reference to Mr John Moir, Sheriff-substitute of Lanarkshire, and the Court "remit him as judicial referee, to decide upon the merits of this cause, upon all questions of expenses between the parties; and also, of commission to Mr Moir to decide all questions of expenses between the parties in the petition of Hugh Morris, with concurrence of Isaac Baxter, and the said John Macarthur." ¹

After this remit, the referee, as appeared from his interlocutors, heard the parties repeatedly viva voce, and also received several written pleadings and answers, between December, 1833, and August, 1834. On 30th November, 1835, the referee pronounced an award finding Macarthur liable for the balance of his intromissions with the estate of the bankrupt (6s. 7d.), "and finds the said John Macarthur liable in expenses incurred by the said Isaac Baxter in the procedure betwixt them before the Sheriff-substitute, and also under the present judicial reference, inclusive of compensation for the great labour and trouble which the judicial referee has incurred in the management of the complicated business in question, and to his clerks; allows the said expenses to be given in, and remits the same, when

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Feb. 20, 1836.

Baxter v.
Macarthur.

Macarthur stated in his minute that he had not been sufficiently heard: that between August, 1834, and November, 1835, when the award was issued, the arbiter had neither seen nor heard the parties, and that he had in the interim taken up new views prejudicial to Macarthur, and had acted on them in the award, without making parties previously aware of this, or issuing any notes of his intended award. As illustrative of the want of due hearing, Macarthur alleged that the referee had, in various items of the accounting, awarded more to Baxter, than Baxter himself had asked. He also alleged that the expenses, though a very important subject, which was expressly referred, was a point on which he was never heard at all; and besides, the referee had not exhausted the reference, as he had made no finding as to the expenses of the original petition by Morris; and that the arbiter's finding of a fee due in favour of himself was highly objectionable, even though no specific amount had been stated. Macarthur concluded therefore that he was still entitled to a full hearing on all these points, and also, that a new referee ought to be selected by the Court.¹

Baxter answered that there had been repeated hearings *viva voce*, besides written pleadings, betwixt December, 1833, and August, 1834, as appeared from interlocutors by the arbiter; that the whole points in the cause were then open for discussion, and were discussed; that an arbiter was not bound to issue notes of an intended award before pronouncing it, though it might be expedient to do so where parties had not been fully heard; and that in point of fact a draft of the award had been read by the arbiter to the agents of both parties, on the day before it was extended, and no objections were then made, nor was time then asked to represent against it. The allegation of want of hearing was therefore unfounded.* He alleged that the balance brought out was the true state

¹ Glennie, Feb. 24, 1825 (*ante*, III. 575), and May 11, 1829, 3 W. and S. 389.

* On this subject Baxter laid before the Court a letter from the referee, addressed to his agents in these terms:—

“ In answer to your letter of this date, I have to state that my final award in the case of Mr Baxter and Mr Macarthur does not contain a decision upon any point on which I had not previously heard parties at full length in writing, and also *viva voce*, at diets appointed for that purpose, which I believe appears on the face of the record. At these diets Mr Macarthur was attended by his brother, Mr James Macarthur, accountant in Glasgow, and by Mr William Steele, junior, as his law-agent.

“ The day before the final award was issued, I carried the draft of it to your chambers, and read it, along with the relative continuation of progressive state of accounts to you, as agents for Mr Baxter. I then proceeded direct to the chambers of Messrs M'Pherson, M'Lachlan, and Steele, Mr Macarthur's agents, where I found Mr M'Lachlan and Mr Steele, and read the draft and continuation of account to them also. Neither of these gentlemen made objections to any part of the award or account. The award was issued next day, and a copy of it was delivered by the clerk to the reference to the agents for each of the parties. A day

accounts, but that it was incompetent to go into that question ; the whole question of expenses was decided as nothing could be excepting what was decerned for. As to the finding of a fee due to the solicitor and his clerks, that was done, of necessity, in order to determine which party was liable in this branch of the expenses, and, as no objection was condescended on, it was unobjectionable. In these circumstances there was no relevant ground stated to authorize the Court to set aside the award : but if this was done at all, it could only be to the effect of a new remit to the referee to hear parties farther.

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Baxter v.
Macarthur.

PRESIDENT.—I think there should be a remit to the referee to hear parties farther. An interval of fifteen months elapsed between the last time the parties were heard, and the period when the award was issued. And the referee made no previous notes of his intended award so as to make the parties acquainted with its tenor beforehand, and give them an opportunity of being heard on the award. It is always proper to issue such notes, and it was particularly so, in this case, in consequence of the long cessation of procedure prior to the award. Without meaning to lay down, as a general rule, that the issuing of such notes is always essential, I think that, in the whole circumstances, and especially in view of the failure to issue notes, in this case, there should be a farther opportunity afforded to parties to be heard before the referee.

Other Judges assented, and

GILLIES was understood to observe that the decerniture of the referee was *ultra petita*.

And the other Judges expressed the grounds of their opinion.

The Court pronounced an interlocutor by which a remit was made to the referee to open up his award to the effect of giving parties an opportunity of being farther heard before him, previously to issuing his final sentence.

J. BURNES, S. S. C.—**CAMPBELL** and **M'DOWALL, W. S.**—Agents.

Whereafter Mr Steele sent one of his clerks to me with a message, requesting to know whether I would receive a petition or representation on the part of Macarthur against the award. I returned for answer that I could not do so, as my powers were exhausted when the award was issued, and copies of it were sent to the agents of the parties."

No. 160.

ROBERT SCOTT, Petitioner.—*W. Bell.*

b. 20, 1836.

THOMAS STEVENSON, Respondent.—*G. H. Pattison.*

et v.

Stevenson.

Bankrupt—Sequestration—Trustee.—A party having been elected trustee sequestrated estate, and being already trustee for the creditors of another bankrupt, and in that character engaged in a litigation with the estate in question, Court refused to confirm his election.

b. 20, 1836.

D DIVISION.

T.

THE estate of Archibald Richardson was sequestrated in the end of 1835 and Robert Scott was elected trustee, without a contest. Scott having presented a petition for confirmation, Stevenson, a creditor, objected thereto, on the following grounds:—The bankrupt Richardson had a claim of debt against the dissolved firm of Scott and Spiers, one of the partners of which firm was the petitioner Scott, the other partner having been the person who proposed him as trustee at the meeting of creditors: on this debt an action was some time since raised at the instance of the bankrupt against those parties, which was still in dependence. & Scott and Spiers had raised a counter-action against the bankrupt, which was likewise in dependence, Scott was, besides, trustee on the estate of another person of the name of Spiers, in which capacity he was defeated in an action of damages at the instance of Richardson.¹

These facts were admitted, and resting on them Stevenson contended:—1st, That Scott, having an interest adverse to that of the creditors, was inept to hold the office of trustee;² and, 2dly, That he was disqualified from the circumstance of his being already trustee on a bankrupt estate and in that character engaged in a litigation with Richardson, on whose estate he now desired to be appointed trustee.³

THE COURT, proceeding chiefly on the principle adopted in the case of Paterson's sequestration, where their Lordships had refused to confirm the election of a party who was already trustee on an estate, between which and the estate in question there were subsisting disputes, found it inexpedient to confirm Mr. Scott as trustee, and appointed the creditors to meet anew to elect another.

PETER COUPER, W.S.—A. SIMSON, Solicitor—Agents.

¹ Ante, XIII. 972.

² 2 Bell, 366, et seq.; *Turcan v. Cox*, Feb. 17, 1832, ante, X. 352.

³ *Paterson*, Dec. 15, 1812, F.C.

DAVID WYLLIE, Suspender.—*Ivory*.
JOHN BRAND, Charger.—*H. J. Robertson*.

No. 161.

Feb. 20, 1836

Wyllie v.

Brand.

—*Suspension—Bill-Chamber*.—A bill of suspension having been presented, and of forgery, of a charge on a bill of exchange, the narrative in the bill extremely short, and the suspender, on a reclaiming note being presented, stated additional facts at the bar, in reference to the forgery;—the Court refused the bill, declaring it competent to the suspender to put in a new bill with a fuller narrative of facts.

THE suspender presented a bill of suspension of a charge on a bill of exchange, and, as the ground of suspension, that his signature, which appeared on the bill as drawer, was forged, and he produced various writings, containing his subscription, for the purpose of comparing them with the alleged forgery. The narrative of the bill was extremely short, and the ground of suspension simply stated, without any facts being entered into. Neither caution nor consignment were

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Bill-Chamber

Ld. Cockburn

T.

denied the forgery, and maintained, that the bill ought to be passed or at least passed on caution only.

The Lord Ordinary refused the bill, adding the subjoined note.* The suspender reclaimed, and at the bar made various additional statements in reference to the forgery, contending that the bill ought to be passed.
.

THE COURT refused the bill, it being declared competent to the suspender to put in a new bill with a fuller narrative of facts.

JAMES IMBIE—J. RICHARDSON, W.S.—Agents.

Had caution had been offered, the bill would have been passed. But forgery is not presumed, and the genuine signatures produced do not appear to the Lord Ordinary to prove it; and no circumstance is stated to make it probable. To suspend in this situation without caution, would just be to suspend upon the uncorroborated averment of the party, and to assume the commission of a crime on his bare word."

See *v. Hart*, Feb. 25, 1826, ante, IV. 504 (N. E. 511).

No. 162.

WILLIAM BOSWELL, Nominal Raiser.—*Forsyth*.

Feb. 23, 1836.

MATTHEW MONTGOMERIE and OTHERS, Claimants.—*Keay—Penney*.

Boswell v.

Montgomerie.

Interest—Accounting—Relief.—1. A series of accounts between brothers was rendered from year to year, in which interest was charged on cash advances from the date of the advance; the interest accruing in each year was added to the principal sum due, and the whole carried forward as a gross sum bearing interest in the accounts of next year: these accounts were expressly approved of in many instances by the debtor, and were all acquiesced in for a long term of years:—Objection repelled, when afterwards stated, to the mode in which interest was charged. 2. Funds ordained to be paid over, by the debtor, only on condition of his being duly secured against such cautionary obligations as he had undertaken for the creditor.

Feb. 23, 1836.

1st Division.

J. Fallerton.

MATTHEW MONTGOMERIE, writer in Glasgow, and others, as creditors of Alexander Boswell, W.S., used arrestments in the hands of William Boswell, Esq. advocate, as indebted to his brother Alexander Boswell, and they also brought a forthcoming against him, and raised a multiple-pounding in his name. An investigation of the accounts between these gentlemen ensued, when it appeared that Mr Alexander Boswell had rendered annual accounts to his brother from 1806 to 1821, which were frequently docqueted by Mr William Boswell as correct. In these accounts a balance, which gradually increased, was stated against Mr William Boswell. It consisted of cash advances; interest was charged upon each advance, and, at the end of the year, the interest so charged was added to the principal sums advanced, and the gross sum was carried forward as a capital bearing interest in the accounts of next year. Subsequent to the year 1821 no accounts had been rendered. A remit being made to an accountant to ascertain the balance due, he made up a report showing a sum of £3585 due, with interest since November, 1834. This was calculated upon the assumption that the interest, charged on cash advances in the manner stated, was a correct charge, being according to the custom of bankers, and having been for so long a period of years approved of and acquiesced in by the debtor. No accumulated interest was charged after 1821.

Mr William Boswell objected to the report, that it amounted to a charge of interest upon interest; and, as the accounts passing between his brother and himself were on the most confidential footing, the whole accounting between them, if it passed into the hands of creditors, should now be held opened up from the first, and placed on the same footing as if there had been no conclusive annual audits at all.

The creditors answered, that, to the extent of rectifying every error of calculi, the accounts might be opened up: but not to the effect of discharging a legal and equitable claim of interest, which was annually made and approved of for so long a term of years.

Mr William Boswell also insisted on a right of retention of funds to ensure his relief against all cautionary obligations which he had under-

half of his brother. He condescended on one of these obligations it might require the retention of £400, to secure him

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Feb. 23, 1836.

Black's Trustees v. Miller.

Ordinary "repelled the objections which were put in for Boswell, the arrestee and nominal raiser of the multiple- approved of the report, and, in the furthcoming, decerned in against the said William Boswell, for payment of the sum of 10½d. sterling, with interest thereof from the 11th day of 1834, and until payment; and found that the said sum, with the fund in medio in the multiplepinding; but found none."

ell reclaimed, and the creditors, besides assenting to the sum retained to meet the cautionary obligation which was confirmed, also minuted an obligation to guarantee him, to the extent received by them, against all loss from similar obligations, if such.

THE COURT, quoad ultra, adhered.

J. PHILLIPS, S.S.C.—J. COURT, S.S.C.—Agents.

BLACK'S TRUSTEES, Raisers.—*More—Monteith.*

No. 163.

MILLER and OTHERS, Claimants.—*D. F. Hope—A. M'Neill—Robinson.*

—*Legacy.*—1. A bequest in a trust-deed of settlement of the residue of the testator's estate to trustees, with power to keep up the trust by assumption of expenses for the purpose of applying the proceeds "in yearly payments to domestic servants settled in Glasgow, or the neighbourhood, who can prove themselves of good character and morals from their masters or mistresses' service; no one to be entitled to more than £10 sterling yearly, but as my said trustees may think proper," or in the event of the residue being less than £600, to distribute the same "to such charitable and benevolent institutions as the trustees might think proper—held not to be void through uncertainty of a certain sum appointed to be lent out on security of a life interest to a legatee, and it being declared that the capital was, at all times, payable to the trustees"—held that there was no bequest to the trustees but that the capital was to merge in the general fund of the trust.

Dr Black, an inhabitant of Glasgow, by his trust-deed of Feb. 23, 1836. executed in 1827, conveyed all his property to the now deceased Maxwell, and to George Rowan and John Miller, or such persons as they should accept, "and the survivors and survivor of the said persons, or to such person or persons as may be assumed by them, or their heirs or survivors, to supply the deficiency of such as may die before the said act, and which they are hereby empowered to do when they are the major number alive and accepting at the time being

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Lord Jeffrey.
R.

No. 163. always a quorum, as trustees or trustee, for the ends, uses, and purposes after specified."

Feb. 23, 1836.

Black's Trusts
v. Miller.

The purposes of the trust were the payment of debts and certain special legacies, and the disposal of the residue of the estate. The special legacies amounted to about £7500, including a sum of £2000 bequeathed in the following terms:—"In the third place, I appoint my said trustees to lend out the sum of £2000 sterling on good heritable or personal security, taking the interest of said sum payable to Mary Maxwell, my cousin, half yearly during her life, commencing the first term's payment at the first term of Whitsunday or Martinmas that shall occur after my death, and the next at the next term thereafter, and so on half yearly and proportionally, and the said principal sum itself payable to my said trustees or their aforesaid at her death."

As to the residue, the deed contained the following directions:—"Lastly, My said trustees shall apply the rest and residue of my estate and effects to such benevolent and charitable purposes as they think proper; and if the same shall amount to £600 sterling or upwards, I recommend to my said trustees, and their foresaid, to execute a deed vesting the same in themselves, and apply the annual proceeds thereof, after deducting expenses, in yearly payments to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters or mistresses, after ten years' service; no one to be entitled to more than £10 sterling yearly, but as much less as my said trustees may think proper; and if the free residue of my said estate shall not amount to the sum of £600 sterling, I authorize my said trustees to distribute the same to such charitable and benevolent purposes as they may think proper."

At the date of this settlement, it appeared that the testator's property, as entered in a cash-book kept by him, amounted to about £14,000, and at his death, in 1834, it had accumulated to nearly £20,000, leaving a residue of nearly £12,000, after deducting the whole legacies.

Doubts having arisen as to how far the bequest of the residue was effectual, the trustees raised the present process of multiplepoinding, in which a claim for the residue was lodged by Miller and others, Dr Black's nearest of kin, on the ground that the bequest quoad it was void through uncertainty, and they supported their claim by the same pleas and authorities as were urged in the cases of Hill¹ and Crichton.² A claim was also lodged for Rowan and Miller, the two surviving trustees, as individuals, for the fee of the £2000, of which the interest was provided to Mary Maxwell during her life, on the ground that the provi-

¹ Dec. 14, 1824 (ante, III. 389, N. E. 275), and in House of Lords, April 14, 1823 (2 W. and S. 80).

² May 12, 1826 (ante, IV. 553, N. E. 561), and in House of Lords, July 23, 1826 (3 W. and S. 329).

the capital" should "be payable to the trustees at her death," No: 163. legacy of that sum to the trustees individually.

claim for the next of kin, it was answered by the trustees, Feb. 23, 1886.
Black's Trus-
tees v. Miller. quest here was much more definite and precise than either of had been held effectual in the cases of Hill and Crichton; for Rowan and Miller as individuals, that the declaration as ital of the £2000, of which Mary Maxwell was to have the as expressly to the "trustees," importing that, on her death, erge in the general trust-estate, and that it never could be con- personal bequest to them individually.

nd Ordinary, on advising Cases, pronounced the following in- —" Finds, 1mo, That the fee of the sum of £2000, directed nted by Mary Maxwell, belongs to and is vested in the trus- late James Black, not as individuals, or for their own personal t as such trustees only, and must accordingly form a part of of his estate, to be disposed of as such residue is by his trust- ted to be disposed of, after the termination of the said liferent, yment of all the special legacies and provisions: Finds, 2do, destination of the whole of the said residue contained in and by the last provision or declaration of the said trust-deed, is either for uncertainty, or as having been made through error ce on the part of the truster; that the trustees are therefore arry it into effect, and to administer and apply the said residue ity to the said destination; and that the next of kin of the re no title or interest in the matter, so long as the trustees administer as aforesaid: And before farther answer, appoints o be enrolled, that parties may state what decreet of prefer- herwise, will be required to carry these findings into effect, nce to the shape of the action, and the present state of the dio." *

—The first point turns wholly on a questio voluntatis; and it seems to rdinary impossible to suppose that the truster really intended to give y individuals who might happen to be vested with the character of his he death of his niece Mary Maxwell. There is a full power in the ame additional trustees at pleasure, and an instruction to fill up the ese who might die or be disqualified, while the direction upon which of the existing trustees is exclusively rested is merely that they shall DO in such a way as that the interest shall be payable to Mary Maxwell Ma, and the principal to 'the said trustees and their foresaids (that is, nce in office) at her death.' The Lord Ordinary cannot entertain a it was to be so payable to them as trustees; and that, if not otherwise by new codicils or legacies of the truster, it must revert and fall back and nce of the trust-estate.

jection of uncertainty or substantial delegation of the inalienable third parties, the Lord Ordinary thinks that it has been set at asce of Hill and Burns, and Crichton and Grierson, both most

No. 163. Miller, &c. reclaimed.

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 Mack's Trustees
 v. Miller.

LORD JUSTICE-CLERK.—I have not the slightest doubt that the interlocutory ought to be adhered to. When we look at the decisions of the House of Lords in the cases of Hill and Crichton, we cannot but be of opinion that the object of the bequest here is far more definitely pointed out than it was in these cases.

LORD MEDWYN.—I entirely agree, and I only wish to observe, with reference to the quotation of English authorities in the papers here, that I can see no necessity for going to the law of England in regard to a matter like this, as which we have so plain and consistent a train of decisions, more especially they admit distinctions in England on this subject which we do not recognise.

The other Judges concurring,

THE COURT adhered.

W. A. G. and R. ELLIS, W.S.—R. KENNEDY, W.S.—Agents.

elaborately argued through all their stages, and both ultimately confirmed by judgments of affirmance in the House of Lords.

“ In Crichton's case the destination of the residue was quite as vague and indefinite as it would have been in this case if the sum had fallen short of £600. But as it greatly exceeds that sum, the Lord Ordinary conceives that the recommendation to apply it for behoof of meritorious servants in Glasgow, is to be regarded as a specific instruction or expression of will on the part of the truster; and from that view it is infinitely more precise than any thing that occurred either in Crichton's or Hill's case, or indeed in any of the earlier cases; and on a point thus settled by authority, it would be idle to go into any general argument on the grounds and reasons of the decisions.

“ The greater part of the argument, and almost the whole of the evidence brought to show the supposed error of the truster as to the amount of the residue, which he meant to be affected by this destination, appears to the Lord Ordinary to be irrelevant and inadmissible. Beyond all doubt, the trust-deed conveyed his whole property for the purposes there mentioned; and it is altogether impossible therefore to suppose that he meant to die intestate as to any part of it. The disposition of the residue accordingly is of ‘ the rest and residue of my estate and effects,’ in the most general and comprehensive terms; and though the case is supposed of its falling short of £600, the disposition recommended on the opposite supposition, is not a disposition of £600 or any such sum, but a disposition to take effect ‘ if it shall amount to £600, or upwards.’

“ It may appear (and in fact it is) extraordinary that, with the knowledge the truster had of the actual extent of his funds, he should ever have contemplated the case of the residue falling below £600. But even if no explanation could be suggested, the Lord Ordinary could not upon this account refuse effect to the clear words of the deliberate deed of a sane man. He is satisfied, however, with the explanation given by the trustees. The deed was executed upwards of seven years before the truster's death, and contains full power to revoke and alter. It was quite possible, therefore, that either by additional legacies, or by misfortune or extravagance on his part, the free residue might be so reduced before the trust came into operation as either to be altogether annihilated, or to fall below the sum of £600, which he seems to have considered as the minimum upon which his scheme for the benefit of deserving servants could be set going.”

FERRIER (Common-Agent in Ranking and Sale of Cromarty). Feb. 25, 1830
Ferrier v.
Rose.
—*Keay—A. Wood.*

ROSE and HUSBAND, Compearers.—*D. F. Hope—Rutherford.*

and Sale—Process.—Held by the Lord Ordinary, after advising with that the common debtor, in a ranking and sale, was entitled to appear for production of the common-agent's minute-book and official correspondence in process.

ranking and sale of Cromarty, a motion was made by the com- Feb. 25, 1830
it for an order to prepare a state of interests. Mrs Rose, the 1st Division
Ld. Fullerton
ative of the common-debtor, and her husband, made appearance,
a counter motion, for production of the common-agent's minute-
official correspondence, in order to enable them to debate on
of the process. The common-agent objected to their right to
this stage of the process, and they replied that by Act of Seder-
h July, 1794, the common-agent was bound to keep a minute-
his proceedings and official correspondence open to the inspection
cerned: That the representative of the common-debtor was un-
y a party concerned; and that he was entitled to appear and
motion now objected to.

Lord Ordinary reported the case.

BALGRAY.—I have no doubt of the common-debtor's title to appear. He
to watch the conduct of the common-agent from the beginning to the

er Judges concurred.

for common-agent.—I submit that it is only inspection that is ordered:
necessary to produce the minute-book in process.

of Faculty, for representative of common-debtor.—The minute-book
put into process. The common-debtor should not be obliged to go to
e-office of the common-agent, every time that he wishes to inspect the
ok.

—I submit that the obligation to produce this book in process, is not
l by the Act of Sederunt; and is incompatible with the duty of the
agent, which implies the book to be in his charge and custody. How
e keep the minute-book?

PRESIDENT.—I think the book should be produced in process, and the
respondence. The common-agent will be sufficiently exonerated by hav-
arrant of this Court for his authority in doing so.

terlocutor was pronounced:—

ing heard counsel for the parties on the common-agent's motion for an
der to prepare a state of interests, and Mr and Mrs Rose's counter-mo-
on for production of the common-agent's minute-book and official cor-
ndence in order to enable them to debate on the state of process, and
advised with the Lords of the First Division, Finds that the com-

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Collins v.
Hamilton.

mon-debtor, as a party concerned in the ranking, is entitled to inspection of the said minute-book and official correspondence, and for that end authorizes and ordains the common-agent to produce the minute-book and official correspondence in process."

W. FERRIER, W.S.—H. MACQUEEN, W.S.—Agents.

No. 165.

EDWARD COLLINS, Pursuer.—*D. F. Hope—A. M'Neill.*

JAMES HAMILTON, Defender.—*Rutherford—A. Dunlop.*

ARCHIBALD ARTHUR, Defender.—*Rutherford.*

JAMES M'DONALD and HUGH M'KAY, Defenders.—*Sol.-Gen. Cunningham—Brodie.*

Jury Trial—Process—Reparation.—1. Where a paper maker raised an action for damages, to the amount of £10,000, against an upper heritor and his tenants, as for polluting the stream, and thereby injuring the quality of the paper and the character of the manufactory: pursuer ordained, of consent, to produce specimens of the damaged paper, in process, that the defenders might examine them before the trial. 2. Question whether the pursuer, in the circumstances of this case, could be called on to specify his alleged damages under distinct items.

25, 1836.

Division.
Jury Cause.

EDWARD COLLINS, paper maker at Dalmuir, raised an action against James Hamilton of Barns, who was proprietor of lands situated higher up the Dalmuir Burn than the paper works, Archibald Arthur, Hamilton's tenant in certain dye works situated on that stream, and James M'Donald and Hugh Mackay, subtenants in these works. Collins concluded for damages to the amount of £10,000, on account of injury to his paper manufactory, by contaminating the stream, and thereby injuring the quality of the paper and the character of the manufactory. The defenders moved the Court to ordain specimens of the damaged paper to be produced in process, that they might have an opportunity of thoroughly examining them before the trial came on. The pursuer observed that the motion was of a very unusual nature, but that he would not oppose it; and the motion was granted accordingly. The defenders then called on the pursuer to give in a specific statement of the items composing the sum of damages claimed; and they alleged this course to have been lately followed in the Outer-House by a Lord Ordinary (Moncreiff) where a random sum of damages was claimed. The pursuer answered that the amount of £10,000 was not stated as a random sum, but as actual damage that he did not mean, at present, to restrict his demand; but that, after his precognition was more fully completed, he would immediately inform the defenders whether he still meant to insist for the full sum, and whether his claim admitted of classification into items. On this explanation the motion was not farther pressed.

W. B. CAMPBELL, W.S.—PATRICK and CRAWFORD, W.S.—J. BURNES, S.S.C.—CAMERON and MACDOWALL, W.S.—Agents.

DAVID MILNE, Petitioner.—*A. Wood.*

Factor—Lease.—Circumstances in which the Court granted authority to the factor, to accept the renunciation of a lease which had three years to run, and to let the farm after due advertisement.

DAVID MILNE, advocate, judicial factor on the sequestrated estate of James Milne, presented a petition to the Court, stating, that one of the tenants, Ronaldson, who held a tack of the farm of Linthill for twenty-one years from Whitsunday 1818, at a rent of £813, 16s. 6d., had applied to him to renounce his tack; that Ronaldson was a tenant who had expended much capital beneficially in improving the farm; that the price of the farm had fallen greatly below what could have been contemplated when the lease was taken; that it would be ruinous to Ronaldson to be held by the lease; and, as he had expended much capital, all of which he would lose by his renunciation of the lease, he ought not to be exposed to hardship; that parties who managed the estate, prior to its sequestration, had given a reduction of 15 and 20 per cent, in 1821 and 1822 respectively, on the report of Mr Low, professor of agriculture, and that the situation of a farmer was certainly not better now than then. The petitioner also stated that the Court had recently authorized him to adopt a similar measure, and accept the renunciation of their leases from a number of the smaller tenants on the estate, who were placed in a position where they would otherwise have ruined themselves with-
out benefiting the estate.¹ He therefore prayed the Court “to grant to him to accept a renunciation of the lease from the said Peter Ronaldson, tenant of the farm of Linthill, as at the term of Whitsunday 1834, and to authorize the petitioner to reset the farm, after due notice by public advertisement in the newspapers, or otherwise.” No appearance was made to oppose the petition, and the Court, after deliberation, and a remit to the Lord Ordinary, granted its prayer.

H. MACQUEEN, W.S.—Agent.

¹ Dec. 20, 1834 (ante, XIII. 222).

No. 167. JAMES STEVENSON and MANDATARY, Advocators and Defenders.—

Rutherford—A. M'Neill.

Feb. 25, 1836.
Stevenson v.
Campbell.

CAMPBELL and MACLEAN, Respondents and Pursuers.—*D. F. Hope—Maitland.*

Agent and Principal—Sale.—Circumstances in a sale of goods by a dealer in Scotland to a dealer abroad, conducted chiefly through the medium of a mutual friend, who was not a regular agent for the buyer, but to whose credit the seller mainly looked, and with whom the party abroad had settled for the value of the goods, which held not to warrant the dealer in this country in coming upon the dealer abroad for payment of the price, on the bankruptcy of the agent.

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Ld. Moncreiff.
T.

NEARLY thirty years ago, the advocator, Stevenson, went to the West Indies, and carried on trade, principally as a saddler, in the island of Tobago. His sister, Elizabeth Stevenson, residing in Beith in Ayrshire, and afterwards Muir, the schoolmaster of Beith, to whom she was married, were for many years in the practice of ordering or purchasing goods of various descriptions and exporting them to Stevenson from this country. They had neither of them any regular authority to act as agents, but it was generally made known to the dealers, with whom they transacted, that the goods were intended to be sent to Stevenson; and in almost all the transactions in which Muir was engaged he acted in the capacity of agent for his brother-in-law, and held himself out as such. In no instance, previous to 1830, did any direct communication take place between the venders of the goods and Stevenson, but the sales and settlements of the price were made with Muir either by cash or by bills, which he accepted for value received by Stevenson, and paid. Amongst other dealers, the respondents, Campbell and Maclean, clothiers in Glasgow, on several occasions previous to that year, furnished goods on the order of Muir, on account of Stevenson, but without communicating with him, and they settled the price by bills accepted by Muir.

In September, 1830, Muir gave an order to Campbell and Maclean for a parcel of goods, with reference to which order, on the 28th September, they addressed to Stevenson the following letter:—

“ Our mutual friend, Mr Muir of Beith, called some time ago to say he would want an assortment for you similar to what we last made; and as no vessel appeared since then for your place, either from Clyde or Liverpool, till Saturday last, we have time only to make up and forward, as per enclosed invoice, value, including charges, £95, 12s. sterling, which will, we trust, arrive in good condition, and in all respects please.

“ Your farther esteemed orders shall at all times have the best attention of,” &c.

invoice referred to was made out in Stevenson's name. Of the
 ate with the letter and invoice, a relative account was entered in
 ell and Maclean's journal to the debit of Stevenson, and they sent
 of the letter and invoice to Muir. The goods were, by an acci-
 at transmitted by the vessel which carried out these documents,
 the 10th November, they addressed another letter to Stevenson, as
 :—"By the enclosed you will see that we intended to forward
 nk of goods per the David from Greenock. But, unfortunately,
 ties interested would not allow any goods to be shipped for To-
 cept what belonged to themselves; and, on that account, we are
 liged to forward them to be shipped at Leith, per Mary Ann.
 st they may yet be in good time for your Xmas sales. And so-
 a continuation of your esteemed orders, we are," &c.
 goods accompanying this letter were shipped on board the Mary
 Leith, under the direction of Muir, along with various parcels
 her merchants; and an invoice, including the whole shipment, was
 nt in the name of Stevenson, as debtor to Muir, the following let-
 n Muir to Stevenson, of date the 27th November, being sent
 th:—"Prefixed is an invoice of goods shipped for you, per the
 Ann, from Leith. The prints, according to orders in patterns sent,
 oked off the last time she sailed from Greenock. These, however,
 posed of, and those sent have been substituted, all warranted fast
 , and of the newest patterns, and which I think will find a ready
 , as it is expected they will arrive before Christmas. I inquired
 ly at the different ports for an earlier vessel, but could find none.
 avid sailed from Greenock 29th September, but refused to take
 hough presented at Greenock, which had to be brought back. The
 of the Mary Ann's present sailing was extremely short; and for
 h, as they were lying ready, the trunk of made clothes [those
 ed by Campbell and Maclean] was sent before the rest by the
 which occasioned a different bill of lading, but the account was
 over to me, a copy of which is sent to you, and the amount is to
 itted to me along with the rest. The shortness of the notice, and
 tance to Leith, prevented me getting them sooner ready along with
 ds. I wrote on the 30th July, with a state of account. Balance
 , £120, 17s. 1½d.; and, at the same time, requesting your atten-
 a request I made to you some time ago, and which I firmly trust
 I not deny me."

Goods thus sent by Campbell and Maclean were received by Steven-
 son, but no demand was made on him for payment at or previous
 November, 1831, when the period of credit, at which the goods
 expired. In February, 1832, Campbell and Maclean took a
 bill for £100, simply "for value received," payable at four
 months, which bill comprehended the value of the goods sent to Steven-

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No. 167. son, together with a small sum of a separate debt due to Campbell and Maclean by Muir. Stevenson settled the whole balance of account between himself and Muir, including the price of the goods above mentioned by drafts on certain parties in Glasgow. In the autumn of 1832, Stevenson died in bankrupt circumstances, having made no settlement with Campbell and Maclean, who thereafter gave notice to Stevenson that they looked to him for payment of their debt. On the demand being refused by Stevenson, who had now returned to this country, they raised a writ against him for payment, before the Sheriff of Ayr, alleging that he had been employed as his agent, and founding on the letters and other circumstances above detailed, to show that they were entitled to come upon him as the principal in the transaction. Stevenson admitted in defence, that Muir had not been authorized, on or previous to the occasion in question, to purchase goods as his agent, and that Campbell and Maclean had not transacted with him as such, but had looked solely to his credit. The sheriff allowed a proof as to the fact of agency, and thereafter found Stevenson liable for the value of the goods.

Stevenson then brought an advocacy, and pleaded ;—

Muir having had no mandate or authority to act generally as agent for Stevenson, the buyer, and having received no instructions to procure for him the particular goods in question, had no right to pledge his credit to third parties, and could not subject him in payment of the price to third parties. Even assuming the fact of Muir's agency, it is evident from the previous course of dealing between the parties, and from the circumstances of the *res gesta*, and the whole conduct of Campbell and Maclean, that they elected Muir as their debtor, and looked solely to his credit in the transaction, and have therefore no claim against Stevenson, the principal.

To this it was answered ;—

The terms of the letters addressed by Campbell and Maclean to Stevenson, and the fact of the invoice having been made out in Stevenson's name, furnish direct evidence of Muir having been the agent in the transaction. Although Campbell and Maclean, for their additional security, took a bill from Muir for the price of the goods in question, and to a certain extent looked to his credit, they evidently did not rely on him exclusively as their debtor ; but it is only in cases where the seller looks exclusively to the credit of the agent, that, according to the authorities founded on by Stevenson, the principal is relieved of his obligation to the creditor, and thus the present case is taken out of the exception which those authorities are held to have introduced to the general rule of law.

¹ Bell, l. 492 ; Kymer (1 Campbell, 109) ; Paterson v. Gandasequi (11 62) ; Addison v. Gandasequi (4 Taunton, 574) ; Campbell v. Shearer, May 1 (ante, XI. 600) ; Young v. Smarts, Dec. 14, 1831 (ante, X. 130) ; Hood v. Cox Jan. 16, 1818 (F.C.)

Lord Ordinary pronounced the following interlocutor, adding the
 and note :—*

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 Stevenson v
 Campbell.

In this cause comes before the Court on interlocutors which proceed on the Lord Ordinary conceives it to be his duty under the statute to find the facts which he thinks are proved. According to his view of the law of it, probably was enough in the admitted facts and the documents produced, to ought the parties to a clear issue if it had been rightly taken. But, unfortunately, the defender put his case at first mainly on the averment that Muir did not act as his agent at all, but always, and specially in this matter as an independent merchant. This, no doubt, rendered a proof necessary when it was demanded; and it was not till the reclaiming petition, drawn by counsel after the report of the sheriff on the proof, that the real points on which the case turns ought distinctly into view.

Lord Ordinary so far differs from the learned sheriff-depute that he thinks the case does not depend on fact alone, but that it is a case of a mixed nature, lying on facts and law together; and he is of opinion that the law, as laid down in authorities which were quoted in that reclaiming petition, and which were fully discussed before the Lord Ordinary, is applicable to the case when it is properly sifted and reduced to simple issues on the undoubted facts. Nevertheless, the Lord Ordinary is of opinion that the proof is not useless, for while he thinks it very clearly establishes that Muir must be considered as having transacted business for the defender, it does also show a distinct course of previous dealings which the pursuers as well as others, were engaged with Muir, tending strongly to explain what took place in the instance in question, and to confirm, in fact, the legal presumptions on which, as arising upon the admitted facts, he thinks that the case must at any rate be decided.

Lord Ordinary thinks the questions of law involved of very great importance and he is of opinion that the judgment of the sheriff cannot be affirmed without danger of shaking the principles of mercantile law, which appear to be settled, both in this country and in England.

In holding Muir to have been merely an agent or factor, it is clear that the pursuers dealt with him, for they had no order at all from the defender. But the name of the defender, as principal, was made known to them, and they sent the invoice in to him under the circumstances explained. It seemed to be thought in the debate that the circumstance of the principal being made known was very favourable to the pursuers. It was so certainly in the question, whether they dealt with Muir as an agent or as principal. But in the legal question which arises, it is very otherwise. If an agent transacts *qua* such, not making known the name of the principal, the vendor has, notwithstanding, his election to go against the agent and not the principal, when he becomes known; and so long as the stipulated period of running, he will not be barred from this option by any settlement between the principal and agent.—See Lord Ellenborough in the case *Kymer, Bell*, i. 492. In that case, if he lets the credit expire, at least after knowing the principal, and there is a settlement between the principal and agent, he will be held to treat the agent as his debtor.

On the other hand, if the name of the principal is disclosed at first, and still the pursuers deal with the agent, and allows the period of credit to expire without settling with the principal, he must then be considered as having elected the agent, and the principal at liberty to settle with him. The Lord Ordinary thinks that the result of the cases of *Paterson against Gandasequi*, 15 East. 62, and the same party, as referred to by Mr Bell, i. 492. The essence of

that the defendant was the person for whose use, and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, would not be the least pretence for charging the defendant.' The case was decided by the jury on the facts only, with the direction in law; and as the jury were charged that the credit was given to the agent, with knowledge of the principal, the non-verdict was confirmed.

"The special facts are not the same in the present case. In *Gandasequi*, the goods were invoiced to the agents, and they were debited in the books; but though in the present case, the invoice was (the Lord Ordinary thinks by accident) made to the principal, wise, the question is, whether the facts do not establish that the pursuers, the principal, elected the agent and gave credit to him. They made no demand on the principal. They never asked for his bill. They did not even mention what the credit was, but they let what they now say was the period of credit expire. Then they took the bill of the agent three months after; the bill was not paid, and still no demand was made, and it was only on the death and bankruptcy of the agent that they endeavoured to turn on the principal. The Lord Ordinary, therefore, holds the case to be within the rule of law there laid down.

"But there is a second point still more decisive. It is admitted that the pursuers furnished Muir with a copy of the invoice. When it is attended to, that the pursuers wrote letters to the defender they did not even speak of his paying the price, there is little doubt that this was done just because they knew that the account was to be settled with the other accounts of Muir; but at any rate, it put it in Muir's power to settle with the defender. Now the Lord Ordinary holds it to be the doctrine of the authorities, that if a party transacting with an agent lets the principal's credit run out, and otherwise so conducts himself, knowing the principal, as to let the principal to settle with the agent, he can have no claim against that agent. This is distinctly laid down by Lord Ellenborough, both in the case of *Kyngdon v. Smith* and in that of *Gandasequi*; and it is also held expressly by Lord Corehouse in *Young v. Smarts*, May 16, 1833, and also by Lord Newton in *Young v. Smarts*, December 14, 1831, in which the very fact, which was the ground of the opinion, was that the party, after knowing the principal, took a bill of the agent. The case of *Head v. Cochrane*, January 16, 1812, appears to the Lord

Elizabeth Stevenson, sister of the defender, in the first instance, No. 167
 towards John Muir, to whom she was married, were in the practice Feb. 25, 1831
 ing or purchasing goods for the purpose of being exported to the Stevenson v.
 r in Tobago : Finds it proved that it was generally made known Campbell.
 merchants with whom these parties so transacted, that they were
 l to be exported to the defender nominatim: Finds it proved,
 so instance as to which any evidence has been led, except that
 the foundation of the present action, did any direct communica-
 e place between the merchants, vendors of the goods and the de-
 Finds it proved, that in most of the transactions, if not in all of
 Muir acted and held himself out as an agent of the defender : Finds
 d that the settlement of the prices of the goods purchased from
 time were uniformly made with the vendors by Muir, either by
 by bills accepted by him alone, and paid by him, in so far as they
 id at the time of his death and bankruptcy : Finds it proved, that
 s to the transaction in question, the pursuers, Campbell and Mac-
 d on three several occasions furnished goods on the order of Muir,
 unt of Stevenson, but without communication with him, and had
 the price thereof by bills accepted by Muir : Finds it proved and
 d that the order on which the goods sued for were furnished was
 y Muir : Finds it proved and admitted that on that occasion the
 vere shipped directly by the pursuers to the defender, under the
 n of Muir, but without having been sent to Muir, and that an in-
 vereof was transmitted along with them to the defender by the
 s, together with the letters founded on in the summons: Finds it
 that a copy of the said invoice was also furnished to Muir : Finds
 'date the 27th November, 1830, the said John Muir transmitted to
 ender an invoice of various parcels of goods furnished by various
 nts, and which appear all to have been shipped on board the same
 the Mary Ann of Leith, engrossed in which is a copy of the in-

Lord Ordinary need not resume the facts. He can see no room for doubt
 s the pursuers did so act as to indicate that they looked to the agent alone,
 im credit in such a manner as necessarily to mislead the defender to settle
 n precisely as he had done in all the previous transactions. It is not neces-
 e shown that the defender knew that the credit was so given. The presump-
 other the reverse, by the expiring of the stipulated credit at least, and no
 being made for a year and a half after he had a right to conclude either that
 t was paid or that the pursuers had taken Muir as their debtor.
 pursuers' counsel said that they were entitled to the expenses in the inferior
 because the case was changed here, though in fact the whole points were
 in the reclaiming petition. But, besides that the Lord Ordinary thinks the
 extremely material, as showing by the previous course of dealing, that the
 really did look to Muir alone, he thinks that if no expenses be found due
 Court, any claim by the pursuers for the previous expenses must be rejected.
 so that the case is somewhat nice, and was perplexed by the mode of plead-
 ing; and therefore he has found no expenses in the advocacy."

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 ab. 25, 1836.
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voice, which had been transmitted by the pursuers, along with the goods shipped on the 10th of November preceding, together with a letter, containing an explanation of the cause of that particular invoice having been sent by the pursuers, contrary to the previous course of dealing, and stating that the amount was to be remitted to him along with the rest (meaning the prices of the other goods in the whole invoice): Finds it proved that the goods were entered in the books of the pursuers to the debit of the defender: Finds, that in neither of the two letters which accompanied the invoice did the pursuers demand payment of the price from the defender, or intimate otherwise than by the form of the invoice, that they held him to be their debtor, or expected payment to be made by him directly to them: Finds it admitted that the goods were received by the defender: Finds that, according to the summons in this action, the period of credit at which the goods were sold was twelve months, which period expired on the 10th November, 1831: Finds it not alleged that at or previous to that date the pursuers had made any demand on the defender for payment of the price of the said goods: Finds, that on 11th February, 1832, the pursuers received from Muir a bill for £100, drawn by them, and accepted by him, for value received, payable four months thereafter; and finds it admitted that that bill comprehended the value of the goods in question, together with a small sum of a separate debt due by Muir: Finds that Muir died in bankrupt circumstances sometime in the autumn of that year, 1832: Finds it not proved, and not alleged, that at any time previous to the death of Muir, the pursuers had made any demand on the defender for payment of the price of the goods in question: Finds it averred on the record, and not denied, that the defender had settled the whole balance of the accounts between him and Muir, including the price of the goods in question, as comprehended in the invoice above mentioned, transmitted by him on the 27th November, 1830, by drafts on Messrs John Campbell senior and Company, of Glasgow, before any notice given to him that the pursuers looked to him for payment of the debt; and in this state of the case finds, in point of law,—1mo, That the pursuers, by letting the term of credit expire, while in the knowledge of the defender, as the principal party to whom the goods were furnished, without making any demand on him, and subsequently accepting of Muir's bill in payment thereof, must be held to have elected to take Muir for their debtor, and cannot now claim payment from the defender; and, 2ndo, That the pursuers, by making no demand on the defender during so long a period after the expiry of the credit, and by transacting for payment with Muir alone, more especially with reference to the previous course of dealing, did mislead the defender to settle with Muir, paying to him the price of those goods, and that they are therefore now barred from maintaining the action against the defender: Therefore sustains the reasons of advocacy; advocates the cause; recalls the interlocutors of the sheriff; assoilzies the defender from the conclusions of the action, and

decerns: But in respect of the nature of the cause, and of the course of pleading in the inferior court, finds no expenses due."

Campbell and Maclean reclaimed.

LORD GLENLEE.—I think the interlocutor right, and should also do so, even if Campbell and Maclean had been entitled to charge Stevenson originally for these goods. But it appears to me that Muir is not proved to have been authorized to take the goods and charge them on Stevenson. It was certainly not necessary that he should have had a written commission, but his authority ought to have been shown from a general habit of acting as agent, and Stevenson settling with him on that footing. Now, till we come to this transaction, there is no evidence of Stevenson having been aware how Muir proceeded. He desired Muir to purchase goods to send out, but he gave no authority to pledge his credit for the goods—which was a very different thing—and he sent money for what he got. There are instances of purchases having been made by Miss Stevenson and Muir where it was known that the goods were destined for Stevenson, and yet the sellers thought themselves safe with the others, and did not consider themselves entitled bona fide to charge the goods on Stevenson. Then as to the transaction in question, did the parties so conduct themselves as to show Stevenson that matters were to stand on a different footing from formerly? They should have put him in mind that they had an account against him; but, instead of this, they allow the whole term of credit, and more, to expire before notice is given to Stevenson; and then they take a bill from Muir, according to the old use and custom which had existed between these parties—no mention being made of Stevenson in the bill, and the value received for his behoof being mixed up with the balance of a debt due by Muir himself.

LORD MEADOWBANK.—I think the ground on which Lord Glenlee has put the case quite invincible.

LORD MEDWYN.—I concur in the view taken by Lord Glenlee. In the first place, it is evident that, in the previous transactions between these parties, Campbell and Maclean held Muir, and not Stevenson, to be their debtor; then does the change which took place in the manner of their transacting in the present instance justify the sellers in thus coming upon Stevenson? I do not think that, in the whole matter, sufficient notice was given to Stevenson that they intended a change of dealing. It is clear that they knew the goods were going to Stevenson; but that is not sufficient, as was found in the case of Hood and Cochrane, since it is very evident they looked to the credit of the party with whom they had been formerly dealing.

LORD JUSTICE-CLERK.—In a case such as this, I do not object to reference to the law of England, which rides over almost the whole of our mercantile law; but we have the law both of the English and Scotch cases on this point well expounded in Mr Bell's work, who has seized the principles which run through these cases. According to the authorities, the matter is brought to this point—was Stevenson prejudiced or not by the conduct of Campbell and Maclean in their dealing with Muir? There appears to be no sufficient evidence that Muir stood in the capacity of an acknowledged agent. These parties were in the habit of dealing and transacting with Muir alone, and then comes this transaction, in which

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voice, which had been transmitted by the pursuers, along with the goods shipped on the 10th of November preceding, together with a letter, containing an explanation of the cause of that particular invoice having been sent by the pursuers, contrary to the previous course of dealing, and stating that the amount was to be remitted to him along with the rest (meaning the prices of the other goods in the whole invoice): Finds it proved that the goods were entered in the books of the pursuers to the debit of the defender: Finds, that in neither of the two letters which accompanied the invoice did the pursuers demand payment of the price from the defender, or intimate otherwise than by the form of the invoice, that they held him to be their debtor, or expected payment to be made by him directly to them: Finds it admitted that the goods were received by the defender: Finds that, according to the summons in this action, the period of credit at which the goods were sold was twelve months, which period expired on the 10th November, 1831: Finds it not alleged that at or previous to that date the pursuers had made any demand on the defender for payment of the price of the said goods: Finds, that on 11th February, 1832, the pursuers received from Muir a bill for £100, drawn by them, and accepted by him, for value received, payable four months thereafter; and finds it admitted that that bill comprehended the value of the goods in question, together with a small sum of a separate debt due by Muir: Finds that Muir died in bankrupt circumstances sometime in the autumn of that year, 1832: Finds it not proved, and not alleged, that at any time previous to the death of Muir, the pursuers had made any demand on the defender for payment of the price of the goods in question: Finds it averred on the record, and not denied, that the defender had settled the whole balance of the accounts between him and Muir, including the price of the goods in question, as comprehended in the invoice above mentioned, transmitted by him on the 27th November, 1830, by drafts on Messrs John Campbell senior and Company, of Glasgow, before any notice given to him that the pursuers looked to him for payment of the debt; and in this state of the case finds, in point of law,—1mo, That the pursuers, by letting the term of credit expire, while in the knowledge of the defender, as the principal party to whom the goods were furnished, without making any demand on him, and subsequently accepting of Muir's bill in payment thereof, must be held to have elected to take Muir for their debtor, and cannot now claim payment from the defender; and, 2ndo, That the pursuers, by making no demand on the defender during so long a period after the expiry of the credit, and by transacting for payment with Muir alone, more especially with reference to the previous course of dealing, did mislead the defender to settle with Muir, paying to him the price of those goods, and that they are therefore now barred from maintaining the action against the defender: Therefore sustains the reasons of advocacy; advocates the cause; recalls the interlocutors of the sheriff; assoilzies the defender from the conclusions of the action, and

J: But in respect of the nature of the cause, and of the course of No. 10
ing in the inferior court, finds no expenses due."

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Campbell and Maclean reclaimed.

D GLENLEE.—I think the interlocutor right, and should also do so, even Campbell and Maclean had been entitled to charge Stevenson originally for goods. But it appears to me that Muir is not proved to have been authorised to take the goods and charge them on Stevenson. It was certainly not necessary that he should have had a written commission, but his authority ought to have been shown from a general habit of acting as agent, and Stevenson set himself up with him on that footing. Now, till we come to this transaction, there is no evidence of Stevenson having been aware how Muir proceeded. He desired to purchase goods to send out, but he gave no authority to pledge his name for the goods—which was a very different thing—and he sent money for them. There are instances of purchases having been made by Miss Stevenson and Muir where it was known that the goods were destined for Stevenson, and yet the sellers thought themselves safe with the others, and did not consider themselves entitled bona fide to charge the goods on Stevenson. Then in the transaction in question, did the parties so conduct themselves as to put Stevenson on that footing that matters were to stand on a different footing from formerly? They should have put him in mind that they had an account against him; instead of this, they allow the whole term of credit, and more, to expire before notice is given to Stevenson; and then they take a bill from Muir, according to the old use and custom which had existed between these parties—no mention made of Stevenson in the bill, and the value received for his behoof being set up with the balance of a debt due by Muir himself.

D MEADOWBANK.—I think the ground on which Lord Glenlee has put the case is invincible.

D MEDWYN.—I concur in the view taken by Lord Glenlee. In the first place it is evident that, in the previous transactions between these parties, Campbell and Maclean held Muir, and not Stevenson, to be their debtor; then the change which took place in the manner of their transacting in the present instance justify the sellers in thus coming upon Stevenson? I do not think that the whole matter, sufficient notice was given to Stevenson that they intended a change of dealing. It is clear that they knew the goods were going to Stevenson; but that is not sufficient, as was found in the case of Hood and Co., since it is very evident they looked to the credit of the party with

No. 167. the character of the dealing was somewhat changed. If they had told Stevens the beginning that they looked to his credit, this would have been a good for the present claim. Looking to the whole conduct of Campbell and M I cannot think that they are entitled to shake themselves free of Muir back upon Stevenson. It is impossible to say that no prejudice has been Stevenson. I agree, therefore, with the interlocutor of the Lord Ordinary

THE COURT accordingly adhered, finding expenses since the date Lord Ordinary's interlocutor.

GEORGE DUNLOP, W.S.—E. and A. M'MILLAN, W.S.—Agents.

No. 168. MRS RAMSAY and OTHERS (Ramsay's Trustees), Raisers. ADAM ANDERSON and MISS AMELIA RAMSAY, Claimants—*Mon* Miss ELIZA ANDERSON and OTHERS, Claimants.—*Keay—Whig*

Implied Will—Testament.—Circumstances in which, held, in construing settlement which was not distinctly expressed, that it was only by a liberal interpretation that the Court could give effect to the true intention of the testator; the settlement should be liberally and rationally construed, to the effect of holding, that an unforeseen surplus should be applied for the testator's benefit in the same way as he had directed, regarding the only surplus which he anticipated or provided for.

Process—Advocate.—Intimation by the LORD PRESIDENT, that the practice of calling upon junior counsel to go on, in the absence of the senior, was adhered to, as a general rule, except only in very special instances requiring deviation from that rule.

Feb. 26, 1836. THE late James Ramsay, merchant in Perth, was twice married. His first wife he had two daughters, Amelia and Agnes, the last of whom in 1815 married Dr Adam Anderson, Rector of the Perth Academy. In his daughter's marriage-contract, Ramsay became bound to pay an annuity of £5000 to Anderson. Of this sum, the amount of £1000 was payable at the time of Anderson's marriage; £2000 was payable at the first anniversary happening six months after Ramsay's death; and £2000 more at a subsequent period. Mrs Anderson predeceased her father, leaving a daughter by Dr Anderson, who survived her. Ramsay's second wife had no issue. At his death Ramsay left a settlement, conveying his whole estate to trustees, for the purposes, 1st, of paying debts, including the sums due under the contract of marriage of Mrs Anderson: 2d, 3d, and 4th, to pay an annuity to his widow and unmarried daughter, and provisions regarding the maintenance of a house and furniture, all varying according to certain contingencies, but the annuity not in any event exceeding £350: also of £200 to his widow and £1000 to his daughter: 5th, an annuity of £200 to the testator's sister, Mrs Bell, and after her death to his niece Cecilia Bell, so long as a certain legacy from the testator's sister

not be received by her : 6th, to pay about £200 in charitable legacies : N
 7th, to pay £500 to each of the testator's grandchildren, four in number, Feb.
 which were born of the marriage of Dr Anderson and his daughter. Ram
 These legacies were to be payable at their respective marriage or major- And
 ity, "with interest thereafter till payment." There then followed this
 clause,—“ Lastly, after payment of all my just and lawful debts, and the
 legacies before written, and after the death of the said Mrs Ramsay, and
 Mrs Bell, I appoint my said trustees to employ the free residue of my
 said means and estate, real and personal, in purchasing government or
 other stock, or to lay out the same on good heritable or personal security,
 and to pay the yearly interest of two-thirds thereof to the said Dr Adam
 Anderson, and of the remaining third thereof to the said Amelia Ramsay,
 in liferent for their liferent use allienarly, and after their deaths to divide
 the free residue equally amongst the children of the said Dr Adam Ander-
 son and Agnes Ramsay, share and share alike. And I hereby declare,
 that, in case my said means and estate shall not be sufficient for answering
 the purposes of the foresaid trust, each legatee shall suffer a proportional
 diminution of the sum so legated to him.” At the death of Ramsay all
 his grandchildren were in minority.

The estate of Ramsay, in place of falling short of satisfying all his debts
 and legacies, was large enough to yield a surplus revenue of about £300
 per annum, which, so long as either Mrs Ramsay or Mrs Bell lived, or
 so long as any of Dr Anderson's children were minors and unmarried,
 was unappropriated to any specific purpose, unless it could be held dis-
 tributable in the proportion of two-thirds to Dr Anderson and one-third
 to Miss Ramsay, as it certainly would be, so soon as Mrs Ramsay and
 Mrs Bell should die, and all the legacies to the children should be paid
 on their marriage or majority. In these circumstances Ramsay's trustees
 raised a multiplepinding, to have the rights of parties ascertained, in
 which process a claim was made by Dr Anderson and Miss Ramsay on
 the one hand, and by Dr Anderson's children and their curator ad litem,
 on the other. Mrs Bell died during the dependence.

Claim by Dr Anderson and Miss Ramsay—

The testator, in his settlement, had two objects in view, 1st, to provide
 for payment of debts and special legacies ; and 2d, to dispose of the free
 surplus. All that he provided respecting the surplus was, that it should
 be held in fee for his grandchildren, and in liferent, for the claimants, his
 son-in-law and his daughter. He had apparently apprehended a short-
 coming of the estate ; at least, he had not expected any free surplus to
 arise, until after the death of his widow, Mrs Ramsay, and his sister, Mrs
 Bell. The express directions which he gave, as to surplus, were therefore
 applicable, *ex figura verborum*, only to surplus then emerging : but the
 same directions ought to be applied equally to all free surplus, whenever
 it might emerge. By any other rule it must be assumed either that the
 testator, though making a general settlement of his whole estate, had still

No. 168. intended to die intestate as to a considerable portion of it; or, that he had meant such portion to be the subject of indefinite accumulation in the hands of trustees. Either of these last presumptions was so very improbable, in the absence of express words, that their adoption would be a greater straining of the implied will of the testator, than if the construction of the claimants was taken.

b. 26, 1836.
Ramsay v.
Anderson.

Claim by Dr Anderson's children and their curator ad litem.

Where a will was conceived in express terms, there was no room left for presumption. The testator had made considerable provisions in favour of Dr Anderson and Miss Ramsay, and he had expressly declared that it was only "after payment of all my legacies, and after the death" of Mrs Ramsay and Mrs Bell that the surplus then existing was to be invested in a particular manner and held for the use of the above parties in liferent. This was equivalent to a declaration that any surplus, emerging in the mean time, must accumulate till that period; at least that these parties should not previously have any right in it as legatees. In this case they would not be worse provided than they would have been in the event apparently contemplated by the testator; which was, that no surplus at all should previously exist. And though such a surplus had unexpectedly arisen, that circumstance could not alter the express provisions of the testament any more than the common enough occurrence of an unexpected deficiency emerging, which last event never empowered the Court to alter a testator's will, or to adapt it to what he might obviously have wished, himself, to do, had he foreseen such event before his death.

The Lord Ordinary "repelled the claim for the children of Dr Adam Anderson, and their curator ad litem; found the claimants, Miss Amelia Ramsay and Dr Anderson, entitled to the liferent of the free surplus revenue of the trust funds, after, and as soon as, the special legacies and annuities bequeathed by the trust settlement are paid, or provided for; and that, in the proportion of one-third to Miss Ramsay, and two-thirds to Dr Anderson, and decerned in the preference accordingly, and found no expenses due." *

* "NOTE.—The clause in Mr Ramsay's trust settlement, which gives rise to this competition, is not distinctly expressed, but the construction now put upon it agrees best with the presumed will of the truster, while it does no violence to the words. If this construction is not adopted, the interest of the free fund, after the special legacies and annuities are provided for, must either be held as having been overlooked by the truster altogether, and left to the disposition of the law, or it must be the duty of the trustees to accumulate this interest for the benefit of the residuary legatees. Neither of these alternatives can well be admitted. It is contrary to every presumption, that a person making a general mortis causa settlement of his means and estate, should allow the interest, of a fund falling under it, to descend to his executors, ab intestato, and it has been repeatedly held that trustees ought not to accumulate accruing interests, unless a direction to that effect is expressly

Dr Anderson's children reclaimed.

LORD BALGRAY.—Had it been a rule in the law of Scotland, as it was in the Roman law, that no one dies *pro parte testatus, pro parte intestatus*, I should have had no difficulty in adhering to the interlocutor of the Lord Ordinary. The testator had contemplated a possible defalcation of his funds, and provided specially for that event only. But in place of this happening, a surplus emerged, and the question is whether the will affords directions as to the disposal of it. On the one hand, the express words of the testator, “ Lastly after payment of all my legacies, &c. and after the death ” of his widow and Mrs Bell, seem to exclude the power of the Court to sustain the claim of Dr Anderson and Miss Ramsay for a *liferent* of the surplus, which claim is made before payment of several of the legacies (though not before they have all been provided for), and also before the death of the testator's widow. But the postponement of the interest of these claimants until all the legacies shall not only be provided for, but also paid, and until the death of Mrs Ramsay, and this too, although a large free surplus has already emerged, seems to be a proceeding unsanctioned by the will of the testator, and at variance with his true intention. The construction of the Lord Ordinary is, on the contrary, so consistent with a prudent and rational interpretation of the will, that, if I am called on to decide the cause at present, I do not feel at liberty to alter that interlocutor. I apprehend that it just touches on the verge of making a will for a deceased party; which is a thing beyond the power of the Court: but the case is one of much difficulty and nicety, and I do not think the interlocutor goes so far as to be impeachable on that account. On the whole, I think it a judgment which ought to be supported.

LORD GILLIES was understood to express an opinion that the true object and intention of the testator was to provide the free surplus, in fee to Dr Anderson's children, and in *liferent* to Dr Anderson and Miss Ramsay; that a claim, upon this principle, had been made, and there was nothing in the words of the settlement to justify the Court, in rejecting that claim, appearing, as it did, to be truly consistent with the will of the testator. His Lordship observed that the case was attended with much difficulty.

LORD MACKENZIE.—I consider this case to be attended with great difficulty. The last sentence of the note of the Lord Ordinary, has occasioned some embarrassment to me, as his Lordship speaks there, of the free fund that may accrue from time to time by “ the payment of legacies, or death of annuitants.” The latter event would certainly set free a fund which could be invested, as it accrues :

given or clearly implied. On the other hand, it is extremely improbable that the testator should have intended that the *liferent* given to his son-in-law and his sister, Amelia, should be postponed until the death of his widow, and Mrs Bell, and until Dr Anderson's children, all in minority at the time of his death, should attain majority, or be married, exposing them to the probable chance of losing the benefit of it altogether. The interlocutor proceeds on these considerations, and also on the ground that the trust settlement, being a *mortis causa* deed, requires a liberal construction. It may be added, that the words easily admit of this sense, namely, that the free fund shall be vested from time to time, as it accrues, by the payment of legacies or death of annuitants, to answer the *liferents* opening as these events take place.”

No. 168. but I do not perceive how the former could do so. The mere payment of a legacy, would not set any fund free. But as this may not at all affect the application of the Lord Ordinary's views, it is perhaps unnecessary to ask any explanation as to this. On considering the whole circumstances of the case, if I am to decide it, at present, I incline to adhere to the judgment of the Lord Ordinary.

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26, 1836.
t v. Selbie.

LORD PRESIDENT.—It is undoubtedly a case of much difficulty and perplexity. But for that very reason it would seem to be the more proper that the Court should not disturb the interlocutor of the Lord Ordinary, which, in the opinion of all your Lordships, has given a rational interpretation to an ambiguous settlement, and an interpretation such as seems, on the whole, to be most consistent with the true intention of the testator. There is no other course which we can adopt that will not be more likely to defeat his will, than to give effect to it.

THE COURT accordingly adhered and ordered the whole expenses of the parties to be paid out of the trust-estate, as the litigation had been caused by the ambiguity of the settlement.*

ÆNEAS MACBEAN, W.S.—W. FRASER, W.S.—Agents.

No. 169.

WILLIAM SCOTT, Pursuer.—*Keay—Pyper.*

JOHN SELBIE, Defender.—*Buchanan.*

Consignation—Novatio Debiti—Bankruptcy.—Where a defender consigned a sum sued for, in a bank which was selected by both parties, to await the orders of the Court, and the pursuer ultimately obtained decree in terms of his libel, but the bankers had failed in the interim: held, in the special circumstances, that the loss, arising from the failure of the bankers, should be mutually borne by the pursuer and defender.

26, 1836.

—
DIVISION.

Corehouse.

S.

SEQUEL of the case reported January 20, 1835 (ante, XIII. 278), which see. The Court then found the defender liable “for the sum, with interest, as libelled, advanced on account of the defender's wife,” under deduction of the value of certain articles of furniture which she was alleged to have left in her brother's house. During the dependence of the action, the pursuer had executed letters of inhibition and arrestment on the dependence, in consequence of which, the defender's agent,

* When this cause was called, the junior counsel for Dr Anderson and Miss Ramsay, stated that although he was prepared to go on, if called upon by the Court, yet as the case was one of some difficulty, he felt it to be his duty to move the Court to delay the advising till his senior, who was engaged in the other Division, might be able to attend. The LORD PRESIDENT observed, that, after what had passed on this subject, he conceived it best to adhere to the rule already intimated, and to call on the junior counsel to proceed. There might be exceptions from this general rule, in particular circumstances, but this case did not appear to be one of them. The junior counsel accordingly pleaded the case.

the consignment, and, in the mean time, send us" a draft of diligence. On 18th January, Grant again wrote to Deuchar, that the terms of the deposit-receipt, will be matter of afterment" when he should get back from his client the signed diligence. That being received by him, the following bond was executed by the defender and his cautioners, dated 27th February, 1832. We Lieutenant John Selbie, R.N., Robert Baird, &c. considering that William Scott lately raised a summons against me Lieutenant John Selbie, concluding that I should be decerned to make payment of £107, 5d. interest of £92, 9s. 1d. thereof, being principal, from the 24th day of February, 1832, &c.; and £52, 6s. 8d., with interest of £49, 18s. 9d. being principal, from 1st March, 1832, &c. Upon the dependence of which process, the said William Scott raised letters of inhibition and arrestment, &c. and in virtue of the warrant of arrestment, contained in the said letters, the said William Scott used arrestments against me, Lieutenant John Selbie, in the hands of James Goodall, Esq. of Pasiehill," &c. "And seeing that the said William Scott has executed a discharge, and has executed a discharge of the said letters of inhibition, and to grant, and has granted a letter passing from the said William Scott, and has also delivered up to me, the said Lieutenant John Selbie, the foresaid letters of inhibition, and letters of arrestment. I, the said John Selbie, on the other hand, having agreed to consign, and have consigned in the hands of Messrs Kinnears, Smiths, and Company, Edinburgh, the said sum of £107, 5d. and £52, 6s. 8d. sterling, and a sum of £7, 4s. 11d. sterling, being interest of the said sum of £107, 5d. sterling, from the said 24th day of February, 1832, and of

No. 169. of £49, 18s. 9d. from the said day of , being
 Feb. 26, 1836. the date of the said consignment, and in time coming during the not
 Scott v. Selbie. payment of the said principal sum consigned as aforesaid, under deduc-
 tion always of such interest as shall be allowed by the said Kinnean
 Smiths, and Company, upon the said consignment; and also, that I, the
 said Lieutenant John Selbie, shall make payment to the said William
 Scott of the expenses incurred, and to be incurred by him in the fore-
 said process; and that, in case it shall be found by the Court of Session, that
 the said William Scott is entitled to interest and expenses in the said
 process."

On the 4th of March, 1833, a deposit-receipt for the consigned sum was granted by the bankers in these terms:—"Received from Lieutenant John Selbie, R.N., the sum of £166, 12s. sterling, which sum, in consequence of an arrangement with the pursuer, is consigned by the said John Selbie in the process brought against him at the instance of William Scott, and depending before Lord Corehouse, and is to remain in our hands, subject to the orders of the Lord Ordinary or the Court in said process."

The bankers became insolvent before any decision was given in the cause, and, after judgment was pronounced in favour of the pursuer, to the effect formerly reported, a question arose regarding the party on whom the loss occasioned by the consignment ought to fall. The defender pleaded, that, in the ordinary course, he would have been left in possession of the sums concluded for, until the issue of the action; that the pursuer had caused a deviation from this, by using diligence on the dependence, and this having resulted, in a consignment made under a special arrangement, which was adopted as being best for the interests of both parties, it must follow that the loss of the sum thus consigned should fall on the party who was ultimately found to be the proprietor of that sum. The pursuer was now found to be the proprietor, and the loss must fall on him.¹

The pursuer answered, that there would have been no need of any consignment, or of any action at all, if the defender had duly paid the debt which was justly due by him. His refusal to do this act of justice, so long as it prevented the money from getting into the pursuer's own custody, kept it at the risk of the defender, and of him alone. This was not the less true because the pursuer, having used diligence on the dependence, had consented to discharge it, on condition of the defender's consigning the principal sum sued for. The pursuer, for his own safety, took care that consignment was made in a bank of reputed responsibility; but he did not thereby discharge the liability of the defender for any part of the debt.²

¹ Arbuthnot, Jan. 19, 1739 (8077).

² Mowat, Feb. 15, 1673 (10118).

PRESIDENT.—This does not appear to me to be a case involving any principle ; it is one of specialty, and should be decided on its own circumstances. Had the defender been allowed to select his own bank, then I think the loss emerging, in consequence of the failure of the bank, ought to fall on him. But as the bank was not left to his own choice, but was selected by arrangement, the loss arising from the failure of the bankers should be shared equally by both. The correspondence of the agents, prior to consignment, is to me to support this view of the case, and to make it the only equitable adjustment. On 1st January, 1833, the defender's agent, Deuchar, requested Grant, the pursuer's agent, to consent " to recal the diligence upon Mr Deuchar consigning in Court the sum sued for." Grant, in answer, next day, requested Deuchar to show that he was " in actual readiness to make consignment, and again, the following day, he desired Deuchar to " prepare for the consignment." This was followed up by a letter from Grant, on 18th January,—" The banker, and the terms of the deposit-receipt will be matter of arrangement." When this results in a consignment, in regard to which Mr Selbie was not left to choose his own consignee, but was, in so far as he was concerned, in his selection, that it was made a matter of joint arrangement, I think the loss arising from the failure of the consignee should fall equally on those three parties to the consignment.

GILLIES.—I am of the same opinion. It is a special case ; and, considering the letter of Grant, that the selection of the bank should be matter of arrangement, and farther, that the terms of the deposit-receipt bear the consignment to be made by the defender " in consequence of an arrangement with the banker," to remain subject to the orders of the Court, I hold that the loss which has emerged should fall equally on the pursuer and defender.

BALGRAY concurred.

MACKENZIE.—I cannot assent to the opinions now expressed, and I am in the view which the Lord Ordinary has taken of this case. I

No. 169. the consignee is to occasion any loss whatever to the creditor of the consigner. It is true that the creditor concurred in selecting the bank, because, unless he took care that the consignee was of reputed responsibility, he might have derived no security from the consignation. But though he attended to this measure, for the purpose of preventing, as far as possible, his security from being impaired, when he gave up his diligence, I hold that he did not thereby in any degree discharge the defender's debt, and that the whole of it is now due and exigible.

Feb. 26, 1836.
MacRitchie's
Trustees v.
Hope.

THE COURT altered the interlocutor, and found that the loss arising from the failure of the consignees must be borne mutually by the parties; *quod ultra*, their Lordships remitted to the Lord Ordinary to proceed as should be just.

M'MILLAN and GRANT, W.S.—C. BRUCE—Agents.

No. 170. MACRITCHIE'S TRUSTEES and JAMES LUMSDANE, Objectors.—*More-Rutherford—Ivory.*

SIR ALEXANDER HOPE, Respondent.—*D. F. Hope—C. Hope.*

Superior and Vassal—Warrandice—Teinds.—1. The vassals in a feu-charter are bound "to pay the haill cess and public burdens due and payable furth of the said lands, of which they shall have allowance out of the first end of their money feu-duty,"—"and that for all other burden and exaction whatsoever;"—Held that the superior was not bound to relieve the vassals of payments of stipend allocated on the lands, except *quoad* the teind-duty stipulated in the charter. 2. The vassal in a feu-charter being "obliged to pay the whole cess and public burdens, and always having allowance thereof in the first end of the feu-duty yearly at clearing,"—and the superior being obliged to relieve the vassals "of the minister's stipend and reparation of manse that may be required furth of the said lands and teinds thereof in all time coming;"—Held that the superior was bound to relieve the vassals of payments of stipend allocated on their lands. 3. A cumulo-duty and teind-duty being payable for certain lands—Found, in accordance with the decision of Graham of Kinross, that the proportion thereof liable to be allocated on the stipend was one-tenth, although it appeared, *ex facie* of the feu-charter, that the cumulo-duty was equal to the full tack-duty or yearly value of the lands.

Feb. 26, 1836.
2^D DIVISION.
Teinds.
J. Cockburn.
Teind Clerk.

IN 1716, Sir Thomas Bruce Hope feued out to Walter Thomson, elder and younger, for an onerous cause, the lands of South Callan in the parish of Ceres, in Fife. In the reddendo of the charter were specified various items which were to be paid "in name of feu and teind-duty for the said lands above disposed, with the teinds and pertinent and, in respect they pay the full tack-duty, therefore the heirs of the said Walter Thomson, the younger, shall be only obliged to pay a sum of £40 Scots in lieu of composition," &c. The charter also provided:—"And further, the said Walter Thomson, elder and younger and their foresaids, are hereby bound and obliged to pay the haill cess and public burdens due and payable furth of the said lands, of which they shall have allowance out of the first end of their money feu-duty up

for both land and teind. The charter provided, that the vassals be bound "to pay the whole cess and public burdens, they allowing allowance thereof in the first end of the foresaid feu-duty at clearing." The superior came under the following obligation. "And I bind and oblige me my aires and successors not only to the sd. Archibald Christie and his sd. spouse and their fords. of minister's stipend and reparation of manses that may be required of the sds. lands and teinds thereof in all time coming but also to this my charter to be good and sufficient to the sd. Archibald and his sd. spouse and their fords. at all hands and against all" The lands of North Callange have now passed by progressive hands of the objector, Lumsdane.

From the date of the above charters no portion of the stipend of the parish of Ceres was payable out of the lands of North or South Callange, Sir T. Hope having, in a process of locality in 1708, obtained an heritable right to his teinds. This state of exemption continued till 1795, when a portion of the stipend was first allocated to these lands; and farther sums were laid on them by schemes of 1815 and 1827. The stipend allocated in 1795 and 1815 was paid by the superior, who had succeeded to the right of the original proprietor of the feus; but when part of the third augmentation was laid on the lands in 1827, the respondent, Sir Alexander Hope, the present proprietor, declined to make any farther payment, on the ground that he was not liable for stipend to a greater amount than one-tenth of the feu and teind-duty payable by the vassals for the lands and which sum the portion of stipend now allocated on the lands

No. 170. dens be sufficiently clear.¹ In the present case, there is a general obligation on the part of the superior to pay all the burdens exigible forth of the lands out of the feu-duty; and there was a sufficient consideration for doing so, in the fact that the stipulated feu-duty was, at the date of the feu-charter, the full tack-duty or yearly value of the lands; and the case is thus brought within the principles recognised in those cases where a clear intention was indicated, or at least implied, that the superior should relieve the vassal of stipend, whether original or augmented. The cumulo feu-duty is liable to be allocated upon for stipend to the extent of one-fifth;—it appears, *ex facie* of the charter, that this feu-duty was the full tack-duty or yearly value of the lands; now the rate of all teinds valued jointly with the stock is one-fifth of the constant yearly rent payable for the lands, stock and teind, and there is no reason why a different rule should be adopted in the present instance; the case of *Grahame of Kinross* being no authority to the contrary, as, even according to the report of Sir John Connell, it was decided entirely on a specialty.²

Feb. 26, 1836.
MacRitchie's Trustees v. Hope.

For Lumsdane it was pleaded—

The vassal is, in terms of the charter, entitled to be relieved from all payments of stipend which “may be required” subsequent to its date. Although the particular word “augmentation” be not used, synonymous terms in a charter, and the expressions of the context, may be so strong and unequivocal as to infer a warrandice of relief from augmentations of stipend.³

It was contended, in answer, for Sir Alexander Hope—

The superior admits his liability in payment of stipend to the extent of the proportion of the cumulo feu and teind-duty, to be considered as free teind, which falls to be taken at a tenth part.⁴ Quoad ultra,—to found a claim, against the superior, of relief from payment of augmentations of stipend allocated subsequently to the date of the vassal's right, it is necessary that the charter should contain warrandice in express terms to that effect, or equivalent expressions, which may be explained by a subsequent course of practice;⁵ but in the present case the feu-charter of South Callange makes no mention whatever of minister's stipend, and that of North Cal-

¹ *Cunningham v. Robertson*, Jan. 27, 1829, *Shaw's Teind Cases*, p. 175, confirmed by *Lowe v. Beaton*, Jan. 31, 1821 (F. C.); *Ker v. Roxburgh*, Nov. 21, 1821 (*Shaw's Teinds*, p. 12); *Macdonald v. Heriot's Hospital*, Feb. 12, 1828 (*Ibid.* p. 156).

² *Grahame*, Feb. 13, 1793, *Connell on Tithes*.

³ *Wilson v. Agnew*, Feb. 1, 1831 (*ante*, IX. 357); *Cunningham*, *supra*.

⁴ *Grahame*, *supra*; *Dundas v. Baikie*, Feb. 13, 1793 (M. 14820).

⁵ *Colquhoun v. Smollet*, Jan. 21, 1798 (*Mor. Syn.* 1808–1814, p. 761); *Plenderleath v. Lord Tweeddale's Representatives*, Jan. 31, 1800 (M. 16639); *Alexander v. Bruce Dundas*, June 9, 1812 (F.C.); *Petrie v. Lindsay Carnegie*, Jan. 27, 1819 (2 Connell, 108); *Earl of Hopetoun's Trustees v. Copland*, Dec. 8, 1819 (F.C.); *Hamilton v. Calder*, June 13, 1823 (F.C.)

large does not specify "augmentations" of stipend. Moreover, the objectors' plea derives no aid from usage, as no stipend whatever was payable for the lands in question for nearly a century after they were feued out, and, when the payment first commenced after 1795, its amount was less than the proportion admitted by the superior to be properly chargeable upon the feu-duties, and was discontinued when by subsequent augmentations it came to exceed that proportion. In the cases of Cunningham and Wilson, mainly founded on by the objectors, there was no disposition of the teinds, which circumstance appears principally to have influenced the Court in sustaining the claims of the respective vassals.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined: *—"Finds, primo, 'That the superior is not bound to relieve the vassals in the lands of South Callange, of stipend paid from these lands, except quoad the teind-duty stipulated in the charter of feu; and that the proportion of the cumulo feu and teind-duty thereby is one-

* "The result of all the authorities is, that there are no precise words in which an obligation to relieve a vassal of stipend must be laid on the superior, but that the constitution of such an obligation depends entirely on the intention of the parties, the existence of which intention is to be inferred or rejected according to the whole of their expressions, as applied to the circumstances of the case. The apparent inconsistencies of the decisions are not inconsistencies in the adopting of the rule, but in its application to special circumstances.

"Now, the feu-charter of South Callange, though it conveys both teinds and lands, makes no mention of stipend whatever, but merely gives the vassal allowance out of the tack-duty of 'the hail cess and public burdens due and payable furth of the said lands,' for which, 'and for all other burden and exaction whatever,' warrantice is given. These words certainly do not necessarily import an exemption from stipend, and as there was no stipend exigible from the lands at the time, it is probable that it was not one of the burdens in view. There are several cases where much stronger words and circumstances have been found insufficient to lay the obligation of relief on the superior. On the question whether the proportion due at common law of the cumulo feu and teind-duty is to be a fifth or a tenth, the case of Graham of Kinross is the safest precedent.

"But in the case of North Callange, the superior binds himself expressly 'not only to relieve the said Archibald Christie, and his foresaids, of the minister's stipend and reparation of mansees, that may be required furth of the said lands and teinds thereof in all time coming,' but to warrant this very charter. And as there was no stipend due out of the lands at this time, these words could have no meaning if they did not apply to future stipends.

"No stipend was allocated upon either of these two lands till 1795, and on this occasion, as also in the next locality in 1815, the superior relieved the vassals. This fact is of some consequence where there are words to which it can with any probability be ascribed, and therefore it aids the construction put by the Lord Ordinary on the charter of North Callange. But it cannot create a permanent obligation in South Callange, where there is such a total absence of words to infer a right of relief, that what took place on these two occasions may be ascribed to inadvertence. But these payments warranted the vassal of South Callange in trying the question, and therefore no expenses are given against him."

No. 170. tenth of said cumulo; and, quoad ultra, repels the objections for MacRitchie's trustees, but finds no expenses due to either party; finds, secundo, That the superior is bound to relieve the vassals in the lands of North Callange of the stipend allocated upon these lands, and sustain the objections for Mr Lumsdaine accordingly; finds the superior (respondent) liable to Mr Lumsdaine in the expenses of the discussion quoad North Callange."

MacRitchie's trustees and Sir Alexander Hope reclaimed.

The Court first took up the question as to the lands of South Callange on which their Lordships concurred with the Lord Ordinary's interlocutor and expressed an opinion that it was impossible to go back upon the case of Graham of Kinross, which must be held to have fixed the rule that the proportion of a cumulo feu and teind-duty liable to be allocated upon the minister's stipend is a tenth part.

The Court then took up the question as to North Callange, on which they also concurred with the Lord Ordinary, on the ground that it was evidently the intention of the parties to the feu-charter that the vassal should be relieved of all future payments of ministers' stipend, and that the words of the charter were sufficient to carry that intention into effect, and

THEY accordingly adhered.

MACRITCHIE, BAYLEY, and HENDERSON, W.S.—THOMSON PAUL, W.S.—JAMES HOPE, W.S.—
Agents.

No. 171. THOMAS ALEXANDER FRASER, Petitioner.—*Gordon—Keay—Dunbar.*
ARCHIBALD T. F. FRASER, Respondent.—*Maitland.*

Appeal.—Circumstances in which the Court refused to grant authority to bring an interlocutory judgment under review of the House of Lords by appeal.

No. 27, 1836. SEQUEL of the case reported Dec. 2, 1835, ante, page 89, which see. The Defender now petitioned for leave to bring the interlocutory judgment, then pronounced, under review of the House of Lords by appeal.

THE COURT, on answers, refused the application.

J. MORRISON, W.S.—Æ. MACBEAN, W.S.—Agent.

bond and adjudication, and he extrajudicially received a large payment of his supposed preferable right, from the raiser, who was trustee for litors; the bond and adjudication were afterwards set aside, except to a : held, that the creditor, in repeating the over-payment he had received, bjected in interest at the full legal rate of five per cent, though alleged to be ordinary market rate; and that he was, in the circumstances, liable in es of discussing his alleged claim of preference.

L of the case reported, June 30th, 1835 (ante, XIII. 1011), Feb. 27, 1836.

. The Court then decided that Hughson's heritable bond, in 1st Division. Bruce, for £1500, did not confer a real right upon him, except Ld. Corehouse B. tent of the sum actually due at its date, and was unavailable as ance, which was a future, contingent, and indefinite debt. The on deduced on the bond was also set aside in the competition creditors. It appeared that the sum actually due at the date of was only about £434; and, farther, that after a multiplepointing raised by the trustee for Hughson's creditors, for the purpose of ing the proceeds of Hughson's estate, that trustee had paid to 15th May, 1833, a sum of £1319, on the assumption of his being le real creditor for the full amount of his bond and adjudication. on now arose as to the rate of interest for which Bruce should be le, in repeating to the trust-estate the over-payment which he red; and also as to the expenses of discussing his claim of pre-

ommon agent for the creditors, contended, that, from the very able nature of his bond, he ought never to have claimed a e; and still less should he have taken payment of a large part of

found Mr Bruce liable to the common agent in the expense in discussing his claim."

Bruce reclaimed, and craved the Court to find him liable only interest since 15th May, 1833, and to subject him in no expense

LORD BALGRAY.—I never saw a more unfounded claim of preference which was maintained by Mr Bruce. I have no doubt that he should be subjected in expenses, and in repetition, with full legal interest, as the Lord Ordinary has found.

LORD GILLIES.—I think Mr Bruce is certainly liable to make full payment to the general body of creditors, for the sum which he received from the bank, far as it was an overpayment. But perhaps that is sufficiently done, by subjecting him in repetition of the principal sum, with interest at the market rate at that time, which was considerably less than five per cent.

LORD MACKENZIE.—I think the interlocutor should be adhered to on all points. Properly speaking, there is no absolutely fixed market-rate of interest at any given time. Every loan, and the interest effecting to it, depends on the circumstances of each individual transaction. To one man a person will lend at the rate of four per cent, to another at the rate of five per cent, and to a third he will not lend at any rate of interest whatever. It follows, therefore, that whenever a man detains the money of another against his will, and without any probable and reasonable grounds for doing so, he should be decerned to repay not only the principal sum, but also the highest legal rate of interest. Such a person is not entitled to say, that, in making repetition, he should pay back no more than the rate of interest at which it could have been borrowed by men enjoying the first credit. Where money is forcibly withheld, and perhaps exposed to the utmost risk, for any thing which is known to the Court, it must be repaid with five per cent interest. This I conceive to be the general rule. How could we know that these creditors would have allowed Bruce to keep this money

observations, they have no reference whatever to Mr Bruce's individual No. 172
 which may be wholly unexceptionable: they merely explain the grounds Feb. 27, 18
 which I apprehend the Court ought, in general, to deal with a question of Mansfield v.
 arising on a fund which a party forcibly withholds from the true owner, Campbell.
 in his uncontrolled possession.

Mr GILLIES.—I should not object to the adoption of the general rule now
 to, but I doubt whether it is consistent with the previous practice of
 the Court to do so.

Mr PRESIDENT.—I concur in the observations of Lord Mackenzie. While
 a party detains the money of another against his will, and perhaps detains it in
 violation of risk, or perhaps trades with it, and makes profit of it, I think he
 is made to repeat the sum with full legal interest. And I see nothing in
 the law to take it out of the general rule.

THE COURT accordingly adhered, and subjected Bruce in additional
 expenses.

GIBSON and DONALDSON, W.S.—C. SPENCE, S.S.C.—Agents.

AS MANSFIELD (Farquharson's Trustee), Pursuer.—*Rutherford*— No. 173
Innes.

—COLONEL JOHN CAMPBELL, Defender.—*Sol.-Gen. Cunningham*
—Wilson.

—*Mora—Reparation.*—A trustee for creditors concluded a sale of a landed
 forming the trust property, to a party who became bound to pay the price by
 instalments and at certain terms; the trustee thereupon intimated to an
 the creditor on the estate that the sum in his bond would be paid by a certain
 which intimation was accepted and acted upon; the buyer having made no
 it till nearly a year after the last of the stipulated terms, the trustee was un-
 fulfil his engagement to the creditor, who raised action against the trustee for
 and damage thereby sustained—held that the buyer was liable to the
 in relief thereof.

The estate of Blackhall, belonging to Farquharson of Finzean, was Feb. 27, 18
 and with diverse heritable debts, the first security being a bond held 2d Divisi
 Low for £15,000, which required six months' premonition prior Ld. Monce
 ing up the amount. Blackhall having been vested in the pursuer R.
 field, as trustee for Farquharson's creditors, he, on the 30th Novem-
 1829, entered into a minute of sale of the estate for £42,000 with
 the defender Campbell, for himself, and as authorized by the parliamen-
 trustees on the estate of Kilmartin, whereby Campbell became
 to pay the price of £42,000 by instalments as follows:—viz.
 100 at Whitsunday, 1829, with interest till paid; £15,000 at Mar-
 ch, 1829, with interest from the previous Whitsunday; and the
 sum of £12,000 at Martinmas, 1830, with interest from Martinmas,
 together with one-fifth part of each of these instalments of penalty

No. 173. in case of failure. Thereafter Mansfield intimated to Low that he would pay the sum contained in his bond, on the 29th December, 1829, which notice was accepted and acted upon by Low. No part of the price, however, having been paid by Campbell, Mansfield could not implement this notice, but he intimated that payment would be made on the 20th December, 1830. Mansfield gave notice to Campbell's agent of his having made these intimations to Low. Still Campbell made no payment until June, 1831, in consequence, he alleged, of having failed till then to arrange the proportions of the property to be taken by him and the Kilmartin trustees respectively, and Mansfield was consequently unable to fulfil his engagement to Low. An action was then raised by Low against Mansfield, founding on the intimations already mentioned and the failures to make payment, and concluding for the damage and expenses thereby incurred.

b. 27, 1836.
Mansfield v.
Campbell.

Mansfield thereupon brought the present action against Campbell, narrating the facts above detailed, and concluding for relief of the claim at the instance of Low.

Campbell in defence maintained, *inter alia*, that, by making payments of the whole price of the lands of Blackhall, with the utmost amount of legal interest that could be exacted thereon, he had fulfilled the obligation incumbent on him, and that the present case was analogous to that of an ordinary money obligation, where, if a party fail to make payment at the stipulated term, he becomes liable to a claim for interest, but not for damages consequentially incurred.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined: *—"Finds that the defender having concluded a bargain

* "The Lord Ordinary cannot think that this case is to be solved by saying, that where a bond is payable at a fixed day, and is not paid, the debtor is not generally made liable for the consequential damage or inconvenience which the creditor may suffer. It is a special case. The estate was under trust. It was sold specially for the payment of debts. Low's debt was a primary heritable security, and was bearing five per cent interest. It could not be paid up without a long notice of six months, except by the creditor's consent. On the other hand, the defender was bound in the purchase to pay £15,000 at Whitsunday, 1829, and £15,000 at Martinmas, 1829; and he had of course, a right to have insisted that the money should be then accepted. But the lands could not be disencumbered, and the title given, without the heritable debts being paid up; and, if payment of the second instalment had been made even at Martinmas, 1829, without any previous notice having been given to the heritable creditor, the money would have been left in the trustee's hands for a long period, at bank interest, to the very serious loss of the trust estate. It is quite clear, therefore, that he was entitled, and warranted to give the notice to Mr Low, for the earliest time which he would accept after Martinmas, 1829, and it is impossible to imagine that the trustee would have given the notice if he had not had the firmest reliance that the money would be paid by the defender in due time.

"The Lord Ordinary therefore thinks, that a party who has so made a voluntary purchase of a bankrupt estate, is by no means entitled to break through the engagement for the payment of the price, and convert the purchase-money into a

ie of the estate of Blackhall, the same having been exposed No. 173.
 pursuer, as trustee for creditors, and having become bound Feb. 27, 1836.
 ent of the price by the instalments, and at the terms spe- Mansfield v.
 ncumbent on him to make all necessary arrangements for Campbell.
 a transaction, and making payment of the price, according
 ted terms: Finds that the pursuer was entitled to rely on
 obligation to this effect, and to act upon such reliance
 hat appeared to him to be for the benefit of the trust-estate
 agement: Finds it established that the pursuer did, in con-
 e notice to Alexander Low, Esq., who held the first secu-
 00 over the estate, that the debt would be paid upon the
 er, 1829, and that that notice was accepted and acted upon
 lexander Low: Finds that the pursuer, in further reliance
 er's obligation, did afterwards give notice to the said Alex-
 at the debt would be paid upon the 20th December, 1830:
 e defender failed to make payment of the instalments of the
 at the terms stipulated between him and the pursuer, or at
 or to the said 20th of December, 1829, or 20th December,
 that by and through such failure on the part of the defen-
 er, as trustee, and the trust-estate under his management,
 loss and damage, in so far as they have been found liable
 lexander Low, for loss and damage occasioned to him by
 the inability of the pursuer to pay the debt to him at the
 vely appointed, and according to the notices given; there-
 he defences, and finds the defender liable in damages; but,
 at the amount of the damage sustained by the pursuer has
 ascertained in the other process, before farther answer
 cause to be enrolled."
 Campbell reclaimed.

in his own hands, pleading that all he is bound for is the legal in-
 actual damage is proved so directly as it is in this case, to have
 failure, the Lord Ordinary conceives that that damage must fall on
 y by whom it has been occasioned.

nd made up upon the summons and defences has been too loosely
 the undoubted fact that the sale was concluded on the 1st May,
 appear from it, though it is stated in the other processes. But the
 payment being Whitsunday, 1829, shows plainly that the sale was
 re that time, though the minute of sale was not completed till a

lder attempted to plead, that because the price, with interest, had
 of, this claim was barred. But the pursuer gave full notice of this
 as the protest or intimation by Low was received.

o said in the debate, that the pursuer was not in a situation to grant
 There is no such statement in the defences. But, at any rate, the
 put himself in a situation to maintain that plea."

Process—Summary Application—College of Justice.—A petition presented by a member of the College of Justice, praying the Court to ordain him to deliver up certain documents over which he alleged that he had a right of hypothec, dismissed as incompetent.

Mar. 1, 1836.

2D DIVISION.
F.

IN the course of a negotiation for a loan, carried on between the petitioner Macneil and a client of the respondent, Douglas, Writer to the Signet, certain bonds and other documents belonging to Macneil came into the hands of Douglas, who refused to restore them on the negotiation being broken off, alleging a right of hypothec in security of his claims for loss of interest by his client pending the negotiation, and his own account of expenses. Macneil thereupon presented a petition to the Court, against Douglas, praying their Lordships to ordain him to deliver up to the petitioner the documents in question, and to be liable in expenses, “reserving to the petitioner any claim of damages he may have against Douglas on account of his improper conduct.”

It was stated, that Mr Douglas was a member of the College of Justice, and might have declined the jurisdiction of the Sheriff, where the cause of the present application being made in this Court.

The Court were of opinion, that the proceeding by petition was incompetent; that it was also incompetent to alter the petition into a petition and complaint, even if its subject-matter were such that the Court could take cognizance of in that shape, and that the proper course was to present a petition in the Sheriff-Court in the first place, and that the result of the respondent pleading his privilege or waiving it.

DAVID RAMSAY ANDREWS, Pursuer.—*Rutherford—Cowan.*
 THOMSON or SAWER and HUSBAND, Defenders.—*D. F. Hope*
 —*J. Anderson.*

Mar. 2, 1836
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id and Wife—Legitim—Jus Relictæ.—A deed executed by a widow, accepting provisions in her husband's settlement in lieu of jus relictæ, and ratifying the settlement, and renouncing her jus relictæ, though such deed was only executed after her husband's death, has the same effect in causing a bi-partite division of his estate between dead's part and legitim, as if it had been executed during the husband's lifetime. 2. Question whether such provisions were, in a certain settlement, made on the dead's part alone. 3. Question whether a settlement was so expressed as to make one of the children, who was named executor and universal heir, give up all claim to legitim, as a condition of accepting that provision. —Where the name and designation of the writer of the body of a deed is fully stated, but the name and designation of the writer of the testing clause is not: held that the deed was not affected by any statutory nullity under 5.

late Robert Sawyer, of Hallhouse, left a widow and four children. Mar. 2, 1836
 been twice married, and his eldest surviving son, Scott Sawyer, 1st Division
 son of the first marriage; Alexander, Jean, and Mary, were children of the second marriage. Jean was the wife of David Ramsay Andrews, a writer in Kilmarnock, and Mary was the wife of James Thomson, a writer in Glasgow. In 1827, Robert Sawyer conveyed certain lands and subjects in Kilmarnock to Mrs Andrews in liferent and her heirs in fee. In 1828, he conveyed the lands of Hallhouse and Wardhouse to Mrs Thomson, during her survivance of him, whom failing to Mrs Thomson, her heirs, and her children in fee. This conveyance was burdened with a sum of £400, the interest of which was payable to his son, Alexander, as an alimentary provision, and, at his death, the principal sum was to be divided among Alexander's children. Alexander, who was then about 15 years of age, had previously received about £1000 besides, granted a discharge of his debt in consideration of this provision. In 1830, Robert Sawyer, on account of a purpose of settling his affairs and preventing disputes between his children as to his succession, did, "with and under the reservation of the burdens, provisions, and declarations after-mentioned, assign, sell, and make over to Mrs Thomson (secluding the jus mariti) all and sundry my whole goods, gear, sums of money, debts heritably secured, and effects, and in general my whole means and estate presently in my possession, or which shall belong, to me at the time of my death, with the vouchers, instructions, and conveyances of the said debts; and I do hereby nominate and appoint my said daughter, my sole executrix and universal legatee."—"Declaring always, that she shall be bound to pay just and lawful debts," &c.; and in case my spouse "should survive me, I hereby declare, that my said spouse is to have her liferent use

tioned, with which the conveyance to Hallhouse had been burdened. Mrs Andrews a sum of £400 was left, it being narrated that she previously received £620. A few minor legacies were left to her grandchildren. The deed declared that “ these several provisions in favour of my spouse, and my said children and grandchildren, I reserve to be in full of all terce of lands, half or third of moveables, legitimations natural, and bairn’s part of gear, or of any other claim whatsoever competent to my said spouse, and my said children and grandchildren, and through my decease, on any ground of law whatever.” The testatrix reserved full liberty to alter at any time, and it dispensed with dower. Mrs Thomson had received a sum of £500 from her father several years before, which was not noticed in this deed.

Robert Sawyer left moveable property amounting to between £2000 and £5000. He died on 7th March, 1832, and, on 15th March, 1832, Sawyer executed the following deed :—

After a recital of the provisions in her favour under the deed of 1828, and that her husband had executed a settlement in 1830, conveying to Mrs Thomson “ his whole goods, gear, &c., debts heritably secured, and in general his whole means and estate, &c., and thereby nominating her his sole executrix and universal legatee, and it is thereby declared that the said Mrs Thomson should be bound and obliged by acceptance to fulfil the provisions in favour of Mrs Sawyer, contained in the settlement, which provisions were, by the settlement, “ declared to be in full of all terce of lands, half or third of moveables that might be claimed by me in the event of my surviving him, on any ground of law whatsoever, and the said latter will and settlement, containing several other provisions”

do hereby ratify, confirm, and approve of each of said deeds in No. 175.
 deeds, clauses, obligations, provisions, and conditions therein Mar. 2, 1832.
 declaring that the generality of this ratification shall nowise Andrews v.
 be same, but that it shall be equally valid, sufficient, and effec- Sawyer.
 t me, my heirs and successors, to all intents and purposes, as if
 deeds were verbatim engrossed herein: And I bind and oblige
 r heirs and successors, to warrant this ratification to be good,
 sufficient to the said Mrs Thomson, my daughter, and to all
 at all hands and against all deadly, as law will: And farther,
 ounced and given up, as I hereby renounce and give up for
 my foresaids, all claim to terce, or half or third of moveables,
 other claim that might be competent in law, and have accept-
 hereby accept, of the foresaid liferent rights and provisions in
 of, and I consent to the registration hereof."

wer repudiated his father's settlement, claimed his legitim, and
 is right to David Ramsay Andrews, his brother-in-law, for a
 00.

, 1833, Andrews raised an action of accounting against Mrs
 and concluding for payment of the legitim due to him, in which
 ned, inter alia, that the effect of the renunciation of *jus relictæ*
 was necessarily to cause a bi-partite division of the moveable
 and that he, in right of Scott Sawyer, was entitled to make
 er account for legitim on that basis.

omson maintained, that, as the widow had not renounced her
 during her husband's lifetime, the moveable succession neces-
 red a tri-partite division; and the effect of any subsequent tran-
 tween the widow, and herself, the executor, was, to transfer to
 whole *jus relictæ*, in consideration of the special provisions
 y the widow.

e cause had been for some time in dependence, Mrs Sawyer, the
 scuted a new deed, on 1st February, 1834, in which, after re-
 he provisions made by her husband in her favour, and the con-
 under the settlement, in favour of Mrs Thomson, and that "it
 r declared by the said last will and testament, that the said
 visions made in favour of me were in full of all terce of lands,
 rd of moveables, or of any other claim whatever competent to
 through the death of my said husband, on any ground of law
 as the said last will and testament, containing several other
 to the children and grandchildren of the said Robert Sawyer, in
 fully bears: And further considering that the said Robert
 husband, died on the 7th day of March, 1832, and that I did
 in lifetime renounce, discharge, or in any manner of way
 legal rights to terce of lands, half or third of moveables, or
 competent to me by law, as widow of the said Robert Sawyer,
 therefore entitled to repudiate the conventional provisions

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made for me by the said disposition and last will and testament, and betake myself to my said legal rights as widow ; and likewise considering that, after the death of my said husband, the said Mary Sawyer, his executrix and universal legatee, entered into an arrangement with me, by which, in consideration of my being put in possession and receiving payment of the different provisions and others made for me by the said deeds, I agreed to renounce, transfer, and make over, to and in favour of the said Mary Sawyer or Thomson, exclusive of the jus mariti of her said husband, all claim to terce of lands, half or third of moveables, or other claim competent to me through the death of my said husband, on any ground of law whatever ; and further, considering that I have been put in possession of said provisions, which I accepted in lieu of my said legal rights, and that it is reasonable and proper that I should grant these presents ; therefore I have accepted, as I hereby accept, of the provisions made for me by the said two recited deeds, with and under the whole obligations, provisions, declarations, and conditions therein expressed, and I have renounced, transferred, and given up, as I hereby renounce, transfer, and give up for myself, my heirs and successors, to and in favour of the said Mary Sawyer or Thomson, her heirs and successors, excluding and debarring always the jus mariti of the said James Thomson, her husband, all claim or right to terce of lands, half or third of moveables, or any other claim or right whatsoever competent to me in and through the death of the said Robert Sawyer, my husband, on any ground of law whatsoever ; turning and transferring from me and my foresaids, as I hereby turn and transfer from me and them my said claims or rights to and in favour of the said Mary Sawyer or Thomson, exclusive of her said husband's jus mariti, as aforesaid, in full of which legal rights or claims, I have accepted, as I hereby accept of the provisions made for me, contained in the aforesaid deeds ; and I bind and oblige myself, my heirs and successors, to warrant this acceptance, renunciation, and transference to be good, valid, and effectual to the said Mary Sawyer or Thomson, and her foresaids, at all hands, and against all deadly, as law will ; and I consent to the registration hereof," &c.

Cases were ordered by the Lord Ordinary, and it was now alleged by the defenders, though it had not been stated on the closed record, that the testing clause of Scott Sawyer's assignation to the pursuer was not written by the writer of the body of the deed, and that though the writer of the deed was named and designed, the writer of the testing clause was not.

These allegations were not admitted by the pursuer.

Pleaded by the Defenders—

1. The assignation in favour of the pursuer was null, because the writer of the testing clause was not named or designed. The pursuer had, therefore, no title to insist, or at least he must obtain the concurrence of Scott Sawyer in discharging any sum found due in name of legitim.

2. As Mrs Sawyer, the widow, had not accepted of any conventional

during her husband's lifetime, it was open to her to claim her No. 175.
 at his death. It was also in her power then to assign her jus Mar. 2, 1836.
 any party whom she chose. And, by the terms of her deed, Andrews v.
 in 1834, she had transferred her jus relictæ to the defender, Mrs Sawyer.
 and had only executed a qualified renunciation thereof, so as to
 solely in favour of the defender. This was a transaction between
 and the executor alone, in which no other party had any inter-
 est by which the children's legitim could not be affected. And
 that deed was not executed till after the cause was in depend-
 ence, as not too late, (1.) because it merely expressed the true im-
 portance of the deed of 15th March, 1832; and (2.) because
 the deed was of a compound nature and contained both a ratification,
 now, of her husband's settlement, and a renunciation of her own
 . The inductive cause of the renunciation was, to give full
 effect to the settlement, which, inter alia, imported a discharge of Scott
 legitim on certain conditions. If the settlement was repudiated,
 , the inductive cause of the deed of renunciation was at an end,
 the widow was no longer bound by it, but could execute a new

even if the deed of 1832 must alone be founded on, it was
 in favour of the defender. The hour of the testator's death could alone be
 in determining whether a division was to be bi-partite or tri-
 partite. At the death of Robert Sawyer, the widow had accepted of no
 special provision, and the division therefore was, of necessity, tri-
 partite. The executor took up the succession, under the burden of that
 deed, any subsequent deed, discharging the jus relictæ, and accept-
 ing of the provisions instead of it, operated in favour of the executor
 relieving her from the burden of the jus relictæ on these terms.
 It could not cause a succession to become bi-partite, which was
 intended to be tri-partite by the state of matters as existing at the
 death of the husband. The defender was therefore entitled, on satisfying
 the provisions of the widow, to draw one-third of the moveable
 in name of dead's part, and another third in name of jus relictæ.
 This was consistent with the older case of Henderson,² in which it
 was held that the renunciation of one child, before the father's death,
 extinguished the claim of legitim; but the renunciation of another
 child, after the father's death, had the effect of transferring the renoun-
 ciation of legitim, under burden of the renouncer's special provisions,
 to the eldest brother, who was the general disponent of her father.³

¹ Dec. 9, 1628 (1788).

² Henderson, June, 1728 (8187).

³ 56; 3 Ers. 9, 16; 3 Bankt. 8, 35; Dirleton, 11, 5; v. Legit. Lib.; Reg. 37.

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4. But if the division was to be bi-partite, the widow's provisions did not fall on the dead's part alone, but, like any other debt of the husband, must be deducted from the whole head of the executry, before dividing the succession into legitim and dead's part.¹

5. The pursuer's share of legitim in this action could only be one-third thereof, as his wife might claim a share, and had not renounced it; and the defender herself was entitled to another share. It was not the intention of the deceased, nor had he used any words importing, that the defender by being named executrix and universal legatee, should forfeit her legitim. It was, on the contrary, the manifest intention and import of the settlement, to bestow the dead's part on the defender, without impairing any legal claim competent to her.²

Pleaded by the Pursuer—

1. Even if the allegation were true, that the writer of the testing-clause was not designed, it could not be listened to (1.) because, although it founded an objection to the pursuer's title, which was of course a defence of a preliminary nature, it was not stated before closing the record; and, (2.) because the act 1681, c. 5, did not require the name or designation of the writer of the testing clause, under the sanction of nullity, and the point had been so decided.³

2. The deed of the widow, in 1834, could not be founded on, as it was executed pendente lite. And as the previous deed of 1832 had not only been deliberately executed at the time, but acted on by the widow's enjoying her special provisions, ever since, the pursuer had a jus quesitum under that deed, which could not afterwards be defeated. Besides even the deed 1834 expressly accepted of the conventional provisions under the settlement, in lieu of the jus relictæ, and therefore the renunciation of the jus relictæ could not be made, to any other effect, than as a simple and unqualified renunciation, which was the condition annexed by the settlement to the acceptance of these provisions. In regard to the widow's wish to give full effect to the settlement, which was now stated as an inductive cause of the renunciation, that could only be so, to the extent to which alone the widow could effectually ratify, which was, in so far as renouncing her jus relictæ was concerned. No ratification of the settlement, quoad ultra, could be viewed as an inductive cause of the deed 1832.

3. Looking then to the deed of 1832 alone, it had the necessary effect of producing a bi-partite division. The husband assigned in his settlement, certain provisions to the widow, on condition of her renouncing her jus relictæ. Had she accepted of these, in his lifetime, it was not

¹ 3 Ersk. 9, 22; Dickson, June 19, 1678 (3944); Murray, July 16, 1678 (2372); Minto, May 29, 1833 (ante, XI., 632).

² 3 Ersk. 9, 25.

³ Watson, Nov. 29, 1683 (16860).

that the division must be bi-partite. But, although it was only death that she accepted, the result must be exactly the same, and of renunciation necessarily drew back to the date of settlement ratified.¹ The settlement and the renunciation still were counterparts of each other, and relative parts of one transaction. The only inquiry was, whether the deed, so executed by the widow, was held to renounce the *jus relictæ*. But it undoubtedly was a simple actual renunciation and extinction thereof; and the inevitable effect of this was, to produce a bi-partite division, because there no longer existed any *jus relictæ* to absorb a third. In so far as the older Henderson could be held to sanction an opposite principle from what was contrary to the previous case of Nisbet, and the subsequent Hog.²

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the widow's provisions were imposed, as a burden, on the dead's share, which was the only part of the estate which the deceased had actually burdened by a settlement.

the provisions made on the respective children, including the dead's share, were expressly declared to be in full of legitim. If therefore the widow accepted her provision, of being executor and universal legatee, she must be held to have discharged all claim for legitim.³ *

Lord Ordinary "repelled the objection to the pursuer's title, that the absence of the testing clause of the assignation is not designed; 1st, because, although a preliminary defence, it was not stated before the pleadings were closed; and, 2dly, Because, if the writer of the deed is designed to be necessary under the statute to insert the designation of the executor who fills up the testing clause: And on the merits, found that the moveable estate of the defunct is subject to a bi-partite, and not, as the defender maintains, to a tri-partite division, and that the legitim is a third part of that estate: that the widow's provisions do not fall upon the dead's share exclusively, but must be deducted from the whole moveable estate before the division: and that the defender is not entitled to object to the division along with the other child or children resorting to their legal shares, and appointed parties to be farther heard with regard to the division of the executry, and any other points that may not be disposed of by this interlocutor." †

at 145.

8, 44 and 53; 3 Ersk. 9, 20; Naismith, June 29, 1658, Decis. of Crombie, 189; Nisbet, Jan. 18, 1726 (8181); Jervoy, Jan. 7, 1762 (8170); Jan. 19, 1776 (6456); Hog, June 7, 1791 (8193); M'Gill, Feb. 17, 1671

lerson, June 26, 1782 (8191).

the points were pleaded not requiring to be detailed at present.

NOTE.—If a husband makes a provision for his wife, on condition that she renounce her *terce* and *jus relictæ*, and if she accepts that provision, and executes the renunciation accordingly, the Lord Ordinary considers it to be clear on

No. 175. Both parties reclaimed.

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LORD BALGRAY.—Whether the *jus relictæ* is renounced in an ante- or postnuptial contract, or by a deed executed after the husband's death.

principle, that there must be a bi-partite division of the moveable successions at the husband's death—one-half being the dead's part, and the other the wife's part, assuming that there are children entitled to the legitim. Further, he can reason for a distinction between the case of the wife renouncing during the existence of the marriage, or after it is dissolved by the husband's death. It is true, that, if she does not accept the voluntary, and renounce the legal provision while the marriage subsists, she has her option at the husband's death, either the one or the other; but it is clear she cannot take both. Therefore it follows, if she make choice of the voluntary provision, she cannot assign the legal provision either to the executor, or to any one else—for that would be to benefit by it, or at least exercising a right over it which cannot exist after renunciation. The defender seems to maintain, that, if the husband dies before the wife declares her option, the *jus relictæ* is vested in her; and being so she is entitled to sell it to the executor or general disponee, receiving as much as the voluntary provisions with which, had she adopted the other alternative, she would have been burdened. This means, in other words, that she does not renounce the *jus relictæ*, but makes choice of it, and having received it, assigns it to the disponee or executor for value. It is enough to say, that that is the *species facti* of the present case. Mrs Sawyer, the widow, did not betake herself to her *jus relictæ*. On the contrary, she expressly renounced it by a deed in favour of Mrs Thomson, the executor and general disponee, alone, but of course, as was ascertained, that is, of the children entitled to legitim as well as Mrs Thomson. If there had been land subject to terce, there was a renunciation of the *jus relictæ* in favour of the heir succeeding to these lands. To convert a renunciation of the legal provision into an acceptance of these provisions, and a subsequent sale of them, is inadmissible. It is plain, also, as the pursuer observed, that the renunciation of the *jus relictæ* must operate retro, and take effect from the husband's death, because that right, though it cannot be rendered available to the wife during his lifetime, does, notwithstanding, vest from the date of the marriage, as part of the communion of goods then created. How the wife so renouncing can be a party to the division, or insist that it shall be tri-partite, when her own share has been previously cut off, does not seem intelligible.

“ There is no doubt another theory, namely, that the husband made a provision for the wife for the purpose of obtaining a renunciation in his own favour to increase the dead's part, and so to benefit the executor. But that view has been often stated and overruled by the Court, that it is unnecessary to notice it. See the argument in the case of Hog, and the authorities and decisions there cited.

“ The only difficulty which attends this part of the case arises from the finding in *Henderson v. Henderson*, on which the defender chiefly relies, where it was held that a child's renunciation of her legitim, after her father's death, in order to obtain a bond of provision, did not increase the fund of division, but operated to the advantage and favour of the executor. The Lord Ordinary has read the papers in that case, and humbly appears to him that the argument of Mr Dundas, particularly in relation to the claim of petition, is invincible, yet the Court refused that petition without giving reasons. The finding in the interlocutor was, ‘ that the second daughter not being a child of the marriage at the time of her father's decease, she hath right to a share of the legitim, but that, by her ratification and renunciation, she hath communicated all her share of the legitim to her brother (the executor) but the 12,000 merks to which she had right by bond of provision is to be reckoned part of the said share.’ Thus they find that she had right to the whole of the bond, and to part of the legitim besides, and that the express condition of the bond was, that it should be in full satisfaction of her share of the legitim.

tain consequences which by the law of Scotland do and must follow. The No. 17
 iation operates an extinction of the right. But when it is extinguished,
 n there be a tri-partite division? There are no termini habiles for it, and Mar. 2, 18
 with the Lord Ordinary, that the division must be bi-partite, between Andrews
 and dead's part. Besides this point, there are others which have been Sawyer.
 by the Lord Ordinary, and before finally disposing of them, I could wish
 a little more into the decisions.

D GILLIES.—I confess that I do not consider this, so far as concerns the
 chiefly argued, to be a case of difficulty. It is one which involves very im-
 and very clear principles in the law of Scotland, which would be over-
 if this judgment was altered. When a husband dies, leaving a widow and
 n, with their legal claims undischarged, the division of his estate is tri-

But if special provisions have been left in lieu of the *jus relictæ*, and
 e accepted, there is an end of the *jus relictæ*, and the division of the estate
 necessity be bi-partite. The widow cannot both accept of the provisions
 e the *jus relictæ* too. She may take either the one or the other: but she
 take both. And if she rejects the *jus relictæ*, by accepting the special
 ns in lieu of it, I hold it to be a certain corollary that the moveable suc-
 of the deceased suffers a bi-partite division. The only right which

The whole argument on the part of the disponent seems to be comprised
 tion from Voet, importing that, in the Roman law, while the share which
 have fallen to children disinherited or excluded by statute, increases the
 fund of legitim, it is otherwise with regard to a daughter excluded in con-
 e of having received a portion. That distinction certainly does not exist
 aw, and indeed is inconsistent with the judgment in the very case of Hen-

To this is added the plea, that the father, by stipulating the renuncia-
 quires right to the disposal of the renouncer's legitim—a plea, as already
 d, often overruled, particularly in the case of Dirleton, and still more dis-
 in that of Hogg. Holding the judgment in *Henderson v. Henderson* con-
 principle, and to the spirit of all the decisions both previous to it and sub-
 ly, the Lord Ordinary has ventured to disregard it, and he is more in-
 o do so, as it is passed over without notice by Bankton and Erskine, which
 scarcely have happened if it had introduced the important distinction on
 he defender rests her case. He does not found on any supposed specialty
 from the difference between legitim and *jus relictæ*, though that is noticed
 rgument in *Henderson's* case.

n the second point, Mr Sawyer having given his wife a provision on condi-
 her renouncing her *jus relictæ*, it must be held as the price of her right,
 refore as a debt due by him, which must affect the whole personal succes-
 d not fall exclusively on the dead's part. Cases may no doubt occur in
 father, with the view of defeating the legitim by a testamentary deed,
 rovisions on his wife in that form, and endeavours to do indirectly what
 d not have done directly. In such cases the law would give redress, but
 d of that kind is alleged in the present instance.

n the third point the defender is not entitled to a share of the legitim, not
 because she is the general disponent, but because she is expressly excluded
 terms of her father's conveyance to her.

the defender is not entitled to legitim, no question as to collation can oc-
 his process; but it might be convenient, with a view to settle all the mat-
 dispute, that Mrs Andrews should be called as a party, who has not yet
 her option whether she will take the voluntary provision, or resort to her
 share. At the same time the questions with regard to the amount of the
 p might be determined."

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Lawer.

could have caused a bi-partite division, is extinguished by the widow's acceptance of those provisions which were left on condition of the *jus relictæ* being renounced. In this case the provisions were expressly left "in full of all terce of lands, half or third of moveables, or of any other claim whatsoever competent to my spouse in and through my decease." The widow took her provisions, under the condition thus expressed; there was no widow, after this, entitled to her legal claims, and the effect of necessity was, to make the succession bi-partite. It is said that the older case of Henderson is opposed to this; but it is strange if it be so, since it is neither noticed by Erskine or Bankton as a leading case, and besides it is, itself, overruled by the subsequent case of Hogg which was very elaborately discussed here, and in which the judgment was affirmed in the House of Lords. That case has been held to fix the law ever since, and I should consider it to be highly dangerous if it could be shaken.

LORD MACKENZIE.—In regard to that part of the Lord Ordinary's interlocutor which finds that the division must be bi-partite, I am prepared to adhere; but as to the other points I should wish for more time to consider. As to the first point, though perhaps the case is a narrow one, yet I think the pursuer must prevail. The widow executed a simple and unqualified acceptance of the provisions under the settlement and a renunciation of her *jus relictæ* in terms of it. That deed stands unreduced. As to the effect of such a deed I can see no ground for making a distinction whether it was executed before or after the husband's death: the effect of it, as to rendering a succession bi-partite, appears to me to be the same. But if the renunciation had been of a qualified and conditional sort, so as to import an assignation in favour of the executor, it appears to me that a case, attended with much difficulty, would present itself for consideration. I shall not at present deliver any opinion as to such a case, because it is not the one now before us. In regard to the other points decided by the Lord Ordinary, I should wish time for farther consideration.

LORD PRESIDENT.—I think the Lord Ordinary's interlocutor is well founded in all points, but as two of your Lordships desire farther time to consider some of the points decided in it, we can only adhere, in our interlocutor at present, to the finding that there must be a bi-partite division. The case, *quoad ultra*, must stand over in the mean time.

THE COURT found, in terms of the Lord Ordinary's interlocutor, that the estate was subject to a bi-partite division, and that the legitim amounted to one-half of the estate. *Quoad ultra* the case stood over.

DONALDSON and CAMPBELL, W.S.—W. FORBES, W.S.—Agents.

IN MACQUEEN and MANDATARY, Pursuers.—*A. Wood—
A. M'Neill.*

No. 176.

LIAM BAILLIE and OTHERS (Clyne's Trustees), Defenders.—
Sol.-Gen. Cuninghame.

Mar. 2, 1836.
Macqueen v.
Baillie.

2 Client.—Where an employer refused payment of a business account on a needless allegation of professional misconduct, the Court gave decree with expenses.

Wallace v.
Earl of Eglington.

as a case of a special nature. John Macqueen, Parliamentary Agent, London, raised an action against the late David Clyne, S.S.C. for payment of a business account of £26, 5s., part of which, amounting to 7s., consisted of fees due to officers of the House of Lords, and to an appeal in which Clyne had employed Macqueen. Clyne paid these fees after the action was raised, and Macqueen refused to demand to the balance, which was all composed of outlay. The defence rested chiefly on the ground of alleged professional negligence on the part of Macqueen. After Clyne's death his trustees were sisted as defenders.

Mar. 2, 1836.
1st Division.
Ld. Fullerton.
D.

The Lord Ordinary considered that the defence was unfounded, and gave decree against the defenders with expenses; and

THE COURT adhered.

J. MACDOWALL, W.S.—D. MANSON, S.S.C.—Agents.

WILLIAM WALLACE, Pursuer.—*Rutherford—Wilson.*
EARL OF EGLINTON, Defender.—*Keay—Anderson.*

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and Vassal—Composition—Non-Entry—Expenses.—1. Where a pursuer's superiority of certain lands was disputed on probable grounds by the defender, who also claimed the superiority;—Held, that the non-entry duties should be paid as feu or retoured duties, until the date of the decree determining the superiority to be in the pursuer; reserving to the pursuer to claim the full value of the lands, if any farther delay occurred in entering, justly imputable to the defender. 2. Held by the Lord Ordinary and acquiesced in, that, where a defender brought an action to compel a defender to enter; and, at that date, the defender was not heir of line of the last entered vassal, but heir of entail under a settlement of the estate executed by that vassal; the defender must, as in the case of a singular successor, pay a year's rent of composition for entry, although the death of a party, during the action, he had become heir of line of the last entered vassal, prior to the decree which declared the pursuer's right. The defender was not allowed, in the minute sisting himself, to insert a condition of payment for previous expenses.

of the case reported Feb. 26, 1835 (ante, XIII. 564), and 30 (ante, VIII. 1018), which see. The Court found that the pursuer, William Wallace, W.S. was the superior of the lands of Cap-

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No. 177. rington and others, and reduced the defender's titles to the superiority which left the defender in the position of an unentered vassal, in a fe holding of the pursuer. The Court also found that the lands had be in non-entry since the death of Robert Hamilton an ancestor of the d fender, but that, in respect of the title founded on by the pursuer could not competently insist, for arrears of feu-duties prior to 1802. question still remained between the parties, whether the non-entry duti should be merely the feu-duties, or whether they should not be the fi rents of the lands from the date of citation in the action. The pursu claimed the full rents; the defender alleged that as he had good groun to doubt the pursuer's right until it was established by decree, he cou not be liable in the penal payment of the full rent, as he had opposed obstacle to taking immediate entry after being duly certiorated of t pursuer's right.

Another question was also at issue, in regard to the amount of comp sition payable for entry. Robert Hamilton above mentioned, had ex cuted an entail of the lands, and when the present litigation commence and, for a considerable period thereafter, the defender, though heir entail in possession of the lands, was not heir of line of the last ente vassal. But before decree was pronounced, declaring the pursuer to superior, the death of a party had occurred which rendered the defe the heir of line of the entailer. The defender therefore contended t he was entitled to an entry as heir and not as singular successor.

The pursuer answered, inter alia, that the defender was not entitl to gain an undue advantage by protracting a litigation which ultimat proved to be ill founded: had the defender not maintained such a liti tion, he must long ago have entered as a singular successor: and it v as a singular successor that he was bound to enter now.

The Lord Ordinary found "that the arrears of feu-duties exigi under the present action, are already limited by the interlocutor of March, 1833, since adhered to by the Court; that, in the whole circu stances of this case, the non-entry duties are to be limited to the retou or feu-duties; and repelled the claim of the pursuer for the full rent the lands; but finds that the defender is now bound to enter with pursuer, and pay a composition of one year's rent, as in the entry o singular successor, reserving to the pursuer his right to claim the rents of the lands from the date of this interlocutor, if there shall be farther delay in entering, justly imputable to the defender: found expenses due to either party, and decerned." *

* "NOTE.—Considering the very long delay by the superiors in enforcing rights, the nature and difficulty of the questions occasioned by that delay, and conditions on which alone the pursuer proposed to give an entry, and which now, to a great extent, departed from, the Lord Ordinary is of opinion that

The pursuer reclaimed, and it became requisite to sist a new party (Pringle), to whom the pursuer's rights were said to be transferred.

Whigham, tendered a minute, sisting Pringle, but only under condition of not being liable for the previous expenses.

Rutherford, objected, that the party must be simply sisted, without qualification: and the Court enjoined this to be done.

This having been done, their Lordships advised the case, and unanimously adhered.

LORD BALGRAY.—To levy the full rents is a proceeding of a penal nature, and nothing has occurred here to justify us in visiting the defender with that penalty.

The other Judges concurred.

A. WILSON, S.S.C.—TOD & HILL, W.S.—Agents.

JAMES DONALDSON and JAMES PINKERTON, Pursuers.—*H. J. Robertson.*

THE MANCHESTER INSURANCE COMPANY, Defenders.—*Buchanan.*

Insurance—Title to Pursue—Discharge.—The proprietor of certain warehouses effected a policy with an insurance company on goods "his own, in trust, or on commission," deposited therein, it being one of the conditions of the policy that the failure to indorse on it an insurance on any of the goods entered into with another company should void the policy: a party deposited in the warehouses a quantity of wheat, then covered by a floating policy of insurance, which circumstance was not indorsed on the first mentioned policy, and no notice thereof given to the company: thereafter a fire occurred in the premises and consumed the wheat, the floating policy having ceased to be current a few days before: the proprietor of the warehouses having subsequently, on a state of the loss given in to the company, which did not include a claim for the wheat, received and granted receipt for a certain sum as the proportion of the whole loss falling on the company;—Held, 1. That an action on the original policy against the insurance company, at the joint instance of the proprietor of the warehouse and the depositor of the wheat, was competent; 2. That the pursuers were entitled, under this policy, to recover from the company the value of the wheat.

defender must be held to have had reasonable grounds for declining to enter, sufficient to protect him against the claim for the full rent of the lands.

"In regard to the amount of the composition, as the character of heir of line devolved on the present defender, long after this declarator of non-entry was raised—and, as the record contains no plea to the effect that the defender, if bound to enter at all, could enter in any character but that of singular successor—the Lord Ordinary thinks that the defender is bound to pay, in the latter character, the composition due. It appears to the Lord Ordinary, that, in this particular, the defender is not entitled to get a positive advantage by the long dependence of the litigation."

No. 178. On the 25th December, 1828, the pursuer Donaldson, merchant in Glasgow, effected a policy of insurance with the Manchester Fire and Life Insurance Company over goods deposited in certain warehouses, called his old and new stores, the subject of the insurance being described in the following terms :—

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ar. 2, 1836.
D DIVISION.
1. Medwyn.
T.
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“ On goods, hazardous or not hazardous, his own, in trust, or on commission, in his ‘ old store,’ consisting of five stories and garrets with back jam behind, of one storey, which adjoins a building occupied as a wright’s shop and bakehouse, situate in a lane between Buchanan and Mitchell Streets, Glasgow, five thousand pounds.

“ On goods, hazardous or not hazardous, his own, in trust, or on commission, in his ‘ new store,’ adjoining to the west of the above, and communicating with a back building of two stories, situate behind, and common to both stores, five thousand pounds.”

It was previously explained to Donaldson, in a letter by the agent of the Manchester Company, that “ an insurance on stock, his own, in trust, or on commission, will cover any thing under his care, whether he has made advances on them, has been instructed to insure, or otherwise.”

The policy acknowledged payment of the first premium of £12, 10s., and set forth that, on payment of the said sum annually, “ the funds and property of the said Company, applicable by the deed of settlement of the said Company to the payment of monies assured by fire policies, shall, according to the provisions of such deed, and subject to the conditions and regulations hereupon indorsed, be subject and liable to pay, reinstate, or make good to the said assured,” &c., any loss that may occur, not exceeding the amount of the sums assured. Among the conditions and regulations here referred to, as indorsed on the policy, were the following :—“ Persons assuring property with this office, must give notice of any alteration, either in the building, or of the trade or goods in the premises assured, or of any removal, and cause such alteration or removal to be indorsed on their policies ; and if the risk shall be increased thereby, must pay such farther premium as may be required, on account of such increased risk, otherwise they will not be entitled to recover in case of loss. And if any assurance be effected with this Company on buildings or goods, at the same time that they are assured with some other company, or if they should be subsequently assured with some other company, the policy granted by this Company will be void, unless the circumstance is noticed in such policy, or by indorsement thereon. This being done, the Company will pay such proportionate part only of any loss subsequently arising, as the sum assured by this Company on the buildings or goods bears to the whole amount of the sums assured on such buildings or goods.”

Upon the back of the policy, shortly after it was entered into, the following memorandum was indorsed :—

Besides the sum insured by the within policy, there is insured on No. 12

—

	Old Store.	New Store.	Total.	Mar. 2, 18 Donaldson Manchester Insurance
the Atlas,	2900	—	2900	
— Alliance,	5000	2500	7500	
— Palladium,	2500	2500	5000	
— Scottish Union,	6000	4000	10,000	
			<hr/> £25,400	

Entered in the office books, 20th January, 1829.

(Signed) JAMES & THOS. TASSIE, Agents."

the spring of 1829, the pursuer, Pinkerton, deposited in Donaldson's warehouses a quantity of Irish wheat, of which the value amounted to £746. At the time when this wheat was deposited, it was insured by a floating policy, effected by Pinkerton with the West of Scotland Insurance Company, the premium having been paid for a year from 11th November, 1828; by which the sum of £10,000 was insured on "grain and other goods not hazardous, his own, or in trust, in all or any of the streets, warehouses, lofts, or cellars, in Glasgow, Port-Dundas, and in the vicinity of these places." One of the clauses of the conditions of this policy was in the following terms:—"Except in the cases of policies effected for short periods, the charges for premium and duty on insurances made with this Company are to be calculated from the day on which the insurance may be effected until the quarter day then next ensuing, and the year or for several years from such quarter day as may be agreed upon, and unless the future payments for renewal of such policies be made within fifteen days of the time limited for their expiration, the insurance shall cease." This floating policy having expired on 11th November, 1829, was cancelled, and shortly thereafter a new one, with some variations, was entered into.

On the 20th November, a fire broke out in Donaldson's premises, whereby the stores above mentioned, with Pinkerton's wheat deposited therein, were destroyed. The agents of the different insurance offices there-affected having in consequence held a meeting in Glasgow, Donaldson was in a state of the loss, including a claim on behalf of Pinkerton, for the value of his wheat. The committee of agents rejected this claim, as to which the agent for the Manchester Insurance Company wrote to his constituents as follows:—"We also refuse to admit Brock's and Pinkerton's claim at all, they both having floating policies in their own names covering their stores, and the offices interested with Donaldson having no objection of any exception; nor indeed the offices who granted the floating policy."

The amended state of the loss, in which no claim for Pinkerton was in-

No. 178. **Donaldson v. Manchester Insurance Co.**
Jan. 2, 1836. cluded, was then prepared by Donaldson and approved of by the agents. A scheme of appropriation of the loss among the different offices was sent to the Manchester Company, who paid their proportion as therein stated, amounting to upwards of £8000, Donaldson at the same time granting a receipt in the following terms:—"Received from Messrs the Manchester Insurance Company, through Messrs James and Thomas Tassie, their agents here, the Manchester bank's draft, on Masterman and Company, of 14th January current, at seven days date, for £8467, 15s. 8d., being their proportion of a claim made by me for loss sustained by fire."

Pinkerton having thereafter claimed against the West of Scotland Company under the floating policy above mentioned, his claim was rejected on the ground that the policy was not in force at the date of the fire, the new policy, on which the premium was immediately afterwards paid, not having been a renewal of the old one. An action was then instituted at the joint instance of Donaldson and Pinkerton against the Manchester Company, founding on Donaldson's policy, and concluding for the sum of £408 as the proportion of the value of the above-mentioned wheat, for which the company were liable as under that policy.

The company maintained in defence, that the action was incompetently brought at the joint instance of Pinkerton and Donaldson, the former having no legal interest or title; that the other insurance companies, being co-obligants, pro rata, along with the defenders, ought to have been called; that in terms of the conditions of Donaldson's contract with the defenders, his policy, in order to be of any avail, ought to have had indorsed on it, Pinkerton's insurance with the West of Scotland Office; and that the action was barred by the loss having been already adjusted and its extent finally settled between Donaldson and the defenders.

The Lord Ordinary having repelled the first and second defences, and remitted the cause to the jury roll, the following issues were prepared and sent to trial:—

"It being admitted that the defenders granted to the pursuer, Donaldson, the policy of insurance, No. 6 of process, upon certain warehouses, and the goods therein contained, and that the said policy was current on the 20th November, 1829.

"It being also admitted, that, on the said 20th November, 1829, the said warehouses, the property of the said pursuer, and the goods therein, were partially destroyed by fire,—

"Whether the pursuer, Pinkerton, on the said 20th November, 1829, had in the said warehouses certain wheat, amounting in value to not more than the sum of £1746, 13s., destroyed by the said fire? And, Whether the defenders under the said policy, are indebted and resting-owing to the pursuers, or either of them, in the sum of £408, 1s. 11d., or any part thereof, as their proportion of the loss upon the said wheat, and interest thereon from and since the said 20th November, 1829? Or,

Whether, on or about the 16th day of January, 1830, the pursuer, No. 17
 Donaldson, discharged the defenders of their liability under the said
 ?”

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 Donaldson
 Manchester
 Insurance

As the pursuer had led evidence, a verdict was, of consent of parties,
 and for the pursuers for the sum concluded for,¹—subject to a special
 to be adjusted by the parties for the opinion of the Court, upon the
 admitted and given in evidence at the trial. A special case was ac-
 cordingly prepared, in which the facts were set forth in substance as above
 stated, the point in issue being stated to be, “Whether the pursuers
 are not entitled to recover?” It was agreed that the Court should
 have liberty to form the same inference from the evidence as the jury
 have done. The Court having thereupon ordered written argu-
 ments, it was pleaded by the Manchester Insurance Company—

The action cannot be competently entertained at the joint instance
 of Donaldson and Pinkerton; the policy claimed on was a contract with
 Donaldson alone, and is neither assigned to Pinkerton, nor by its own
 terms or according to the regulations of the office assignable; and no
 contract has been proved, by which the benefit of Donaldson’s policy
 could be communicated to Pinkerton. 2. Donaldson’s policy is ineffec-
 tive at the time when he received Pinkerton’s wheat into his stores no
 notion of its being covered by a floating policy with another office
 made to the Manchester company, and no indorsement of this sepa-
 rate insurance was made on it, which, in terms of the conditions and regu-
 lations, was essential to its validity. 3. The action is besides excluded
 by the adjustment of the loss which took place, and which must have the
 effect of preventing the settlement between Donaldson and the
 company from being opened up; more especially since the adjustment
 did not remain in nudis finibus but was followed by payment.²

It was answered for Donaldson and Pinkerton;—1. It is now too late to
 question the title of the pursuers to recover under the policy in question;
 in the events, Donaldson’s title is indisputable, and it cannot be made
 defective by Pinkerton being conjoined with him as pursuer of the action.
 As to the merits, again, Pinkerton’s floating policy did not require to be
 indorsed on Donaldson’s policy with the Manchester company, the
 objects of the two policies being essentially distinct, and their co-
 incidence in regard to Pinkerton’s wheat having been foreseen by nei-
 ther of the parties insured, and being purely accidental and evanescent.
 The receipt granted by Donaldson for the sum received from the com-
 pany as their proportion of the loss sustained, did not bear to be a full
 discharge of the policy, and implied no discharge of the claim for the
 value of the wheat in question.

March 15, 1833, ante, XI. 570.

See Marshall on Insurance, II. 632, et seq.; Bilbie v. Lumley (East. II. 469); Her-
 bert v. Champion (Campbell, I. 134).

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The cause having been put out for advising, 19th June, 1834, the Court repelled the objections to the title of the pursuers, apparently on the ground that Donaldson was undoubtedly entitled to insist, and the circumstance of Pinkerton being conjoined with him in the action made the title no worse; but, before answer on the merits, and in consequence of the agreement of the parties finally to abide by the decision of this Court, their Lordships required the opinions of the other judges.

Some of the consulted Judges, wishing information as to the law of England in regard to certain points, proposed for the opinion of English counsel the following statement and questions, which were laid before the Attorney-General (Sir John Campbell) and Sir William Follett.

“ In this important cause, and with reference to the special case, some of the consulted Judges, before giving their final opinion, are desirous of being informed as to the law of England on some of the matters stated by the parties, as comparatively few questions on the contract of fire insurance have been brought under judicial discussion here, and, particularly, as it has been arranged between the parties that they are to abide by the judgment of the Court, and waive the right of appeal. It appeared to these Judges, that the contract had been borrowed from England; and, therefore, in considering the effects and legal consequences of that contract sought to be enforced here, much might depend upon how and in what manner it had been understood in practice, and interpreted in England.

“ In the first place, they wish to be informed, whether in England, what are called floating policies, similar to that which occurs in Mr Donaldson's case, are sanctioned by the law, and whether the owners of goods, depositing the same with a person who has such a policy, must have a special agreement to that effect, before he can be legally entitled to claim the benefit of the same; or whether, if the understanding of the parties be to communicate this benefit, the mere deposition or consignment of the goods with the insured under the floating policy will complete the depositor's right to it?

“ In the second place, they wish to be informed if the law has sanctioned the practice by which the benefit of such a policy is communicated by an agreement only, or deed of assignment, what is the nature of the deed to be executed, or if it be a matter left to an equitable construction, and corresponding relative claim?

“ In the third place, where policies against fire specially condition, that if the property be insured in other offices, the said insurance must be indorsed on the policy, under the pain of nullity, whether that clause be enforced by the law; and whether, when the same property and goods are insured in different offices, and by different policies, and no indorsement takes place respectively, these several policies are held in the practice of the law to be null and void, in terms of the condition; and, more particularly, when a party, having previously effected a policy on certain goods, wherever lodged, within a certain district, afterwards deposits them with a person who had previously effected a floating policy, like that of Mr Donaldson's, so as to bring them under that floating policy also—whether, in that case, it be usual, and held in law to be necessary to indorse the first policy on the second, under pain of nullity?

the fourth place, they wish to be informed whether, when the benefit is to be assigned, the law holds it to be sufficient that the same can be by a simple agreement, or any document expressive of consent and in- or does the law require a particular, special, and appropriate stamped nt?

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the fifth place, Whether, when a prior insurance has been effected, whether or not, on a subsequent policy, it is incumbent on the assured to the first policy, and whether his allowing it to fall, will vacate his claim e subsequent one?

the sixth place, If it be not incumbent on a party insured to keep up an e, when he has insured with another office, or obtains the benefit of a ch as Mr Donaldson's, and if he allow the first to cease, will it affect his recover under the subsequent policy, that the first insurance was not upon it while it was current?"

following answers were returned:—

, and 4. Policies in the form of Mr Donaldson's, by which the insurers answerable for goods, whether the party who effects the insurance be the owner of them or only the depository, are common in England, and are d by the English law. But such policies are not understood to establish t contract or privity between the owner of goods, who deposits them party effecting the insurance, and the insurers. No agreement between r of the goods and the depository, whether by parole or in writing, would e former to sue the insurers in his own name.

only in marine insurances, where the policy is differently framed, that er of goods intended to be insured is supposed to contract with the in- nd has a direct remedy against them. In marine insurances, the party the insurance is considered the agent of all who are interested, and no greement is required to give the parties who are interested the full f the policy. But upon such a policy as Mr Donaldson's, he alone could ur courts. He would be allowed to recover in his own name for the f the depositors the value of any goods which he held in trust or on com- and which were destroyed by fire upon the insured premises. For this proof would be required that, either by agreement, verbal or written, him and the depositors, or by the usage of trade, he was liable to the s for the loss of the goods by fire while in his possession.

olicy, such as Mr Pinkerton's, upon goods against fire, without stating uses in which they are to be deposited while protected by the policy, we before met with.

There a policy contains a condition that it shall be void for omitting to upon it another policy previously effected by the party, the policy would void for breach of this as of any other condition; but we are of opinion h a condition for indorsing on the policy any other policy insuring the would not extend to a policy effected by a depositor of goods like Mr a. Mr Donaldson could not know all the policies effected by all the who had deposited or might deposit goods in his warehouses, and it never the intention of the insurers that his policy should be rendered void by

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the omission to indorse upon it any policy effected by any such depositor. We humbly apprehend that, for this purpose, nothing can turn upon the form of Mr Pinkerton's policy, and that the omission to indorse it on Mr Donaldson's policy cannot prejudice the claim for the value of Mr Pinkerton's wheat, unless Mr Donaldson's policy is wholly void.

" 5. We are clearly of opinion, that where a prior insurance has been effected, whether indorsed or not on a subsequent policy, it is not incumbent on the insured to keep up the first policy, and that his allowing it to fall will not vacate his claim under the subsequent one.

" 6. If the condition in this case had extended to the indorsing of Mr Pinkerton's policy, we should have thought that Mr Donaldson's policy was rendered void by the omission to indorse Mr Pinkerton's policy upon it, notwithstanding Mr Pinkerton's policy had expired before the loss happened. Although the first policy was allowed to cease, the right to recover under the second policy could not be supported, the first policy not having been indorsed upon it while it was current."

Thereafter the consulted Judges returned the following Opinions:—

LORDS PRESIDENT, BALGRAY, MACKENZIE, FULLERTON, MONCREIFF, and JEFFREY.—" We are, on the whole, of opinion, that the verdict of the Jury should be confirmed,—and judgment given in terms of it against the Assurance Company.

" The title of both pursuers, we observe, has been finally sustained, by the interlocutor of Court, of 19th June, 1834; and this relieves their case of its greatest difficulty.

" In perusing the special case, it struck us, at first, that the pursuers ought to have produced some evidence of Pinkerton having instructed Donaldson to insure, or to give him the benefit of his existing insurance; but, on looking at the postscript to the letter of the defender's agents, of the 10th January, 1822, upon which Donaldson's insurance confessedly proceeded, we observe it there distinctly stated, and held forth, that ' the insurance will cover any thing under his care, whether he has made advances on them, or has been instructed to insure, or otherwise.' Whatever might have been requisite, therefore, in this respect, at common law, or where there was no special undertaking, we are of opinion that the defenders are barred, in this case, from objecting to the want of such evidence by the terms of their own engagement.

" In these circumstances, we are of opinion that the condition in Donaldson's policy, as to indorsing thereon any other policy effected on the same goods, cannot apply to such a floating policy as appears to have been held by Pinkerton, when his wheat was deposited in Donaldson's storehouse; as Donaldson could have no knowledge of all the policies of this kind which might be held by the various depositors to whom his stores were constantly open; and as, by the special agreement of the defenders, they were answerable for every thing in their stores, whether he had been instructed to insure or not.

" It would rather appear, indeed, that if this condition could be held to void Donaldson's policy as to the goods belonging to Pinkerton, it must equally void it, as to all the other goods in the same storehouse. The words are quite general,—that if any other subsisting insurance on goods covered by this policy is not

on it, 'this policy shall be void.' But beyond all doubt, the goods de-
 y Pinkerton were included in the description of goods covered by Don-
 policy, being 'all goods, his own, in trust, or on commission, in his new
 c. And this had been farther interpreted by the defenders' agents, to
 'any thing under his care' within those premises. If the condition,
 was to be enforced according to its letter, the whole policy was void ;
 defenders ought not to have paid the £8961, for which they have actual-
 l. But if this settlement was just, and according to the true meaning
 engagement, we apprehend that there is no ground upon which they can
 se to extend it to the goods in question.

appears, indeed, pretty plainly from the evidence in the special case, that
 t upon this ground that payment of Pinkerton's loss was withheld, when
 was settled. The only two witnesses examined at the trial as to what
 e at the discussions with the defenders' agents when the claim was re-
 occur in stating, that the ground of the rejection was, that they believed
 ned, that Pinkerton was entitled to recover the whole amount under his
 policy ; while it is now certain that that policy had previously expired,
 no longer in existence. And it being also clear, that even if it had been
 on Donaldson's policy, Pinkerton might have let it expire, without in-
 is claim on the defenders.

are, therefore, of opinion, that the pursuers are entitled to recover the
 ified in the verdict."

ion to above opinion by—

GILLIES, BALGRAY, MACKENZIE, FULLERTON, MONCREIFF and JEF-
 ' We do not think that Pinkerton's claim can be affected or impaired by
 instance of Donaldson giving up that claim when objected to, or taking
 or granting receipt for the amount of the loss thus restricted. It is to
 ed, that he grants a receipt only, and not a discharge ; but the material
 tion is, that by this time the loss had been incurred ; the rights of the
 parties having interest in the policy had vested ; and the claim of Pin-
 one of those parties, had been distinctly brought under the view of the
 and their agent. In that situation, though Donaldson, as holding the
 ad power to receive payment, and to discharge such claims as were thus
 we think he had no power to discharge Pinkerton's claim, without pay-
 d thus to abandon a right truly vested in another, without his privity or
 and as there is no evidence that Pinkerton in any way authorized such
 e, we are of opinion that the terms of the settlement with Donaldson
 just ground of defence."

ion by—

GILLIES, COREHOUSE and COCKBURN.—" From the information laid
 s Court, we understand that, by the law of England, a condition in a
 lik regard to the indorsement of other insurances, similar to that which
 the present case, does not apply to floating policies, and as the defend-
 n English company, we concur, chiefly on that ground, in the opinion
 men are entitled to recover."

No. 178. LORD BALGRAY.—“ I concur in this addition.”

Mar. 2, 1836.
Hepburn v.
Greig.

The cause having come to be finally advised this day,

Haldane v.
Donaldson.

THE COURT concurred with the consulted Judges on the grounds stated by their Lordships, and accordingly confirmed the verdict of the Jury, and found the pursuers entitled to expenses.

CAMPBELL and MACDOWALL, S.S.C.—CUNNINGHAME and WALKER, W.S.—Agents.

No. 179. NINIAN AND DAVID HEPBURN, Claimants.—*Sol.-Gen. Cuninghame*
—*A. C. Dick.*

ROBERT and JAMES GREIG, Claimants.—*Forsyth—Sandford.*

Mar. 2, 1836.
2^D DIVISION.
Lord Jeffrey.

THIS was a special question of expenses, in which the Court, varying the Lord Ordinary's interlocutor, found Hepburn entitled to expenses and Greigs not entitled thereto.

JAMES PEDDIE, JUN., W.S.—DANIEL FISHER, S.S.C.—Agents.

No. 180. MISSES JANE and ISABELLA HALDANE, Pursuers.—*Keay—Penney.*
ALEXANDER DONALDSON, Defender.—*Sol.-Gen. Cuninghame—*
Marshall.

Agent and Client—Reparation—Proof.—A law agent was employed to invest a sum of £2000 on heritable security; he secured it over a distillery, belonging to another client of his, on which there were prior burdens amounting to £18,500. He was in the knowledge of this, but refrained from communicating it to the lender. The subjects afterwards fell very much in value, and proved insufficient for the prior burdens—Held that the agent was liable for the £2000, though he alleged that from recent valuations of the property, he had good reason to hold it was worth £12,000 or £13,000, more than the prior burdens, at the date of the loan; and though the postponed heritable security was drawn and completed with technical accuracy.
2. Circumstances which, held to prove that a law agent acted as such for both borrower and lender.

Mar. 3, 1836.
1ST DIVISION.
Ld. Corehouse.
B.

IN 1815, Archibald Dunlop, distiller at Haddington, obtained a lease from the Magistrates of Haddington, of a field or inclosure at a rent of £50, 10s. The endurance of the lease was for twice 99 years. Dunlop erected a large distillery on the field so let to him. In 1826 the magistrates put up to sale a feu-right of the field, under burden of the lease to Dunlop. The feu-right was bought by Dunlop, and in August, 1826, he took infestment in the subject, holding feu of the magistrates. In 1818 Dunlop had borrowed a sum of £2000 from one William Cunningham, and assigned the lease to him in security. The lease contained

empowering Cunninghame "to enter to, occupy, and possess the d with the distillery, &c. or to set the same to tenants," &c. in rt of Dunlop not paying up the £2000, "within six months after ad of payment shall have been made:" providing "always that . William Cunninghame shall be bound to pay the whole rents il the whole other obligations" of the tack. Cunninghame inti- his assignation to the magistrates, but he took no steps to attain atural or civil possession of the subjects. In 1823 Cunninghame to uplift his money, and Dunlop desired to replace it by a fresh n November of that year Alexander Donaldson, town-clerk of gton, who was Dunlop's agent, wrote to him, "I think I shall £2000 from Mr Henry Haldane, at least he told me some weeks t he had the needful, and wished a good security." This was up by Haldane's paying the £2000, and obtaining an assignation security of Cunninghame. This assignation was executed by on, who, however, took no step, either of intimation to the tes, or of clothing the right with natural or civil possession. on had been employed in executing many pieces of business by and his near relations, being apparently their family agent. y Haldane died about the end of 1826, and a question having arisen is relations regarding the party entitled to succeed to Dunlop's £2000 and the security of the lease, Misses Jane and Isabella Hal- ulted Donaldson, as their agent, on the subject. Donaldson said ived that the feu-right in favour of Dunlop had absolutely evacu- previous lease, and that the real security for the £2000 was e gone; and, in the correspondence which occurred at this time, on wrote, in October, 1827, to the brother of the Misses Hal- I mentioned (to the late Henry Haldane), that in my opinion, nger held any security beyond Mr Dunlop's personal obligation, Mr D. would pay him up the money at the ensuing Martinmas shed it; but he said that he was quite satisfied with Mr D.'s own . Under the circumstances now stated, I do not think this can ed in any other light than a personal bond." A memorial was ared at this time, by Donaldson, for the Misses Haldane, which ended to be laid before counsel, containing this statement:—"A l object with Mr Dunlop in this transaction was to enable him w a considerable sum on a better security than he could previously d with this to pay off some debts secured in the same manner as dane's. This he accomplished, and he intimated to all who held s that he would discharge these at the ensuing term of Mar-

authorized to intimate to Mr Haldane that Mr Dunlop would at that term, or to tell him that Mr Dunlop would keep the i was more convenient for him, and he was quite satisfied real security. I think it was going to a funeral (sometime

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perhaps in August or September, 1826), that I made this communication to Mr Haldane. I explained to him the change in Mr Dunlop's situation, and told him that I no longer thought he had any security over the distillery. I do not distinctly recollect his answer, but it was to the effect, that as he had no occasion for the money, and was quite satisfied with Mr Dunlop's own security, he would rather wish him to keep it."

This memorial was framed by Donaldson, at a time when it seemed to be for the interests of the Misses Haldane, that the £2000 should not be viewed as heritably secured at Henry Haldane's death: it was never put into the hands of counsel, and the Misses Haldane did not admit the statement in it to be correct, or to have ever been communicated to them. No judicial discussion ever arose as to their right to the bond for £2000, which, by arrangement among all the parties concerned, was conveyed to them along with the right to the lease. The party who executed this conveyance was one Cruickshank, and it was revised by John Court, S.S.C. It was never intimated to the Magistrates of Haddington, nor were any steps yet taken towards acquiring the natural or civil possession of the subjects. The Misses Haldane soon afterwards desired another security from Dunlop; and accordingly Donaldson, on 3d November, 1827, wrote to Dunlop, "The Miss Haldanes, who are now in the right of your bond to Mr Cunninghame, are quite satisfied to have you for their debtor; but it occurs to them, if the money is to lie in your hands, that they should have the same kind of security as he got. Till you may have time to determine whether you will do this, or pay up the money, they will wait your answer till the 1st of January."

Dunlop resolved to offer a disposition in security, rather than pay the money, and on 4th February, 1828, he granted a disposition of the distillery, &c. in security. Infestment in favour of the Misses Haldane was duly expedite. In this transaction, Donaldson acted as the agent for Dunlop. After the Misses Haldane obtained this security they renounced their right to the lease which was cancelled. In 1831 Dunlop became bankrupt, and it appeared, that, in October, 1826, he had granted heritable securities over the distillery, one for £15,000, in favour of the British Linen Company, and another for £8500, of which sum £5000 went to reduce the sum due to the bank, making in all a burden of £18,500, which was preferable to the security of the Misses Haldane. Donaldson was all along in the knowledge of these prior burdens, and was the notary who expedite the infestments in favour of the creditors.

In July, 1826, before obtaining the loan of £15,000 from the bank, a report and estimate, by two valuers had been obtained, which stated the probable cost of the distillery to have been £40,000, and its probable value to be £30,000 or £32,000. In 1830 a loan of £5000 had been obtained on the security of the distillery, on the condition that creditors to the extent of £3500, who were preferable to the Misses Haldane, should, to that extent, exchange places in the ranking with the last!

On Dunlop's estate was sequestrated, the general creditors paid the rest of the heritable debts for one year, after which, finding that the assets would not satisfy these debts, they abandoned them to the heritable creditors. A ranking and sale was then brought, in which a witness, James Haldane, deponed that he estimated the value of the distillery at £10,000; he had valued it about the end of 1831, by Dunlop's desire, and he estimated it at £13,800; but that in 1825, when the distillers' business was flourishing, he would have considered it worth £25,000.

At the same time the Misses Haldane, on 10th December, 1833, raised an action against Donaldson, setting forth his agency both as to the lease, and as to the feudal security, and that he had omitted to make a search for incumbrances, or had culpably withheld any intimation of them from the pursuers; "that the value of the subjects in question is so much diminished by the said prior and preferable securities, as to leave nothing of the security held by the pursuers, and in fact, not to be sufficient even to satisfy the foresaid prior and preferable rights; or, at least, the pursuers are threatened, through the insufficiency of the said security, with the loss of the said sum of £2000, in whole or in part; or at all events, the pursuers are placed in a totally different situation with reference to the security, from that in which they were induced to believe, in consequence of the representations or culpable concealment of the defender, in which they were placed at the time of the said bond and disposition being executed: And further, the debtor in the bond, the said Archibald Dunlop, has become bankrupt, and has had his estates sequestrated under the bankrupt statute: That the loss which the pursuers have sustained, and with which they are threatened, and the situation of the pursuers afore-said has been occasioned by the negligence, want of skill, and breach of professional duty, or one or other of them, of the defender; and the defender is, in consequence, justly and legally liable to make payment to the pursuers of the said sum of £2000, with interest, as afterwards demanded for, the pursuers always granting to the said defender, but at the expense, an assignation to the said bond and disposition in security, of their whole right under the same; or otherwise, to repair and make good to the pursuers the whole loss and damage which they have sustained, and may yet sustain," &c. The conclusions were for payment of the £2000, with interest after Martinmas, 1832, when interest was last paid, and for making reparation of all the damage sustained in consequence of the insufficiency of the security.

In making up a record, Donaldson averred that he had not been employed by the Misses Haldane, but solely by Dunlop, and that he had paid Dunlop alone with the fees for business; he also averred that the Misses Haldane, or their brother John Haldane, as their authorized manager in the matter, were in the full knowledge of the prior burdens, but were nevertheless content to continue the loan of £2000 on getting the postscript.

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No. 180.

In these circumstances Donaldson

Pleaded in defence—

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Donaldson.

1. As he was not the agent of the Misses Haldane, but solely of Dunlop, he was not liable professionally,¹ to any farther extent, than that the several deeds executed by him should be in a correct technical form; and they were so prepared. Nor would he have been liable, even to that extent to the pursuers, but for the circumstance that they employed no other agent, and that the decision of the Court, in *Struthers v. Lang*,² and other similar cases, had declared a liability to the extent now admitted. This defence covered equally his connexion with the assignation to Cunninghame's lease, and with the subsequent feudal security.

2. In regard to the pursuer's acquisition of Cunninghame's assignation, no ground of liability could be stated against the defender. (1.) At the date when that right was transferred to Henry Haldane, the law was generally understood, in consequence of the case of *Yeoman*,³ to be, that intimation to the landlord, completed the right, without any possession. And as the assignation by Dunlop to Cunninghame in 1818 had been intimated to the Magistrates of Haddington, no loss could accrue from the non-intimation of Cunninghame's subsequent assignation to Haldane, unless Cunninghame had become bankrupt, which never happened. (2.) From the tenor of the assignation to Cunninghame, possession of the distillery could not be attained until six months after a demand for payment had been made, so that the actual possession of it by the creditor was not contemplated as a step towards the original completion of the right in security, but was merely provided for the period when the creditor might wish to put an end to the loan and call back the money. And as the entry to possession would have subjected the creditor to pay a rent of £50, 10s., and fulfil all the other obligations of the long lease in question, nothing but the express instructions of Henry Haldane would have justified the defender in putting him in actual possession. (3.) The pursuers had cancelled their right to the lease, such as it was, without consulting the defender, and they could not afterwards rear it up to the effect of subjecting him in any liability on account of it; especially as they had deprived themselves of the means of now making it over, *valore quantum*, to him.

3. At the date of the feudal security, the defender was aware of there being prior burdens to the amount of £18,500. But the subjects had been valued, less than two years previously, by two valuers, at £30,000 or £32,000, which was stated to be £10,000, under their actual cost. The defender, thus seeing a free surplus value of about £12,000 or £13,000, was entitled to consider that a farther loan of £2000 was consistent with the perfect safety of the pursuers, even if they were to be

¹ Wilson, June 20, 1826 (*ante*, IV. 732;—or 739, new ed.)

² See pursuers' authorities, p. 615.

³ Hunter, on Landlord and Tenant

viewed as his clients. Had an unburdened heritable estate, worth £12,000, been the subject on which he had, as agent, lent a sum of £2000, he could not have been censurable for rashly hazarding their money: and though the free surplus arose, in this instance, after deducting prior burdens, this circumstance was not enough to subject the defender penally, in reparation of a loss arising from no cause but a subsequent depreciation of the property. So little could such depreciation have been foreseen that other parties in 1830 made a considerable loan on security postponed to the pursuers: and even after the bankruptcy, the general creditors paid the interest of the whole heritable debts for a year, expecting that there would be a free reversion.

4. But the pursuers were sufficiently certiorated of the existence of the prior burdens, through their brother John Haldane, who acted for them: and that alone was enough for the defender's exoneration. The memorial prepared in 1827 was sufficient evidence of this; and farther proof would be adduced if necessary.

5. If the defender was to be viewed as employed by the pursuers, then the letter of 3d November, 1827, intimating to Dunlop that they would be satisfied with the same kind of security which Cunninghame had got, was sufficient to exonerate the defender from looking for any other subject but the distillery, as that was the special subject of security pointed at in the letter.

The pursuers answered—

1. The evidence proved that the defender acted as the agent, first of their brother Henry, and afterwards of themselves, in relation to both the lease and the feudal security. He was their family agent; he had been consulted on Henry's death as to the lease; and his letter still extant, proved him to be communicating with Dunlop as to the security to be given to them in the end of 1827, failing which, he intimated, on their part, a call for the money as at 1st January, 1828. In place of paying the money, Dunlop, who was confessedly the defender's client, granted the feudal security in February, 1828, and thus the defender was proved, *de facto*, to have acted as agent both for the borrower and the lender. Though Dunlop alone was charged with fees, that was because the borrower had to bear the cost of the loan; but even had the defender acted gratuitously, he would still have been responsible.¹ And though the pursuers had never employed the defender at all, still, as they had no other agent, he would have been liable to them, in executing the deeds for their security, precisely as an agent is to his client; and this had been proved by a series of cases.² In either case, his responsibility was not at

¹ Currie, June 17, 1823 (ante, II. 407 or 361. new ed.)

² Struthers, Feb. 2, 1826 (ante, IV. 418;—or 421 new ed.); 2 W. & S. 563; Rowand, July 4, 1827 (ante, V. 903, and 4 W. & S. 177); Brown, March 28, 1828 (4 Murr. 474); —, Dec. 2, 1831 (ante, X. 85).

No. 180. an end, by merely preparing deeds which were accurate in style; he was liable for the execution of a good marketable security.

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2.—(1.) At the date of executing the assignation of Cunninghame's lease to Henry Haldane, in 1823, the defender was bound to have known that mere intimation to the landlord would not make a real right, without being followed by either actual or civil possession. The facts of the case of Yeaman did not support the rubric in that report, and did not imply intimation alone to be enough. But this was immaterial, because no intimation of the transference to Henry Haldane was ever made. (2.) Though the assignation to Cunninghame did not admit actual possession of the distillery till after a demand for payment, that did not prevent such constructive possession, as would suffice to complete a real transference in security; any more than the right to sell or possess lands, under a heritable bond, only after six months' premonition, could prevent a creditor from immediately obtaining a real right in security by the symbolical possession implied in an infeftment. But if such had truly been the nature of the right held by Cunninghame, that it could not be made a real right, excepting in the way alleged by the defender, he only committed the greater error, and was the more clearly liable, for having recommended to Henry Haldane to lend his money on such a security. (3.) As the defender had informed the pursuers that he thought their right to the lease was good for nothing, as a security, and as they had a right to rely on having got a good feudal security, they were at liberty to cancel their right to the lease, without thereby forfeiting any claim of reparation against the defender.

3. The defender, before the pursuers took their feudal security, was bound to have communicated the existence of the prior burdens, amounting to £18,500. He was the borrower's agent, as well as the pursuer's, which rendered this duty peculiarly incumbent on him: and if he chose to conceal these burdens, and thereby induce the pursuers to lend £2000, as a postponed security to bear the first brunt of all the fluctuations in the value of the subject, he could only do so at the peril of making up all loss which might thence arise to them.¹ The subject being a distillery, and of peculiarly fluctuating value, the defender was the more bound to intimate all previous burdens. Had he done this, it would have been for the pursuers to judge, whether the previous valuations of such a subject were satisfactory to them; or what farther valuations they might desire to be made; or whether they would lend their money at all, where the subject was affected with prior real burdens. The defender, at his own hand, kept back this essential information, and for this violation of professional duty, he must now make up the loss, even though it might have arisen in whole or in part from subsequent depreciation.

¹ Graham, March 4, 1831 (ante, IX, 543).

was denied that the pursuers were certiorated, through their brother, of the existence of the prior heritable burdens. The al was unknown to them ; and its reference to Dunlop's having certain loans, was, at any rate, too vague to exonerate the defender if it had been communicated to them.

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The letter of 3d November, 1827, in pointing out the same kind of as that which Cunninghame had got, evidently meant, either a security, which was what he had obtained, or at least a safe heritable security. It could not be made to sanction a postponed security, as the pursuers were then ignorant of the existence of prior burdens.

Lord Ordinary “decerned in terms of the libel ; and found the defender liable in expenses of process.” *

NOTE.—In the circumstances of this case, there is no reason to suppose the defender intentionally sacrificed the interest of the pursuers, or their brother Henry Haldane, to that of his client, Mr Dunlop ; but it is thought that he undertook, notwithstanding, to indemnify them for the loss they have sustained in consequence of negligence and error in his professional conduct. It is plain that, in facilitating the loan by Mr Haldane, he acted in the double capacity of agent for the borrower and lender ; a delicate situation, in which more than ordinary care and circumspection are necessary. On that occasion he neglected to create the security in the way in which it ought to have been done. He communicated to the granters of the lease the assignation by Cunninghame to the pursuers, nor did he put the assignee either into actual or constructive possession. This omission exposed Haldane to the danger of Cunninghame's bankruptcy, second to that of Dunlop's bankruptcy. The first omission was quite inexcusable ; the second was neither justified, as is alleged, by the terms of the lease, nor by the decision in the case of Yeaman in 1813.

Dunlop having obtained a feu-right of the subject of his lease, but under the terms of that lease which had been conveyed to Henry Haldane, the defender falsely informed Haldane that his security was thereby evacuated. He says that Haldane, on that occasion, expressed his intention to let the money remain on his personal security ; an averment of which there is no evidence, and which, if true, would not now be material.—After Henry Haldane's death, the pursuers made a compromise with their eldest brother, obtained right to the bond and assignation from Dunlop. Whatever may have been the intention of Henry Haldane, it is clear that the pursuers desired to have an effectual heritable security from Dunlop, and that the defender acted for their behoof in attempting to do so, though again in the double capacity of agent for borrower and lender. The defender avers that he informed the pursuers that the security created by the assignation of the lease was evacuated by the feu-right, and it appears from his letter of the 3d November 1827, that he applied to Mr Dunlop for a new security to the pursuers of the same kind which their brother got ;” which can be construed in no sense other than a first security over the subjects. Accordingly he did obtain an assignation of the bond from Mr Dunlop, on which he expedited an infestment. But on that day, though perfectly aware, as he admits, that the property had in the mean time become encumbered to the amount of nearly £20,000, which rendered it a security altogether unfit for a permanent investment, and which no prudent man of business, acting for the pursuers, would have accepted, he concealed that fact from the pursuers and exposed them to the loss which has since occurred.

A sufficient excuse has been stated for this conduct on the part of the defender. He says the pursuers relinquished their security under the lease, without his knowledge or consent ; but they are not to blame on that account, as he himself had deceived them that that security was destroyed—information singularly unfortunate,

No. 180. The defender reclaimed. The Court did not call on counsel in support of the judgment.

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LORD BALGRAY.—This is a stronger case than if it could merely have been alleged against the defender that he had omitted to make a search for incumbrances. He knew of the existence of incumbrances, and he refrained from communicating the fact to the lender. I look on him as having been the agent for both parties, and that is a very delicate position indeed, and one in which the agent is very apt to commit himself on the one side or the other.

LORD PRESIDENT.—I also consider the defender to have been agent for both parties. He repeatedly transacted pieces of business for the pursuers and their family. When the question of a loan to Dunlop, on heritable security, came to be settled, he should have told the pursuers that he was agent for Dunlop, whose interests, as borrower, were not the same with theirs, as lenders, and that he could not act in this transaction for them. The origin of the evil was that he omitted this, and attempted to act for both. In regard to the question of his responsibility, arising out of his connexion with the lease, I look on it as absorbed in the subsequent question of his omission to give notice of the prior incumbrances when the heritable security was granted by Dunlop to the pursuers. He was bound to have told them to beware how they lent money on a subject which was already burdened to the extent of nearly £20,000. He refrained from making them aware of these burdens, though himself in the knowledge of them, and I cannot hesitate to adhere to the judgment under review.

LORD GILLIES.—I concur in the judgment of the Lord Ordinary, and also in the note explanatory of his lordship's views. I have no doubt that the defender acted as agent for the pursuers. On 3d November, 1827, he addressed a letter to Dunlop, stating that "the Miss Haldanes, who are now in right of your bond to Mr Cunninghame, are quite satisfied to have you for their debtor; but it occurs to them, if the money is to lie in your hands, that they should have the same kind of security as he got. That you may have time to determine whether you will do this, or pay up the money, they will wait your answer till the 1st of January." Here the defender writes in the pursuers' name, and answers for them as their authorized agent. And what is meant by the terms, "the same

for even at that moment, it rather appears, he might have repaired his original neglect, and rendered it available. Another defence is, that he did give them information that Mr Dunlop had granted securities over his feu; because in his memoir to Mr John Haldane, he had stated that the feu right was obtained to enable Mr Dunlop to borrow money, and to pay off certain debts. But this communication, even if shown to the pursuers, which they deny, and which is not proved, was much too vague and imperfect to put them on their guard, for it neither specified the sums borrowed by Mr Dunlop, nor the nature of the securities he had granted. Still less is it relevant to plead that the pursuer did not employ him to select a security, but restricted him to take one from Mr Dunlop. Even if that had been the case, it was his duty to have explained to them distinctly that Mr Dunlop had no longer the power to give them an effectual security, having borrowed on the distillery to the great amount above mentioned. It is plain that the defender, misled by the apparent prosperity of the distillery—at best a hazardous speculation—and by the supposed resources of Mr Dunlop, had considered the real security as of little moment, and become incautious and negligent with regard to it."

kind of security as Mr Cunninghame got?" I think it clearly means heritable security. It cannot mean any thing less. Did the pursuers then get heritable security? They only received a postponed security, ranking after prior burdens to the amount of nearly £20,000. It is true that even so large a sum as that did not necessarily exceed the value of the distillery: but it was for the pursuers themselves to judge whether they would be satisfied with such a postponed security for their money. The defender was bound to put them in possession of the facts, so that they might judge for themselves whether they would lend or continue the loan on such terms. And as he failed to perform this essential duty, I must adhere to the judgment, though it infers a penal responsibility against a professional man, such as to make the duty of the Court in this instance a painful one.

LORD MACKENZIE.—I am of the same opinion. It may be perfectly true that the loss in this instance has emerged from the fluctuation in the value of the subject. But a loss from such a cause is no new thing; and as it was peculiarly perilous to invest the pursuer's money on a postponed security where the first brunt of all fluctuations necessarily fell on it, before any of the prior loans could be affected, the defender was bound to have intimated the prior burdens to the pursuers, and to have received their instructions whether they were satisfied with such a security.

THE COURT adhered, and awarded additional expenses against the defender.

J. COURT, S.S.C.—GIBSON and DONALDSON, W.S.—Agents.

PAGET BAYLY, Petitioner.—*Shaw-Stewart*
EDWARD SWAN, Respondent.—*Pattison*.

Prisoner—Cessio Bonorum—Sanctuary.—A debtor took refuge within the sanctuary of Holyroodhouse, and contracted a debt there, and the creditor incarcerated him in the Abbey jail, under an act of warding granted by the bailie of the Abbey: after a twelvemonth's imprisonment, he petitioned the Court to grant warrant for transmitting him to the Canongate jail, and detaining him there till liberated in due course of law, his object being to qualify himself thereby to raise a process of cessio:—Held that the Court could not grant the petition.

PAGET BAYLY, while resident within the sanctuary of Holyroodhouse, contracted a debt of £10, to Edward Swan, grocer in the Canongate, for necessities supplied to him and his family. Bayly was incarcerated in the Abbey jail by Swan, under an act of warding, granted by the bailie of the Abbey. After having endured confinement for twelve months, Bayly presented a petition, stating that it had been decided that a prisoner in the Abbey jail could not pursue a cessio;¹ and that, in order to escape from perpetual imprisonment, it was necessary for him to obtain

¹ Dunlop, July 11, 1799 (11,800, and also p. 7).

No. 181. a warrant from the Court to transfer him to the Canongate jail, being the common jail of the district, where he might meet all his creditors on equal terms, and thereby be entitled to the benefit of the process of *cessio*.¹ He therefore craved the Court to appoint intimation to Swan, and thereafter “to grant warrant to Macers of Court and messengers-at-arms to pass to the Abbey jail of Holyroodhouse, and there to apprehend the petitioner and convey him to the jail of Canongate, along with the act of warding, or other diligence on which he stands incarcerated; and grant warrant to, and ordain the keeper of the Canongate jail to receive and detain him in said jail until liberated in due course of law.”

r. 3, 1836.
ly v. Swan.

The Court ordered intimation to be made not only to Swan but also to the bailie of the Abbey and to the Duke of Hamilton, from whom the bailie's commission was derived. Swan lodged answers, and pleaded, 1st, That the petition was incompetent; it was *ultra vires* of the Court to transfer the prisoner from one jail to another, in prejudice of his diligence; and no precedent was referred to in support of it. 2. The respondent had given credit to the petitioner, in the knowledge that he was liable to incarceration for the debt, but not for his debts at large, and the respondent had thus a *jus quesitum* in keeping the petitioner subject to his incarceration only, as he was thereby more likely to recover payment of his debt. And there was no hardship pleadable by the petitioner, even supposing such a plea to be relevant; because, if he sought the extraordinary privileges of the sanctuary, he must submit to their counterpart, and forfeit the benefit of the common-law, and the process of *cessio*.

The petitioner answered, 1st, That by the ancient common-law of this country, every innocent debtor, after one month's incarceration, was entitled to his liberty, on executing a disposition *omnium bonorum*. This was a right so important that nothing but express enactment could place any of the lieges beyond the pale of its operation, if he claimed it, and was willing to undergo the requisite imprisonment. The onus lay on the respondent to show how the petitioner was to be deprived of this law, and thereby exposed to the hardship of imprisonment for life. But there truly was authority in support of the petition; as, in the case of *Dunlop*,² while it was decided that imprisonment in the Abbey jail did not entitle to the benefit of the *cessio*, it had been conceded at the bar as an indisputable remedy against the grievance of perpetual incarceration, that the prisoner might be transferred to the Canongate jail, if he craved this. 2. The respondent had no legitimate interest in keeping the petitioner imprisoned in the Abbey jail, rather than any other. If the petitioner, after contracting the debt to the respondent, had left the sanctuary, as he might have done, the respondent could have had no preference of any sort, in doing personal diligence, merely because the debt had been con-

¹ Bell, 574.

² July 11, 1799 (*Dict*, p. 21).

within the sanctuary. And, as all the privileges of the sanctuary No. 181
 intended for the benefit of debtors, the petitioner might waive them, Mar. 3, 18
 him at any time the humane benefit of the common law. If a trans- Bayly v. Sw
 from one jail to another was essential to enable him to gain this
 essential privilege, the Supreme Court, from the very necessity of
 e, must have the power of granting the warrant craved; and it was
 all uncommon to grant analogous warrants for far inferior objects,
 to enable a party to attend a diet of examination or of proof.

D PRESIDENT.—The petitioner betook himself to the sanctuary, and
 himself of its peculiar privileges. He voluntarily withdrew himself from
 ration of the common law, and I apprehend he thereby also forfeited the
 of it. I conceive he is liable to an imprisonment which is not within the
 f the humane law of cessio. Whether there may be any circumstances
 which a bill of suspension and liberation could now or afterwards be pre-
 it is not at present necessary to inquire.

D BALGRAY.—I doubt the power of this Court to put a stop to the im-
 ment of the petitioner in the Abbey jail, and to put him in prison in the
 ate jail. It is under the diligence of his creditor alone that he is liable
 isonment, and this creditor will not consent to imprison him anywhere
 n where he is.

D MACKENZIE.—I see no authority sufficient to support the prayer of the
 . And I rather conceive the respondent has something like a *jus ques-*
 ainst our granting it. The petitioner, in his present position, is exempt
 e diligence of all other creditors but this respondent. In consequence of
 ference, by which the respondent has obtained what may be termed a law-
 opoly of incarceration, he has the strongest prospect of enforcing full pay-
 his debt. If there be any money at all within the reach of the petitioner,
 gence of the respondent will compel its being made available towards pay-
 debt and procuring the petitioner's liberation. Whereas, if the Court
 w to remove him to a common jail, like that of the Canongate, all his
 s at large would have equal access to him, with their diligence, and the
 t of full payment to the respondent would be materially weakened. In
 aliar circumstances in which this debt was contracted, I conceive that this
 change of the place of imprisonment, by warrant of the Court, would be
 to the incarcerating creditor. But I do not wish to give any opinion
 re is no remedy, if the petitioner was seriously in danger of perpetual
 ation. There may be remedies, as, for example, if the petitioner could,
 means, transform all his debts into Abbey debts; or there may be other
 f relief; to all which I merely allude, without offering any opinion, and
 for the purpose of guarding myself against being understood at present
 ion unqualifiedly the doctrine that, in refusing this petition, the peti-
 necessarily left to perpetual incarceration.

D GILLIES.—I doubt the competency of this application altogether. As
 me of Dunlop, although such a suggestion as the transference of the debtor
 mon burgh jail may have been made at the bar, it did not, as I conceive,
 he sanction of the Court, in any authoritative shape at all. And, in re-
 petition, I cannot refrain from observing that I believe the unfortunate

No. 181. debtors who inhabit the sanctuary, obtain such credit from grocers and shopkeepers as is essential for their support, on the very strength of their being liable to the compulsitor of imprisonment in the jail of the Abbey, beyond the reach of the process of cessio. But for its being known that this compulsitor existed, these debtors would probably obtain no credit at all; and nothing could be more cruel to them, in reality, however humane it might be in appearance, than to grant the prayer of this petition. The result would probably be, that they would never receive credit again, in any case.

Mar. 3, 1836.
His Majesty's
Advocate v.
Suter.

THE COURT refused the petition.

J. P. FALKNER, S.S.C.—J. MARTIN.—Agents.

No. 182. HIS MAJESTY'S ADVOCATE, Complainer.—*Sol.-Gen. Cuninghame—Innes.*

A. ROSS SUTER, Respondent.—*Neaves.*

Public Officer—Petition and Complaint.—Circumstances in which, while the Court found that a sheriff-clerk had committed an irregularity, they held it unnecessary to pronounce any further deliverance on a petition and complaint by the Lord Advocate for malversation in office, observing that that course of procedure was not called for.

Mar. 3, 1836.
2D DIVISION.
R.

THIS was a petition and complaint at the instance of his Majesty's Advocate against the respondent Suter, sheriff-clerk of Ross-shire, for alleged malversation in office. The petition stated that Suter had "upon various, or at least upon two or more occasions, been guilty of issuing warrants both for summons and arrestments," under the Small Debt Act, "without one single blank therein being previously filled up, and with nothing whatever added to the schedules or skeleton styles pointed out in the statute, except that he adhibited thereto his own official subscription as sheriff-clerk." It further set forth that Suter had been obliged to sue out a cessio, and that his circumstances were not such as to enable him to make reparation for any damage that might be occasioned by his irregularities. Notwithstanding the general allegation in the petition there was only one instance condescended upon of blank warrants having been signed by Suter, and that had reference to two warrants for arrestment dated the 1st January last; but the petition prayed the Court "to find that the said Alexander Ross Suter has been guilty of malversation in his said office; and, in respect thereof, to inflict such punishment upon him by deprivation of office, temporary suspension therefrom, pecuniary penalty, censure, or otherwise, as to your Lordships in the whole circumstances shall seem meet; and, in all events, not to allow the said Alexander Ross Suter to continue in, or in case of suspension to resume, the exercise of his said office, unless upon condition of his providing security to the public for the due and lawful discharge of its duties, by findi

sufficient caution to that effect acted in your Lordships' books; and to find the said Alexander Ross Suter liable in expenses; or to do otherwise in the premises as to your Lordships shall seem just."

In his answer to this petition and complaint, Suter acknowledged and expressed his regret for the single instance of irregularity charged against him, which, he stated, had arisen from his having been called up to grant the warrants in question, about four in the morning on the 1st of January, when he was unwell, and, being afraid of exposing himself in these circumstances to the cold, he had signed the blank schedule, trusting to the officer, in whom he had confidence, to fill it up before putting it in execution. In regard to the statement as to his circumstances, while he submitted that it had been improperly introduced into the petition and complaint, he explained that his having sued out a cessio had occurred in 1827 in consequence of his taking upon himself debts of his father's, but that he had since paid the whole debts in full, and obtained a discharge, which he produced, and further, that sufficient caution had been found in common form for the execution of his office. The accuracy of these statements was not disputed by the Lord Advocate, and Suter contended that there was nothing to warrant the unusual course of a petition and complaint, nor a demand for further security, which demand was besides incompetent.

LORD JUSTICE-CLERK.—Under all the circumstances of this case, there seems little ground for pronouncing any very severe censure. It must be admitted that the proceeding was irregular, and this is allowed by the respondent himself, but there is no allegation that he was in the practice of committing such irregularities. I think the complaint of the Lord Advocate is by no means made better by the statement which has been entered into as to the respondent's circumstances and poverty.

LORD MEADOWBANK.—I have read these papers with some degree of indignation. I do not think the powers of the King's Advocate ought to have been exercised in this way, when there was other redress to be had before the Sheriff. The Advocate has thought fit to press an enquiry into the circumstances of the party which is not *hujus loci*.

LORD GLENLEE.—I am of the opinion of the chair. This irregularity was a breach of duty; but it was one breach of duty only, as both arrestments were made at the same time. The Court can do no more than find that the proceeding was irregular. I agree with Lord Meadowbank, that this enquiry into the party's private circumstances was improper, and it cannot be proposed to lay him under caution. As to what is stated in regard to the cessio, instead of being to his prejudice, it is highly to his honour; but I think there was an impropriety in alluding to it at all.

LORD MEDWYN.—I entirely agree, and thought from the first that an application to the Sheriff would have been the better course; and I wish that due enquiry had been made before this statement was given, as to the respondent's means. I do not think a complaint of this sort should have been made, unless

No. 182. there was cause for suspending the party from his office ; and as to sec
agree that the Court had no power to require it.

—
ar. 3, 1836.
Murray v.
Moncur.

THE COURT found that the proceeding complained of was irregu
ought not to have been adopted, but that, under the circumstance
case, it was unnecessary to pronounce any farther deliverance the

D. CLEGHORN, W.S.—H. INGLIS and DONALD, W.S.—Agents.

No. 183. J. T. MURRAY, W.S., Pursuer.—*M'Neill—Marshall.*
JOHN MONCUR and OTHERS, Defenders.—*Rutherford—J. Ham*

Bankrupt—Composition.—A having lent money on a second heritable
over certain house property, obtained from B and others a personal bond
roboration, binding themselves to pay the interest of his debt, and also the
of the prior debt, together with the annual feu-duty and the expense of kee
an insurance : B's estates were sequestrated and a discharge granted under
position contract, no claim having been made by A : the debtor subsequently
bankrupt, and the prior heritable creditors entered into possession of the sul
1. Held, in an action by A against B and the cautioners for his compositio
although A averred that he could put no value on his heritable security,
entitled to insist for payment of the composition, not only on the interest
but on the interest of the prior debt to be paid to the creditors therein
feu-duty to be paid to the superiors, and on the expense of insurance termly
sums fell due, unless B should report discharges thereof. 2. Question supe
as to whether A was entitled to demand a composition on the value of these
payments, converted into a capital sum.

ar. 3, 1836. MATTHEW NEIL, builder in Edinburgh, was proprietor of certain l
subject to an annual feu-duty of £44, 5s. 6d., and burdened w
heritable debt of £1400. In 1830 he borrowed from the pursuer M
W.S., the sum of £700, in security of which he granted an he
bond over these houses, and further obtained for him from the de
Moncur, and three other individuals, a personal bond of corrobo
whereby, renouncing the benefit of discussion, these parties bound
selves as follows:—1st, To pay to Murray the interest of the £70
to Neil; 2d, To keep the subjects over which the heritable se
extended insured to the amount of that sum; 3d, To make paym
the creditors under the prior security for £1400, of the interests
thereon, and report discharges to Murray; and, 4th, To make paym
the feu-duty to the superiors, and report discharges in like man
being declared “ that so long as any part of the said principal sum
tained in and due by the foresaid bond and disposition in securit
remain unpaid, these presents shall continue in full force for the r

—
D DIVISION.
Lord Jeffrey.
F.

and punctual payment of the interest on the balance, whatever it may be."

In January, 1832, the estates of Moncur, one of the obligants in this bond of corroboration, having been sequestrated under the bankrupt statute, he offered a composition of 2s. 6d. in the pound on "the debts owing by him at the date of the sequestration," payable by two instalments at four and eight months. This offer was accepted, and Moncur obtained his discharge (August 6, 1832) on granting bond, alongst with certain parties as his cautioners, for payment of the composition. At this time no part of the interest on the £700 was unpaid, and Murray made no claim in the sequestration. In July, 1833, however, the estates of Neil having been sequestrated, and the prior heritable creditors under the £1400 bond having entered into possession of the subjects, Murray, in May, 1834, raised a summons against Moncur and his cautioners for payment of the composition, which set forth the circumstances above narrated; and further, that he could put no value whatever on the heritable security for his debt of £700, the subjects, as he alleged, not yielding sufficient to pay the feu-duty and expenses, and the interest of the prior debt, and which summons, though inaccurately expressed, was held sufficient to conclude for payment of the composition on the arrears of interest now fallen due on the £700, and termly on that to fall due in time to come, together with the composition on the interest of the prior security of £1400, the expense of insurance and the superior's feu-duty, as they should fall due termly and respectively, or alternatively on the capital sums to which these might be converted on a valuation.

In defence, besides an objection to the framing of the summons, to which it is unnecessary particularly to advert, it was pleaded—

1. That the composition applied only to debts actually due at the date of the sequestration, and that Murray having then only a contingent claim for which he made no demand was not entitled now to insist for any composition thereon.

2. That as the summons was founded on an allegation that no value could be put upon the heritable security by reason of the prior and preferable debt, Murray had no interest to insist against the defenders for payment of the interest on that prior debt to the creditors therein, or of the feu-duty, or the expense of insurance, the obligations as to these being merely for rendering available to him the heritable security, which, he admitted, would not be rendered available thereby; and,

3. That at all events the alternative conclusions for a composition on the value of these annual payments considered as perpetual annuities, and converted into capital sums, was incompetent.

The Lord Ordinary, by interlocutor of date December 2, 1835, repelled the objections to the form of the summons, and on the merits his Lordship (16th December) pronounced as follows, adding the note sub-

said interests on the £700 bond as are past due and unpaid;—
to make payment of the like composition on every sum of interest

* “ This is a very perplexing case, if it be assumed (as the Lord thinks it must be) that the defenders (who are truly the cautioners for composition) are in no event to be burdened with the payment of a perpetuity from generation to generation of their representatives, and that the tithen must be liquidated, and put in a way of final extinction as soon as possible. Considering that it is impossible to say when the lands over which the tithen extends may be sold, and what part of the £700 may be paid off, from the produce of the sale, it seems altogether impracticable to bring the amount of the obligation to a present value, as things now stand; and it therefore seems unavoidable to subject them to the termly payments, as the interests felt by a sale should be effected. By that event (the obligation for the feu-duty necessarily terminating as to them) some part of the £700 would probably be paid off, and the interest subsequently exigible would suffer a proportional abatement. As no farther payment of the principal would then be possible, the obligation for the interest (whatever was its amount) would become a perpetual obligation, and be capable, of course, of being liquidated, and brought to a capital, and settled. This accordingly is the principle of the interlocutor, and the Lord Ordinary does not see what better could be made of it. At the same time it is subject to some obvious objections. If the lands are sold next year, and half the £700 paid off from the price, the defenders will settle by paying the composition for one year's interest, and on the conversion of a perpetual annuity equal to the £700 into a term annuity for ten years, they will pay the composition for ten years, and yet have the same conversion to settle for at last, which may more than double their burden. This may no doubt be remedied, but does not occur in what way it could be remedied, or how a solvent cautioner in Moncur's situation, not having himself a power to force on a sale, could have avoided it.

“ The Lord Ordinary has also doubted whether he should have made any provision as to bringing to a capital any possible remaining interest on the prior

may hereafter become due on the said bond, the terms of payment being always first come and bygone, and that aye and until the property over which the said £700 is secured shall be sold, and the price thereof applied in payment or diminution thereof; and immediately upon such sale and payment, appoints an account to be taken of the then present value of a perpetual annuity equal to the composition on the annual interests payable upon whatever may remain unsatisfied of the said principal sum of £700; and ordains the defenders then to make payment to the pursuer of the capital sum so ascertained, as the present value of an annuity equal to the composition on such interests;—farther, ordains the defenders either to make payment to the pursuer of the composition on any interests that may now be due and unpaid on the bond for £1400 in the proceedings mentioned, and of any feu-duties which may now be due and remain unpaid, for the lands over which both the said debts are secured,—or to report and exhibit to the pursuer receipts and discharges for the said bygone interests and feu-duties from the proper creditors therein; and, in like manner, ordains the defenders either to pay compositions or exhibit discharges, as above, for any future sum of interest on the said bond for £1400, or feu-duties for the said lands, which may become due and remain unpaid after their respective terms of payment, and that aye and until the lands over which the said debt is secured, and for which the said duties are payable, shall be sold, and the price thereof applied in manner foresaid; and immediately upon such sale (the claim for future feu-duties pressing of course against the purchaser), and such application of the price, ordains an account to be taken of the then present value of a perpetual annuity equal to the composition on the annual interests which may be due upon such part (if any) of the said principal sum of his £1400, as may still remain unsatisfied;—and ordains the defenders then either to report and exhibit the receipt and discharge of the creditors in the said £1400, for the then present value, so ascertained, of the said annual composition, or to pay over the same to the pursuer, that he may satisfy and settle with such creditors; and decerns ad interim accordingly.”

Moncur, &c. having reclaimed,

THE COURT pronounced the following interlocutor:—“ Adhere to the interlocutor of the Lord Ordinary, pronounced on the 2d of December last, and submitted to review, repelling the defences founded upon the alleged irrelevancy and inconsistency of the summons; and to this extent refuse the desire of the reclaiming note, and decern: But recal the interlocutor of the 16th of December last, and decern against the defenders to make payment to the pursuer of the composition on the successive interests of the bond for £700, in so far as these are due and unpaid; and farther, for payment of the said composition on the future interests which shall become due on said bond, or the

No. 183.

Mar. 4, 1836.
Crichton v.
Irvine.

balance thereof, the said interests being first come and bygone, and that aye and until the said bond be fully paid and extinguished: Farther, ordain the defenders either to pay the said composition on the interests of the bond for £1400 sterling, which may be now due and unpaid, and also the composition on the feu-duties now due and payable for the subjects over which the said security extends, and to continue said payments or interest and feu-duties, aye and until the said subject shall have been brought to sale for payment of the sums secured thereon, or to report regularly to the pursuer valid discharges of the same; and supersede, hoc statu, consideration of any other points in the cause, and remit the cause to the Lord Ordinary: Farther, allow this decree to go out and be extracted ad interim, and decerns."

THOMAS RANKIN, S.S.C.—JOHN GARDINER, S.S.C.—Agents.

No. 184. PATRICK CRICHTON and OTHERS, Claimants and Real Raisers.—

Sol.-Gen. Cuninghame—Moncreiff.

MRS JANET STEWART OF IRVINE, and OTHERS, Objectors and Nominal Raisers.—*M'Neill—T. Mackenzie.*

Multiplepoinding—Process—Competition—Bankruptcy.—Circumstances in which the Court dismissed a process of multiplepoinding as incompetent, though the real raiser was a creditor to the extent of £1500; and the fund in medio was the estate of a deceased insolvent, not liable to sequestration; and there were about 200 claims made against it, which involved many legal questions, but as to which the most of the claimants had acceded to a private trust for winding up the estate extrajudicially.

Mar. 4, 1836.

1st DIVISION.
Ld. Corehouse.

AFTER the death of the late General Stewart of Garth, in 1829, his sister, Mrs Irvine or Stewart, served heir, cum beneficio inventarii, and was confirmed executor to him. For several years she administered the estate of her deceased brother, consisting both of heritage and moveables, but as it ultimately appeared that he had died insolvent, she executed a trust-conveyance in 1833, in favour of Charles Macdiarmid and others, conveying the whole estates of the deceased to trustees for behoof of his creditors. The body of creditors was very numerous, and was said to amount to about 200; most of the debts were for sums under £100, many under £50, and some under £10. The purpose of the trust was to realize the estate, and pay the creditors, according "to their rights and preferences," conform to a scheme of division to be prepared by the trustees. The trust-deed contained powers to sell the heritage, to submit and refer all questions in relation to the debts due by General Stewart, or the execution of the trust; to assume all just creditors into the benefit of the trust.

&c. It was also provided that Mrs Stewart or Irvine should not be "personally responsible for any part of the debts or claims due by General Stewart, or for any balance which may remain unpaid to any of the said creditors, after drawing whatever dividend they may receive from the said estate and effects, nor for any claims which may be rejected by the said trustees as inadmissible, nor for any other claims or demands whatever arising out of or connected with the heritable and moveable estate of the said deceased General Stewart, or connected with the present trust, or my previous intromissions and management of and with the said estates and effects, or in any other manner of way, the whole being faithfully conveyed and made over to the said trustees, for behoof of the whole just and lawful creditors of the said deceased General Stewart, as aforesaid." The deed contained provisions as to duly advertising for claims, and dividing the free funds among the creditors. A deed of accession was also prepared, which contained a submission of all questions that might arise in the ranking. Many of the creditors signed this deed; but some of the creditors did not, and their precise number, or the amount of their debts, did not appear.

The trustees sold the heritable estate, and paid off the heritable debts, which left a considerable reversion in their hands, applicable to the claims of the personal creditors. They made repeated advertisements, and addressed printed circulars to the known creditors. They also laid a memorial and queries before the Dean of Faculty for direction as to the claims lodged. The queries related, inter alia, to the period at which prescription should be held to be interrupted, in relation to various claims, and classes of creditors; as to the effect due to various unstamped vouchers; as to the validity of various bills of exchange, some of which bore markings by the General, others by Mrs Irvine, others by a sub-factor, &c.; as to the effect due to acknowledgments of debt, which were granted by Mrs Irvine when in the belief that the estate was solvent; as to the competency of referring a variety of questions to her oath; as to certain claims in which Mrs Irvine insisted as creditor against the estate, &c.

Having obtained the Opinion of the Dean of Faculty, the trustees made up a scheme of division, in which they ranked claims sustained, to the amount of £16,383; claims doubtful, £1729; claims still unvouched, £501; and claims rejected, £877. They intimated a dividend of ten shillings per pound as ready to be paid on the claims of the first class; and they reserved funds to meet a similar dividend as to the doubtful and unvouched claims, if these should ultimately be established. But they did not state any sum as reserved on account of the rejected claims. It was anticipated that a subsequent dividend of four shillings per pound might probably be made. In these circumstances, Patrick Crichton and others, the trustees of the deceased Daniel Macdowall, who was a creditor of General Stewart for £1500, and whose claim had been lodged and admitted, but who had never acceded to the trust, raised a multiplepoint-

No. 184. ing in name of Macdiarmid and the other trustees, under Mrs Irvine's trust-deed.

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 ar. 4, 1836.
 ichton v.
 vine.

The summons set forth that the raisers "are daily harassed at the instance of parties whose claims are not satisfactorily vouched, and appear not well founded, and by others whose claims are totally inadmissible: That amongst the claims which appear to be just and duly vouched, and which are of greater amount than the sum realized and in the hands of the pursuers for distribution; some are maintained to be preferable to the others, and the pursuers have been interpellated by creditors, whose claims are alleged to be preferable, from making any payments to other creditors, unless the said creditors, whose claims are alleged to be preferable, shall be paid in full: That, in these circumstances, it is necessary that the pursuers distribute and divide the funds in their hands under judicial authority, and that they be exonerated of their intromissions in manner underwritten."

The nominal raisers lodged objections to the multiplepoinding, stating, inter alia, that the deed of accession "was signed by Mrs Irvine, and also by a great proportion of the creditors." They pleaded that the trust-administration of the insolvent estate was a measure which would be eminently beneficial in winding it up with the least delay and the least expense: that there were numerous small creditors to whom the dividend of ten shillings per pound, which was ready to be paid, was of the utmost consequence, as some of them were so poor as to be now receiving parochial relief: that every precaution which prudence could suggest for bringing all the creditors into the field, and ranking their claims according to law, had been resorted to, short of going into Court, which it was the very purpose of the trust to avoid; that as the real raisers, Macdowall's trustees, were the only parties who desired a judicial distribution of the estate, they should have raised an action of count and reckoning against the objectors, which would have produced full payment of their debt, if they were entitled to it, and they ought not to have raised a multiplepoinding, which would force into a judicial discussion a number of claimants who were all satisfied to have their rights extrajudicially disposed of; and that there was so much inexpediency, if not actual incompetency, in the course adopted by the real raisers, that the Court ought to dismiss the action.

The real raisers answered, that the process of multiplepoinding was both competent and expedient, if not inevitable. The estate was insolvent, and every creditor was struggling de damno vitando. It was his right to see that no competing claimant received any part of the fund in medio, without having a legal title to it, and nothing but a court of law could decide on the great variety of interests involved. The whole creditors had not even acceded; and various claimants had been absolutely rejected, who might not acquiesce in such rejection; and there might be many claimants who were not yet certiorated of the proceedings, or had not a

forward. The multiplepointing was, therefore, competent, and, if there was truly an unanimous consent by all the other claimants to be satisfied with an extrajudicial arrangement, they might assign over their claims to the objectors, who could lodge a corresponding claim in the multiplepointing, and thus have the whole question as cheaply discussed in this process, as if the real raisers had brought an action of constitution against them, according to their suggestion.

The Lord Ordinary “sustained the objections to the competency of the action; dismissed the same, and decerned: and found the real raisers liable in expenses, reserving to them to bring such other action as may be competent.”*

* “NOTE.—General Stewart died deeply involved in debt. His sister served heir to him cum beneficio inventarii. She executed a trust-deed to which it is said almost, if not all, the creditors, to the number of about 200, have acceded; the trustees have realized the property, and it is in the course of distribution, agreeably to a scheme which has been submitted to the consideration of eminent counsel. The real raiser of this multiplepointing, acting for the trustees of one creditor, lodged a claim, and was ranked by the trustees on General Stewart's estate; but he refused to sign the deed of accession, and it rather appears from the correspondence produced, that he had not acceded *rebus ipsis et factis*.

“The questions are, 1st, Whether this single creditor is entitled not only to have his own claim tried in a court of law, but whether he can set aside the trust altogether, and throw the whole funds into Court, to be judicially distributed. 2d, If he is entitled, whether this can be done by a multiplepointing raised in the name of the trustees, but without the consent, and contrary to the wishes of them, and of the 200 acceding creditors. There can be no doubt, that if he has not acceded, he has a direct action against the trustees for his debt, and if they do not choose to pay in full, he may force them to count and reckon for their intromissions. But this by no means involves the necessity of making all the creditors parties, or defeating the process of distribution under the private trust, though perhaps it may possibly lead to that result. If General Stewart were alive, and was a trader, the private trust would not have prevented a sequestration, and as it is, the estate might have been brought into Court by a ranking and sale. But the proceeding which the non-acceding creditor has adopted, is of a different description. Without constituting his debt, or raising diligence upon it, he brings a multiplepointing in the name of the trustees, founding upon the trust-deed as their title, and setting forth the powers which it confers upon them, and he subsumes in their names that it is necessary the funds realized should be distributed under judicial authority, and that they should be exonerated of their intromissions. Now, it is settled law, that the real raiser of a multiplepointing cannot impeach, in his summons, the title of the nominal raiser, or set forth in his name facts inconsistent with that title. The conclusion for exoneration in this process is a striking illustration of the propriety of that rule. The nominal raisers are acting under a trust-deed, by which they are not only authorized but bound, 1st, To realize the funds, and afterwards to apply them in payment of the debts according ‘to the rights and preferments’ of the creditors, conform to a scheme of division to be prepared under their own authority, and to whom, in the deed of accession, there is a submission of all questions which may arise among the acceding creditors in the ranking. It is plain, therefore, that they would not have been entitled, without the consent of all the acceding creditors, to stop short before they had performed half their duty, to throw the whole trust affairs into Court, and to create all the tedious and expensive litigation, which it was the very object of the trust to prevent. As this would have been clearly incompetent in an action raised at the instance of the trustees

No. 184. The real raisers reclaimed.

Ar. 4, 1836.
 Lichton v.
 Fine.

LORD PRESIDENT.—I am disposed to adhere. The real raisers lodge claim, and it was admitted without dispute. The objectors are ready to dividend of ten shillings upon it to them, and the chief plea urged against acquiescing in this, is the alleged risk that some other claims may be imp sustained by the objectors, as trustees, which will unduly diminish the c fund. But surely that plea is at least prematurely stated. This is a case special circumstances indeed; there is a very great expediency in the view has been taken by the Lord Ordinary, and I see no ground to compel us regard that consideration; and, on the whole, in respect of the specialties case, I think the judgment of the Lord Ordinary is well founded.

LORD BALGRAY.—I concur. Where a creditor has not acceded to a trust, it is free to him to bring his action of count and reckoning against trustees. That would have been the proper remedy in this case. The real were not entitled to bring, and were not justifiable in bringing, this multiplepinding, and disturbing the extrajudicial settlement of all the other claimants. would have got full justice for themselves in an action of count and reckoning they would have done so, without prejudicing other parties in the manner which they do prejudice them by this process.

LORD GILLIES.—Every creditor may bring his action of constitution against his debtor, or the representative of his debtor. That is the natural and remedy of the creditors, and why was it not adopted here? The only ground on which a multiplepinding can be brought, and which is therefore necessarily stated in every summons of multiplepinding, as it has been here

themselves, so it also must be incompetent in an action raised in their name without their consent. The real raiser may perhaps be able to attain his object in another shape, but it is thought that he cannot do so in this shape. If the multiplepinding were sustained, the very first step must be to cite the 200 creditors, a number of whom are already cited, and the expense of these citations by no means inconsiderable, would fall on the fund in medio, and afterwards would all be obliged to lodge separate claims, or be at the expense of executing assignments to trustees for their behoof, a heavy burden on a multitude of creditors many of whose claims, it is said, do not exceed ten shillings. But if the raiser tries his own case in an ordinary action, the trustees are at once brought in the field, and it becomes a simple competition with them, acting for all the other creditors.

“Further, it may be observed, there is no double distress here, nor the prospect of it. There is but one creditor who demands a judicial decision on his claim; all the rest have bound themselves to abide by the judgment of the trustees, which they consider by far the cheapest and most convenient mode of settling up the affairs of the deceased.

“The Lord Ordinary has thought it right to state his views at length, but the process of multiplepinding, of the greatest utility where it is properly applied, has recently been attempted in cases to which it is totally inapplicable, and a sometimes styled a congeries of actions, there seems to be a notion that it will supersede every other form of action. See *Ronaldson v. Johnston, &c.*, Dec. 1834.”¹

¹ (Ante, XIII., 180).

allegation of double distress. It is a part of the premises which is essential to No
 infer the conclusions of the summons: and, accordingly, it is here stated, that
 the pursuers are daily harassed at the instance of parties whose claims are not Mar.
 satisfactorily vouched, and appear not well founded, and by others whose claims Crichton
 are totally inadmissible," &c: and "that it is necessary that the pursuers dis- Irvin
 tribute and divide the funds in their hands under judicial authority, and that
 they be exonerated of their intromissions in manner under-written:" These are
 stated as the grounds of bringing this process; yet the statement is contrary to
 the fact. So far as appears, the objectors are not harassed by various claimants.
 So far as appears, the whole claimants excepting the trustees of this one creditor
 would acquiesce in an extrajudicial settlement. I am at a loss, therefore, to hold
 ourselves bound to authorize this process, when it is raised upon alleged grounds
 which are directly contradicted in point of fact. Are we to authorize it to go
 forward, in opposition to the terms of the summons itself? The real raisers take
 the high ground of their absolute right to raise this process, and in the same way
 any one of all the creditors, any one even of those for a debt under £10, might
 do the same, and might insist on a judicial discussion of all the claims against
 the estate, and a judicial distribution of the fund, even in regard to all the other
 creditors who were contented to have an extrajudicial adjustment. If the Court
 cannot dismiss this multiplepinding, they could as little dismiss such an action,
 though raised by the smallest of all the creditors on the estate. I hold that the
 Court have a power to put a stop to a proceeding which will evidently entail a
 very and grievous expense upon this trust-estate, and in which the statements
 alleged in the summons in order to found the action are contradicted by the facts
 of the case.

LORD MACKENZIE.—I am of the same opinion. I do not conceive it to be the
 absolute right of the real raisers to tumble the whole of this estate and the claim-
 ants into Court per aversionem. If it were so, it would not only be the right of
 any creditor, however small, to do so; but it would equally be the right of every
 pretended creditor to bring the process, and force on a judicial discussion in this
 manner. There is no such absolute right; and, short of that, I can see no ground
 for hesitating to adhere to the interlocutor of the Lord Ordinary.

THE COURT adhered, and awarded additional expenses against the real
 raisers.

J. GORDON, W.S.—J. ROBERTSON, S.S.C.—Agents.

No. 185.

Mar. 4, 1836.

Cowan v.
Farnie.

JAMES COWAN, Senior, and OTHERS, Pursuers.

JAMES FARNIE and OTHERS, Defenders.—*Rutherford—Shaw.*JAMES COWAN, Junior, Compeerer.—*D. F. Hope—Patton.*

AND

JAMES FARNIE and OTHERS, Pursuers.—*Rutherford—Shaw.*JOHN MOWBRAY and ANDREW HOWDEN, Defenders.—*Keay—Montell*
(Conjoined Actions).

Process—Advocate—Agent and Client—Implied Mandate.—1. An action was raised in the Court of Session, in name of Cowan and five others, but without the authority of Cowan: after a record was closed, Cowan lodged a disclaimer, and the other pursuers made no farther appearance; the defenders obtained from the Lord Ordinary a judgment of absolvitor with expenses against all the pursuers, and Cowan reclaimed; the defenders then raised an action against the law-agents of the pursuers, to free and relieve them of all the consequences of the action in which they had unauthorizedly used Cowan's name: the actions were conjoined, and the Court altered the interlocutor of the Lord Ordinary, in so far as it subjected Cowan and, quoad ultra, subjected the law-agents in liability, (1.) for the expenses incurred by the defenders in the action in Cowan's name; (2.) their expenses in the action of relief; and (3.) the expenses incurred by Cowan in lodging his disclaimer subsequently; reserving to the agents their claim of relief against their actual employers who had assured them that Cowan had concurred in the action. 2. Circumstances in which law-agents were personally subjected to defenders for the expenses of a process in which they unauthorizedly used the name of one out of six pursuers, though the agents had acted with perfect professional bona fides: Question how far the presumption of mandate, which is implied in the appearance of an advocate in a party's name, will bind such party if he has granted authority to appear.

Mar. 4, 1836.

1st Division.
d. Corehouse.
B.

IN 1791, James Cowan, senior, shipwright in Burntisland, married Helen Coutts, who was possessed of some heritable subjects there. By their contract of marriage, these subjects were disposed to the spouses liferent, and to the children nascituri, in fee. In 1819 James Cowan senior, and his wife executed a disposition and settlement by which they disposed the subjects to their six children, in fee, reserving their liferent. The eldest son of Mr and Mrs Cowan, was James Cowan junior, tailor in Glasgow. In 1823, being desirous to effect a loan on the property, Cowan, senior, and two of his sons, put the titles into the hands of Mowbray and Howden, W.S., who obtained a loan over it from the late A. Burns, W.S. It did not appear that Cowan, junior, was one of the sons who had called with his father on Mowbray and Howden when giving the titles to them. Before effecting the loan, Mowbray and Howden got the infestment expedited, on the disposition of 1819, in favour of the children in fee. Several of the principal title-deeds were placed in the hands of the creditor.

About the same time Andrew Howden, W.S., a partner of Mowbray and Howden, was employed to write a ratification on the back of the disposition and settlement of 1819, in order that the family might

en wrote the ratification, and the family, including Cowan, junior, No. 18
it.

828, Cowan, senior, and some of his family, waited on Mowbray ^{Mar. 4, 18}
owden, and instructed them to raise an action against James Farnie ^{Cowan v. Farnie.}
hers, on account of alleged encroachments on the subjects in
land. They at the same time mentioned that James Cowan,
concurred with them, and they put into the hands of Mowbray
owden, five writs, forming part of the progress of titles prior to 1791,
er with a petition which had been presented by Mr and Mrs
, senior, to the dean of guild, in 1803, and a plan of the subjects,
ed in 1804. Cowan, senior, at the same time desired Mowbray
owden to apply to Burns for any other titles which might require
roduced in the action.

ore this time Mrs Cowan was dead. Cowan, junior, did not wait
owbray and Howden along with his father, nor did he give them
ritten mandate, or hold any communication with them.

4th June, 1828, an action of declarator was raised in name of
es Cowan, senior, shipmaster in Leith; James Cowan, junior, tailor
sgow;" and three other sons and two daughters of James Cowan;
; two of the sons named Thomas and Andrew resided in London
eir father was stated to be their mandatary; the action stated that
rsuers were heritably infeft in the subjects, all which were fully
ed from the titles; it then stated that James Farnie and Others,
ere coterminous proprietors, were making unwarrantable encroach-
; and it concluded that the defenders should exhibit their titles to
espective properties; and that it should be declared "that the pur-
have, in virtue of their rights and infeftments in the subjects and
before described, the only good and undoubted right and title, in
te property, to all and whole the foresaid close, and that the same,
imed and taken possession of by the defenders, is a part and por-
f, and comprehended within the bounds and limits of the subjects
thers particularly before described, and of consequence, that the
belongs heritably in property to the pursuers," &c. There were
linate conclusions as to ordaining the defenders to cede possession.
; with the summons were produced a sasine in favour of Mrs Cowan
had been passed in 1794, and also the sasine which passed in 1823
the disposition and settlement of 1819. Defences were lodged, and
rd was made up, in the course of which, nine titles of the progress
its to the subjects, besides a plan of them, were produced on the
f the pursuers.

1829, the defenders called for mandates on the part of the two
ne who resided in London. None were produced, and the defen-
btained decree of absolvitor, as to them, with expenses. In 1830
~~the~~ was closed, and during all this time, Mowbray and Howden,
rd as agents for the pursuers. Cowan, senior, then died, after

for the pursuers.

“ *Patton*, for the said James Cowan, junior, stated that although the action above mentioned had been brought in his name as a pursuer, he never authorized the said action, nor gave any mandate and authority to any one to raise it in his name; that he never knew, or heard of the said action until a few weeks ago; that he repudiated and disclaimed the appearance made for him in the said action; and protested that he should not be made liable for any expenses incurred thereby.”

The Lord Ordinary thereon “ in respect of the foregoing matter, James Cowan, junior, disclaiming the appearance made for him in the said action, dismissed the same in so far as he the said James Cowan, junior, was concerned, and decerned; and before answer as to the claim of expenses incurred by the defenders against the said James Cowan, junior, all the account thereof to be given in, and remitted to the auditor to audit the same, and to ascertain what part thereof, if any, has been occasioned by the appearance made for the said James Cowan, junior, and to report thereon.”

In June, 1832, the defenders obtained decree of absolution from the expenses against the two daughters of Cowan, senior, who had been abroad and left no mandate.

Thereafter the Lord Ordinary, on 15th February, 1833, heard counsel for the parties, and considered the report of the auditor in respect of the disclaimer for James Cowan, junior, and that notwithstanding no other pursuers now appear to support the conclusions of the auditor, he assoilzied the defenders from the whole conclusions of the action, and the whole pursuers, conjunctly and severally, liable to the defenders' expenses, approved of the auditor's report upon the account, and

to be against Mowbray and Howden and their real employers, for
 unwarrantably used his name. Farnie and others refused to ad-
 at Cowan, junior, had given no authority to Mowbray and How-
 out they contended that they were not bound to enquire into this,
 se even if he had not done so, he was equally liable to them for
 ses, as if he had given authority, reserving to him his recourse
 at the parties who had improperly used his name, if he really had
 authorized them.

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at this point the Court ordered minutes of debate. Before this order
 pronounced the agent for Farnie and others had repeatedly written
 Mowbray and Howden requesting a sight of the mandate or authority
 which they acted, and had received no answer.

added by Farnie and others.

In the special circumstances of this case, Cowan, junior, was liable
 for the expenses of process. He had an interest, along with the other
 in the property of the subjects regarding which the action had been
 . If he left the absolute control of the titles in the hands of his
 or his brothers, and they were thus enabled to put these writs into
 the hands of agents who raised an action in the name of the whole family
 including Cowan, junior, he must suffer for this, because he ought to have
 taken better care how the common title-deeds were used. The agents'
 possession of the titles gave them the appearance of holding an implied
 mandate from all the nominal pursuers; and, the defenders, having thus
 been led, by the negligence of Cowan, junior, to rely implicitly on his
 being duly authorized these agents, he ought to be liable to the defen-
 ders in regard to the expenses of process, just as much as if he had truly
 authorized these agents.

But, independently of any specialty, Cowan, junior, was liable for
 the expenses, because a counsel had duly appeared at the bar and pleaded in
 his name, and agents had carried on a process in his name, with every
 apparent regularity in point of form. If his name was used without
 authority, he would have his redress against the counsel and agent who
 so used it: but in the mean time, their conduct had rendered him
 liable to the opposite party the defenders.

It was a general rule, in all supreme courts, that the appearance of a
 counsel was the same with the appearance of the party. An advocate's
 office was *munus publicum*; he was sworn, *de fidei administratione* offi-
 ciated by the trust and privilege of his gown, he had a presumed man-
 date to all clients for whom he appeared, within the kingdom, which
 obviated the necessity for producing a written mandate, and compelled
 the defender to join issue with the party in whose name he appeared, under
 the decree going forth against such defender. If, therefore, a party
 afterwards disclaim the counsel's presumed mandate, to the effect
 of judging an opposite party, it would unhinge the security of judicial
 proceedings; and it would lead to frequent and dangerous fraud, as a party

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and his agent could concert to destroy all evidence of employment at any stage of a cause, and then the client might disclaim the whole proceedings. Whereas, if the client was held bound by the proceedings, in all questions with the opposite party, reserving his relief against his own alleged agent, if he used his name unwarrantably, it would generally be an easy matter for him to disprove the employment, when truly unauthorized, and seek redress from the agent, besides, if necessary, instituting a reduction of the unwarranted judicial procedure. But, in the first instance, he was bound quoad the opposite party, and there were many authorities which proved this.¹

Pleaded by Cowan, jun.—

1. He had not been guilty of any negligence in allowing the titles to remain in his father's hands, because his father held a right of reserved liferent; and Cowan junior's own right to a sixth part of the fee, did not come into operation till after his father's death. There was no specialty, therefore, to operate against him, and the general question arose, whether a party could be bound by the unauthorized appearance of a counsel or agent for him in Court.

2. In regard to the decisions which had any tendency to support the plea of Farnie and Others, they referred generally to the case of defenders, who, after receiving a citation, which certiorated them of the dependence of judicial procedure, did not take care to see whether their name was used afterwards or not. But this was a different case. The name of a pursuer had been unwarrantably used, while he was totally ignorant of it, and the question was, whether he could be more bound by the false use of his name in a summons, than he would be by its being forged to a bond. He maintained that he could not. The presumed mandate implied in a counsel's gown, never could prevail against the actual fact of there having been no authority. Such a presumption was not *juris et de jure*; for that applied only to certain legal fictions,² which could not be redargued; but, in every case of presumption, the rule applied, *presumptio credit veritati*. Accordingly it was the right of any opposite party to demand, if not from the counsel at least from the agent, a sight of the authority by which procedure was carried on against him, so as to discover whether he had a real opponent, or a mere man of straw to contend with.

¹ 3 Ersk. 3, 33; Wedderburn, July 14, 1610 (7326); King, Jan. 10, 1694 (12247); Hardie, Jan. 4, 1709 (12248); Campbell, May 29, 1821 (ante, L, 37); Bryan, Nov. 13, 1824 (ante, III., 282;—or 198 new ed.); Gilfillan, March 8, 1833 (ante, XI., 548); 2 Pothier, 899, ed. 1781; Spottiswoode, 7; 2 Mack, 228; 1 Stair, 12, 12; 4 Bank, 3, 26; Hamilton, Nov. 25, 1813 (F.C.); Darling's Form of Proc. 49; Ballantyne, Dec. 7, 1676 (Dict. 348); Stewart, Feb. 3, 1681 (Dict. 353); Melville, Dec. 7, 1681 (Dict. 355); Butler, July 31, 1708 (Dict. 356); Marchmont, June 7, 1715 (Dict. 358); Wallace, May 31, 1821 (ante, I. 40;—or 43 new ed.)

² Mascard. de Prob. con. 1321, No. 24.

each party chose to go on without requiring to see such authority, No. 185
 stated. It would indeed lead to the most alarming injustice, if a
 affecting property, or status, could be carried on behind a man's
 and totally without his knowledge, and he was yet to be bound by
 proceedings, and left to seek his remedy of recourse, so far as he
 met it, against those who had unwarrantably used his name. And,
 rightly, the weight of authority was opposed to any such doc-

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considering these minutes of debate, it was suggested that, if, on
 hand, Mowbray and Howden could instruct their employment by
 jun., this would defeat his disclaimer, and all that he had found-
 ; while, on the other hand, if Mowbray and Howden acted with-
 authority, they were liable to relieve Farnie and Others of their ex-

It thus appeared that the general question, argued in the minutes
 te, would not require to be decided if Mowbray and Howden were
 into the field, and the Court granted warrant to serve on them a

Cowan's reclaiming note, and of the minutes of debate, and to
 m to appear for their interest. This was done, but as they de-
 o appear, and as they did not exhibit to the agent of Farnie and
 any mandate from Cowan, when asked to exhibit it, an action
 sed, with the approbation of the Court, by Farnie and Others,
 Mowbray and Howden, which narrated the procedure that had
 lace, together with their failing to instruct their mandate when
 n, and concluded for decree against them "conjunctly and seve-
 free and relieve the pursuers (Farnie and Others) of the said
 raised in the name of the said James Cowan, jun., and of the
 consequences and effects thereof, and to free and relieve the pur-
 f all damages and expenses, they may thereby sustain, and, in par-
 to make payment to the pursuers of the said sum of £79, 0s. 5d.,
 he taxed amount of expenses decerned for, by the interlocutor of
 orehouse, dated 16th February, 1833, with interest thereon from
 h of February; together with the sum of £100, or such other sum,
 r less, as shall be ascertained by our said Lords to have been the
 es incurred, or to be incurred, by the pursuers, posterior to the
 the said interlocutor in the said action; as also, with the sum of
 r such other sum, more or less, as our said Lords shall modify as
 enses of the said process, in case the same shall be awarded to the
 mes Cowan, jun., against the pursuers," besides the expenses of
 ion of relief.

defence against this action, Mowbray and Howden stated the
 r of their employment in the terms which have been already

Others had been allowed to extract decree in his own name for £79, 0s. 5d., and should, therefore, have been a co-pursuer; Farnie and Others might have called for a sight of the mandate of Cowan, jun., before going on in their action, and should now, therefore, bear the consequences of not having done so.

Farnie and Others answered—

1. That the professional bona fides of Mowbray and Howden were not disputed, but they had acted rashly, and without a warrant. They were now, therefore, be liable, in regard to expenses of process, pro Cowan, jun., would have been, supposing him to have given a mandate, and his name to have been warrantably used.

2. The insertion of the name of Cowan, jun., was necessary in going on the action; but, even if it had not been so, and had not cost extra expense, it would still have made him liable for expenses, Mowbray and Howden had possessed his authority for inserting it. If they had not his authority, they must take the liability upon themselves.

As to the subordinate defences—

The action was not premature, as Cowan was repudiating his mandate and denying that he had ever granted a mandate: and though the agent might extract decree for the £79, 0s. 5d., he had not done so, and his employers remained liable for the whole sum till he was paid. There was no faulty omission in not calling on Mowbray and Howden to show their mandate, at commencing the cause; the only error was on the part of these gentlemen in not having one to show.

In this action the record was closed on summons and defences. The action having been reported to the Court, their Lordships referred it along with the previous action, to Lord Corehouse.

giving consideration of the cause,

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JILLIES observed—I am a little doubtful whether the action of relief brought by the proper party here. I rather think that Cowan, junior, ^{Mar. 4, 1836} ^{Cowan v. Farnie.}

It has been settled law for two centuries at least, that no party in this Court is to require production of the mandate or authority, in virtue of which the agent of his opponent appears, that person being within the kingdom of Scotland. Scottiswood states the practice as early as 1627, and he is confirmed by Johnston, and Erskine. But if Cowan's plea is sustained, every party, with the exception of the agent, is exposed to the danger of having the whole procedure in a cause, annulled by the bare disclamation of his agent, and even after sentence, annulled by the bare disclamation of his agent, and of losing all the expense he has incurred in the suit, with no means of redress but an action of relief against, perhaps, an insolvent attorney. To impose the burden of proving employment on him, as in a question with his opponent, in most cases, be to require an impossibility; for, if fraud is intended, the production of employment will of course be suffered to exist.

The production of a mandate cannot be required by the opposite party, it is the duty to follow, that the party for whom the procurator professes to act, at the first instance, at least, be bound by his actings. It is against him that the jury, in the first instance, is committed, and therefore he should be first to seek redress. He has also the best means of obtaining it, knowing what has passed between himself and the procurator, or if any thing passed between them at all. By this course the danger of collusion, between the party who appears and the attorney disclaimed, is prevented, or greatly lessened, which, otherwise, might easily be practised, with scarce the possibility of detection. Moreover, if a fraud is contemplated against the attorney, or an advantage taken of a bona fide mistake on his part, the attorney has better means of defence against that attempt.

It is true that there is a danger on the opposite side to be guarded against. An agency may, possibly, be formed to bring forward an unauthorized attorney to defend, that a judgment in foro contentioso may be obtained against a party, and a warrant of the proceedings. With regard to this, it may be remarked, that there is much less chance of its occurrence, because it would infer a heinous crime, well concerned to the highest arbitrary punishment known in the law. But if it is proved, undoubtedly an action of reduction would lie to set aside the proceedings, with damages and expenses. In that action, however, the party injured is the pursuer, and bound in that character to establish his case, not by a mere disclamation, but by competent evidence. Further, it may be conceded, that the party bound in the first instance by the actings of the unauthorized procurator, should fail to obtain redress from the funds of that person, on account of his poverty, it may be incumbent on the opposite party, quoad ultra and subsidio, to relieve him. It is understood that this is the practice in the Courts of Session, and will be immediately pointed out.

The pursuer, Cowan, seems to be sensible that these consequences follow from his plea, that the procurator is not bound to produce his mandate: for he says, that the procurator lies only to the advocate, in contradistinction to the agent, and that the agent may be called upon, at any time, to show by what authority he acts. That is a mistake; for the rule obtained before the separate profession of an agent, and while the advocate alone, or with the assistance of his servant, was responsible, conducted every part of the cause. And certainly as he is quoted where the Court was required to sist process until a party should inquire and examine whether the agent of his opponent had authority, in order demanded that the agent, in contradistinction to the advocate, should produce his mandate.

The rule of the law now taken seems fully confirmed by the cases which have been decided. In *Ballantine v. Edgar*, it is expressly laid down in a very strong

No. 185. being under decree at the instance of Farnie and others, should have brought his action of relief against Mowbray and Howden: in place of which, he presented

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case, that if an advocate appears without warrant, it will not weaken the decree, though it subjects him in damages. It is said that the party disclaiming there was a defender, who had been cited, and who is therefore distinguishable from a pursuer disclaiming, as the latter may have had no notice whatever of the proceedings. The answer appears sufficient: 1st, That the law is stated by the Court, in the most comprehensive terms, as equally applicable to pursuer and defender; and, 2dly, That there is no good reason for the distinction, because a defender, though cited, may have intended that a decree should go in absence, by which no expense is incurred, and against which he has the privilege of being reponed; whereas, by the unauthorized appearance of a procurator, it may become a decree in foro, and he may be saddled with enormous costs. It is also said, that the party disclaiming in that instance restricted his proof to the oath of his advocate; but what proof can be more complete, if both the mandant and the mandatary admit the non-employment, the latter doing so upon oath, and the other party offering no proof or presumption that there was a mandate?

“More than a century afterwards the same doctrine was laid down as explicitly and with still greater authority, in *Hamilton v. Marshall*. Lord Meadowbank holds the point to have been settled from the time the College of Justice was opened, and Lord Robertson points out the evils which would necessarily follow on any other principle. That a reduction might still be competent was admitted on all sides, and the nature of the thing requires that it should be so. But the reduction while it lays the onus probandi on the pursuer, does not stop the decree or other proceedings from operating, in the mean time, as between the parties in the cause, nor will it relieve the pursuer of the reduction from discussing, in the first instance, the agent who has culpably or from negligence proceeded without a sufficient warrant. Far less does it lead to the inference, that a party, by a simple disclaiming, which is the case here, can at once slip out of the cause, and leave the question to be tried between his opponent and his own ostensible agent, and that entirely at the expense of his opponent, necessarily ignorant of all the circumstances of the cause.

“The case of *Wallace* is no authority on the other side. It is true that a bill of suspension was passed, but the letters were afterwards found orderly proceedings. There might have been reason to suspect that the charger fraudulently sisted, as trustee that he might obtain expenses from the creditors, the original suspender being bankrupt; and it is necessary to observe, that any such fraud or collusion would at once annul the proceedings, and subject the party in expenses. The reported case of *Anderson* occurred in similar circumstances. It seems, from the account given, to have gone no farther than the passing of a bill of suspension, there might be reason to suspect that the charger fraudulently sisted the trustee merely for the sake of getting expenses from the sequestrated estate.

“It is thought, therefore, that all the authorities and decisions are in favour of the rule in question, that the mischievous consequences, represented as flowing from it, are imaginary, the remedy of reduction being always competent, or of suspension, if there is reason to suspect collusion between the agent and the party against whom he ostensibly acts; and it may be also a subsidiary claim, at the instance of the party injured against his opponent, the agent not being responsible. On the other hand, if the one rule were not observed, the magnitude of the evil alluded to by Lord Robertson in *Marshall's* case would be immense. To take but one instance: Suspensions are daily presented in mala fide, and for no purpose but delay. But that delay might be obtained with impunity, after years of procedure both in the Bill-Chamber and in the Court, by a mere disavowal of the proceedings on the part of the suspender, while the charger was left to seek his relief from an intervenient agent, selected perhaps, solely on the ground of his insolvency, a person who looked forward to a cessio, in which his unwarranted appearance would be attributed to innocent mistake or misapprehension, in a story concerted between

a reclaiming note, and then Farnie and others brought their action of relief. What right had they to do so?

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Fa

self and the suspender. On the other hand, when this suspender and this agent are left to contest the matter between themselves, the real state of the facts must be disclosed, and the danger of collusion prevented.

"Lord Meadowbank, in the case of Marshall, referred to the law of England as having adopted the same rule, and the observation appears to be correct. It is stated, that 'if an attorney, without warrant, appears, this is a good appearance as to the Court, and the attorney is only liable to an action.'¹ Chief-Justice Holt is reported to have said, 'The course of this Court is, where an attorney takes on him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him if it turns out otherwise.'² And again, 'An attorney appeared and judgment was entered against his client, and he had no warrant of attorney; and now the question was, if the Court should set aside the judgment? Et per cur., If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer; for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means.'³

"The Roman law, and the commentary of Donellus upon it, have been cited certainly to little purpose, that very author distinctly explaining, that the procurator for the defender may be required, in initio litis, either to produce his mandate, or to find caution judicatum solvi; while the procurator for the pursuer is, in most cases, required absolutely to produce his mandate, and in every other case to find caution that his actings shall be ratified by the party. If the French law at present is accurately stated by Cowan, and if there is no security either from the register, which every procurator is required to keep of his actings, and to make patent when demanded, or in some other way, it is thought that the rule, that the procurator is bound to produce no authority to act, while at the same time all his actings may be annulled by a simple disavowal, is not founded on reason or expediency.

"But it rather appears to the Lord Ordinary that this case may be decided on the special circumstances attending it, without going into the general question at all. The action now before the Court, at the instance of Farnie against the agents, is closed upon the summons and defences. It is stated for the defenders, and not denied by the pursuer, that Cowan, the father, was originally the proprietor of the subjects to which the action related; that he afterwards disposed the fee to his children, including James Cowan, reserving his own liferent; that Cowan senior, and certain of his children, personally instructed the agents to raise this action, and stated to them that James concurred; and indeed without his concurrence, the action could not have been effectually carried on. It is farther stated by the defenders, and not denied in this record, that the titles of the subjects were put into their hands by the other joint proprietors, that is, by the other brothers and sisters exclusive of James Cowan. As in a question, therefore, between the agents and Farnie, the agents appear to have instructed their employment; because, even in an inferior court, and a fortiori in this, the production of titles is a sufficient mandate, which does not admit of being redargued, more especially when there is no allegation whatever on the record that they were improperly obtained. And this is the express decision in King v. Seton of Barns, where 'Barns alleged the defect was truly in absence, seeing the procurator compearing had no mandate. Answered,—His producing writs relative to the cause presumes a mandate. Replied,—These writs were in his hands upon another account. The Lords found

¹ 1 Kable, 89.

² 1 Salkeld, 86.

³ 1 Salkeld, 88.

No. 185. *Rutherford.*—They were ordered by the Court to do so.

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LORD PRESIDENT.—The actions can now be conjoined, as they are both before the Court, and we can pronounce such a judgment as will justly extricate all the respective rights of these parties.

The actions were then conjoined, and, on the motion of Mowbray and Howden, they were allowed to put in “a Minute without argument, stating specially the title-deeds which they allege to have been put into their hands as implying a mandate, and at what time, in what manner, and by whom those deeds were so delivered; and also to state, by what evidence they propose to prove their averments.”

This was followed by answers, but nothing new was elicited. The cause was then finally advised and decided.

LORD GILLIES.—I have been very much impressed by the views contained in the note by the Lord Ordinary; and I am not disposed to dissent from the principles laid down in it. But I apprehend there is a distinction between the power of a counsel and agent to bind a party, in whose name they unauthorizedly appear, so far as regards the merits of a decree, and their power to bind him so far as regards the expenses. It is necessary to keep this distinction in view in referring to previous decisions. It is a question of the expenses alone, of an unauthorized appearance, which is now before the Court: and as Messrs Mowbray and Howden, who certainly possess the highest professional respectability, have acted rashly in this instance, and without a warrant, I think they ought to be subjected in the expenses, and that Cowan, junior, should not.

it sufficiently instructed that he was his ordinary procurator, and had a mandate in this cause.’

“It is true, in the original cause between Cowan and Farnie, Cowan alleged that he left the title-deeds with his father; that his father put them into the hands of Burns, a writer, with a view to raise money, and that it was from Burns that the agents obtained them. But it may be remarked, 1st, That it was his own fault that he intrusted them to his father as custodier; and if the custodier exceeded his powers, it is he who must be responsible to third parties; and, 2dly, It is not enough to allege that the writs came into the agent’s hands for another purpose, for the possession of writs, ‘without proof of the giving,’ as Lord Stair observes, is a sufficient mandate. But what appears conclusive upon the subject is, that after James Cowan was explicitly informed, on the 25th of July, 1831, that the action was in dependence, at the instance of himself and his brothers and sisters, and that decree absolutor had been obtained against some of them, he did not disclaim the action, nor make any inquiries concerning it for a long period; nor was the disclaimer lodged till the 8th of March afterwards, being a period of nearly eight months. During all that time he took no steps to have his title deeds, the authority of the procedure, withdrawn from process. Without inferring, what is by no means improbable, that he was waiting to take benefit by the suit if it proved successful, and to disclaim it if otherwise, there was at least such a culpable negligence as to entitle Farnie to hold by his decree, leaving Cowan to obtain relief from the agents, who, in this case, are admitted to be perfectly responsible. Whether, even in a question between Cowan and them, the same facts would furnish a sufficient defence, may well be doubted; but that question, in the shape into which the case is now put, is not properly before the Court.”

MACKENZIE.—I have much difficulty in supposing that there is any No. 18
 ion between the power of a counsel to bind a party, by an unauthorized
 nce, as to the merits, and the power to bind him as to the expenses. I Mar. 4, 18
 y find it difficult to see on what ground the presumed mandate would Cowan v.
 o bind the party as to the merits, and yet not bind him as to the ex- Farnie.
 I desiderate authority for that doctrine, and I must doubt whether
 an be any good principle for holding that an appearance which would
 o make a valid decree as to the merits, and thereby perhaps affect a large
 should not be at least equally valid, as to the expenses. The power to
 expenses must, I conceive, be at least commensurate with the power to
 to the merits, of a cause. But then the question comes to be how far
 party be bound either as to the one or the other, by an unauthorized ap-
 e which is made in his name. On this point I could have wished that
 of the Lord Ordinary had been a little more precise. I wish his Lord-
 distinctly stated to what extent he conceives a party to be bound by the
 counsel and agent who usurp his name. Are we to say that the gown
 nsel does, of itself, so unqualifiedly imply a mandate to appear, that the
 a whose name he appears, will be firmly bound to any thing which is
 decerned in a process to which the counsel has duly sisted him? Or are
 old, on the other hand, that the implied mandate of the gown is worth
 and that a party may simply disclaim it at any time? I do not incline
 either extreme. And I have no hesitation in saying that I reject the
 that the implied mandate of the gown is indefeasible, and cannot be red-

I do not carry the doctrine farther than this that the gown presumes
 te, and it lays the onus on the party disclaiming it, to prove that he
 mandate. The same effect would be produced if a written mandate had
 nded on, which, though formal ex facie, had been forged. The party
 ing it would be put to prove that it was forged; but having done so, he
 ot be bound either by the forgery or by the process based upon it. And I
 would no more be bound by the act of a person, whether counsel or agent,
 rped his name and used it without a warrant. The tacit mandate can-
 ore binding than the express mandate; and, on proving the falsehood
 r, the alleged mandant is no longer bound by what was done in his name.
 case I think it sufficiently instructed that Cowan, junior, gave no autho-
 rary on the action. I cannot therefore assent to a decree going out
 him in the mean time, and merely reserving to him a relief against
 with perhaps an ultimate reduction of the very decree we are now called
 onounce against him. Upon the whole of this question, I would observe,
 m not willing to lay down any absolute doctrine; but, where any party,
 ith or without a reduction, certiorates the Court, on reasonable evidence,
 never gave a mandate, I think he is entitled to get free. And as I think
 enough on the facts of this case that Cowan, junior, gave no authority, I

A reporter understood the distinction referred to by Lord Gillies, in the same
 that in which Lord Mackenzie here expressed himself to understand it.
 he reporter did not hear Lord Gillies very perfectly, he has not reported
 him of that Judge in more decided terms than those which are given

liferenter by reservation, and naturally had the custody of the titles. In this circumstance, without imputing any fault to Cowan, junior, tended to show that Mowbray and Howden; as Cowan, senior, brought the titles to them, and gave them to the party in whose hands the titles were, and mentioned the junior, concurred with him in raising the action. They proceeded on an erroneous assurance, and as it was not consistent with the fact, it now appears that their proceedings are without authority from Cowan, junior, who gave in a minute of disclaimer. In these circumstances, without imputing blame to Messrs Mowbray and Howden, excepting that they were too confiding, I am afraid they must be subjected, and Cowan, junior, must be decerned against.

LORD PRESIDENT.—I have arrived at the same conclusion. It appears that Cowan, junior, gave in a minute of disclaimer, and that he did so. It appears to me that Messrs Mowbray and Howden have failed to insist on receiving any authority from him. In these circumstances I concur in the opinion which was delivered by Lord Gillies.

Keay, for Mowbray and Howden, submitted to the Court, that, as Cowan, junior, was now found entitled to be free, it followed that those parts of the discussion between him and Farnie and others, in which they had attempted to fasten liability on him, was unwarrantably incurred by Farnie and others, and the expense of it should not be laid on Mowbray and Howden.

Rutherford, in answer, stated that Farnie and others had no alternative. As soon as Cowan, junior, lodged his disclaimer, they applied to Mowbray and Howden for a sight of the mandate and authority on which they had used his name. They got no satisfaction from Mowbray and Howden, and, being kept in the dark, were obliged to maintain the alternative liability on either party or the other.

The **LORD PRESIDENT** intimated that he thought Farnie and others

junior, for the sum of £79, 0s. 5d. of expenses and for the dues of extract: Find that the said James Cowan, junior, is not liable in any part of the expenses of the action, at the instance of James Cowan, senior, and others, disclaimed by him; and, quoad ultra, adhere to the said interlocutor: Find John Mowbray and Andrew Howden, jointly and severally, liable to James Farnie and others, for payment of the said sum of £79, 0s. 5d. of expenses, with the interest thereof from and after the said 15th February, 1833, the date of the foresaid interlocutor, and decern: Find them also jointly and severally liable, to the said James Farnie and others, for the expenses of process in the original action, and in the conjoined actions, from and after the date of the said interlocutor, and appoint an account thereof to be given in: Find them also liable, jointly and severally, to the said James Cowan, junior, in the expense by him incurred in the said processes, from and after the date of his disclamation of the foresaid action, and in the expenses of the said disclamation, and appoint an account thereof to be given in, reserving to the said John Mowbray and Andrew Howden any claim of relief competent to them against James Cowan, senior, and others, pursuers of the original action, and to them their defences as accords."

A. HUTCHISON, S.S.C.—MOWBRAY and HOWDEN, W.S.—G. RITCHIE, W.S.—Agents.

JOHN GALLIE, Pursuer.—*D. F. Hope—Pyper.*

JOHN ROSS and OTHERS, Defenders. } *Rutherford—M'Dougall.*
DAVID ROSS, Defender.

Cautioner—Septennial Prescription—Interest.—1. Circumstances which held insufficient to relieve the cautioner in certain confirmations of his liability for the intromissions of the executors confirmed. 2. The septennial limitation found not to apply to an obligation as cautioner in a confirmation. 3. Terms of a summons according to which, held, that interest on certain sums found due could be charged only upon such portions of those sums as were principal sums at the date of the action.

THE late David Ross, bleacher in Roslin, died in 1790, leaving a trust-settlement, whereby, after providing an annuity to his widow, he bequeathed the residue of his succession to his grand-daughter, Janet Ross, then resident in Jamaica, and the heirs of her body, failing whom, to his nephew, David Ross, resident in Milton, Ross-shire, and his heirs. The widow having died in 1809, the surviving trustee consigned in bank the residue of the trust-funds, and caused inquiries to be made in the West Indies after Janet Ross, of whom, however, no accounts were received. In 1814, David Ross of Milton died, leaving a widow and six daughters, of whom five were married—one to the pursuer, Gallie, another, Margaret, to the defender, John Ross—while one, Wilhelmina, remained unmarried. With a view of obtaining possession of the money consigned, Margaret and Wilhelmina Ross expedite a confirmation as executors-dative

No. 186. **qua nearest of kin to David Ross of Roslin.** The defender, David Ross, became cautioner in the confirmation to the extent of the amount consigned, £283, together with interest from the date of consignment, and bound himself "that the same shall be made free and furthcoming to all parties having interest therein as law will." On the title created by this confirmation, a discharge being granted by Margaret and Wilhelmina Ross, the money was, in 1818, uplifted by Margaret's husband, the defender, John Ross.

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ar. 4, 1836.
Gallie v. Ross.

In 1822, Margaret and Wilhelmina Ross further expedite a confirmation as executors **qua nearest of kin to William Ross, son of David of Roslin**, and who had predeceased his father, in a sum of about £250, which had been consigned by him to this country. In this confirmation also, the defender, David Ross, became cautioner to the extent of £250, binding himself to make the same free and furthcoming to all having interest. This sum was in like manner, in 1823, uplifted by John Ross.

In 1824, John Ross called a meeting of the relatives of David of Roslin, and exhibited a statement of his intromissions with the two sums of money above mentioned, showing a fund for division amounting to £60, which was divided among the children of David of Milton, some of whom granted discharges for the portions they received. It was soon after discovered that David of Milton had made a disposition of his property in favour of Margaret and Wilhelmina and John Ross, David of Roslin's legacy being included in the conveyance to the latter. This deed, along with the discharges granted by David of Milton's children, was reduced, on the ground of fraud, in an action at the instance of three of the sisters against Margaret Ross and her husband, who abandoned the case, after it had been set down for trial.

Thereafter, in November, 1830, the present action was raised by the pursuer, Gallie, as assignee of four of the daughters of David of Milton, against Wilhelmina, Margaret, and John Ross, and David Ross, the cautioner in the confirmations already mentioned, founding on the circumstances above detailed, and concluding for count and reckoning and for payment to each of the daughters, pursuers, of one-sixth of the principal sums uplifted by Wilhelmina, Margaret, and John Ross in 1818 and 1823, respectively, "with the due and lawful interest of each sixth part from the respective dates at which the sums were uplifted as above set forth, amounting, each sixth part of said principal sums and interest, as calculated to the 11th November, 1830, to the sum of £133, 7s. 5d., and for the whole four daughters to the sum of £533, 9s. 8d., conform to state hereto annexed, and referred to as relative; with the interest from said 11th November, 1830, of such part of said sums as is principal, and until payment."

In defence against the action, it was maintained, *inter alia*, that, as Gallie could only claim in right of the daughters of David Ross of Milton, the share of the funds in question truly belonging to these parties at the date

action, and as the widow of David Ross, in whom previously to No. 18
 these funds were vested, had, at that date, a valid claim of jus Mar. 4, 18
 over them, Gallie was only entitled to claim a proportional part Gallie v. R
 surplus, after deduction of the amount of the widow's claim; that
 the defender, David Ross, the cautioner, the obligations granted
 were of a cautionary nature, with express clauses of relief, and
 as therein stated, were, from the beginning, of a fixed and positive
 tion, capable of being instantly demanded from the executors, and
 claim had been made on him, either since the date of the granting
 bond or the uplifting of the money, the claim on the bond of cau-
 was cut off by the septennial prescription; that, by the delay al-
 so the primary obligants, and by declining to call David Ross as a
 the reduction, by no judgment in which could his interests be
 all claim under the cautionary obligations must be held to have
 issued from and discharged.

is answered by the pursuer, that the widow of David Ross of
 was entitled to no part of the funds in question, and it was jus
 the defenders to plead her alleged rights; that the defender,
 Ross, was liable under the express terms of the bonds of cautionry,
 septennial limitation did not apply to such bonds; that there had
 undue delay, and the deed and discharges which had been set
 the head of fraud, could afford no defence to the cautioner more
 the principal.

Moncreiff, Ordinary, pronounced the following interlocutor,
 the subjoined note: *—"Finds, 1st, That it being admitted that

A demand was made for an interim decree. The sum admitted to be due
 £78, 13s. 3d., and even if a decree were to be given against the principal
 s, could the Lord Ordinary give any decret against the cautioner, while
 ists of defence against the whole claim have not been finally disposed of?
 mand be insisted in, it had better be made the subject of an independent

ough nothing is said on the subject in the interlocutor, the Lord Ordinary
 thinks that the fair expense of obtaining information, and the expense of
 imations, and any actual expense necessarily incurred by John Ross,
 e allowed. But he will be able to judge better of this when he sees an
 nt's report. He also, of course, understands that the several sums of £10
 t be allowed.

it is evident that the funds recovered from the estate of William of Ja-
 more than equal to all the debts of David of Milton, condescended upon,
 Ordinary has thought it unnecessary to perplex the case with any finding
 n to these debts, in connexion with the succession of David of Roslin.
 matter stated in the debate, he thinks that the latter funds were never
 David of Milton, and so could not be liable for his debts. But as some
 t gone upon, and not cleared up in the record, might create a little dif-
 the point, he has thought it better to leave that on the broad ground in
 on which the confirmation was obtained, and the equal right of other

No. 186. funds of the moveable estate of the deceased David Ross, designed of Roslin, in this record, and who is said to have died in 1790, were uplifted and received by the defenders, John Ross and Margaret Ross, in virtue of the confirmation in favour of the said Margaret and Wilhelmina Ross, obtained by the title of nearest of kin to the said David of Roslin, as set forth in the record, the said defenders are bound to account to the pursuer, as in right of four of the nearest of kin of the said David of Roslin, at the date of the confirmation for their just share of the said funds: Finds, 2d, That the said John Ross and Margaret Ross are also bound to account to the pursuer, as in right of four of the nearest of kin of the said David Ross, and as being also four of the nearest of kin of David Ross of Milton, their father, for the money uplifted by them, as part of the moveable estate of the deceased William Ross, designed of Jamaica, in virtue of the confirmation obtained by the said Margaret and Wilhelmina, as the nearest of kin of the said William, as also set forth in the record: But, 3d, In respect that it is admitted by the minute lodged by the pursuer, on the 10th July last, that the said William Ross of Jamaica predeceased the said David Ross of Milton, and in respect that the said William Ross must be taken to have been domiciled in Jamaica at the time of his death, Finds, that the right of David Ross, designed of Milton, in the moveable estate of the said William, as nearest of kin, was vested without confirmation; and thereafter, that any right competent to the pursuer's constituents, in the moveable estate of the said William Ross, uplifted by the defenders, under the confirmation last mentioned, must be subject to a proportional share of any lawful debts of the said David of Milton, which can be shown to have been paid by the defenders, or to be justly due to them, or either of them; and finds further, that one-third of the said effects, under a proportional burden, devolved upon the widow of the said David of Milton. But finds that under the Act of Parliament, the pursuer's constituents, or such of them as were nearest of kin to the said David of Milton, or his widow, at the time of their respective deaths, are in titulo to call the defenders to account for any share of said funds competent to them as in right of him or her: Finds, 4th, That the septennial prescription of cautionary obligations does not apply to the obligations of the defender, David Ross, cautioner in the two confirmations above specified: Finds, 5th, That the discharge granted by the pursuer to the said John Ross and Margaret Ross cannot be available to the defender, David Ross, in respect that the same has been totally reduced on the ground of fraud, by the decree of the Court, under proceedings of which the defender, David Ross, was full cognizant, and which decret he has made no attempt to challenge: Finds, 6th, That, as cautioner in the said confirmation, he is bound to account, along with the other defenders, for all the funds which were uplifted under the said confirmations, in so far as the pursuer has shown title to demand and receive them: Finds, finally, That an account r

made up between the parties on these principles, and for that purpose
 nits to

h power to him to consider the state of accounts produced, with the
 actions made thereto; and to call for all competent evidence or expla-
 ions—and to report what sum was due by the defenders to the pur-
 r, at the date of the summons in this action, and the interest which
 y have accrued thereon, since that time, and in the mean time, reserves
 questions of expenses.”

A remit having been made to an accountant, in terms of the above in-
 locutor, a report was given in, as to which Lord Cockburn, Ordinary,
 nounced as follows:—“ Approves of the report, finds the defenders,
 in Ross, as principal, and David Ross, as cautioner, liable to the pur-
 r for the principal sum of £325, 12s. 3d. sterling, with the legal in-
 est thereof, from the 12th day of November, 1830, till payment, and
 xerns; and grants warrant for interim extract of the decret to this
 ent, if required: Finds the said defenders, John Ross, as principal,
 l David Ross, as cautioner, liable to the pursuer in the further prin-
 al sum of £34, 15s. 8½d. sterling, as the shares of Ann and Isabella
 m of what had fallen to their mother, the widow of David Ross of
 lton, jure relictæ, with the legal interest thereof from said 12th No-
 ober, 1830, till payment, and decerns, superseding extract, as to the
 l sum of £34, 15s. 8½d. sterling, until the pursuer shall produce a
 : by confirmation, in the persons of the said Ann and Isabella Ross,
 a an assignation by them to said sum in his favour.”

David Ross reclaimed.

THE COURT, varying the interlocutor of the Lord Ordinary, found
 “ that, in terms of the summons, interest on the several sums
 found due can be charged only upon such portions of those sums
 as were principal sums at the 12th November, 1830: Find, of
 consent of parties, that of the sum of £325, 12s. 3d. sterling the
 sum of £206, 18s. 2d. was principal at the date referred to, and
 that of the sum of £34, 15s. 8½d., the amount of principal at said
 date, was £25, 12s. 2½d., on which reduced sums, accordingly
 interest must be charged; with this variation, adhere to the inter-
 locutor of the Lord Ordinary: Find no additional expenses due,
 and remit to the Lord Ordinary to proceed accordingly.”

PATRICK PEARSON, S.S.C.—ROBERT ROY, W.S.—Agents.

No. 187. WILLIAM SWANSON and OTHERS, Petitioners.—*Rutherford—Montei*
ROBERT WIGHT, Respondent.—*Penney.*

r. 5, 1836.
anson v.
ght.

Bankruptcy—Accounting—Trustee.—A trustee under the bankrupt act, presented a petition and complaint against a former trustee who had resigned, and whose resignation had been accepted by the creditors; the petition craved an order accounting, and payment of any balance found due: Held that this summary application was competent, notwithstanding the resignation of the former trustee.

r. 5, 1836.

T DIVISION.
S.

WILLIAM SWANSON presented a petition and complaint, stating that the estates of Walter Biggar were sequestrated in 1811, and Robert Wight, senior, accountant in Edinburgh, had been appointed trustee; that Wight had committed many and great irregularities, and that an account of his intromissions since 1815, had ever been rendered; that Wight resigned his office, by letter on 27th March, 1834, and a meeting of the creditors was held, at which the resignation was accepted and petitioner, William Swanson, was elected trustee; and that it was directed by § 71 of the Bankrupt Act that the “new trustee shall immediately to account his predecessors in office.” Certain creditors on the estate concurred with the trustee, and the petition prayed the Court to order Wight “to produce in process a state of his intromissions with the funds of the said sequestrated estate, and to pay the balance arising on his intromission to the petitioner, William Swanson; and further, to decree and ordain the said Robert Wight, senior, to deliver up to the petitioner the whole vouchers and papers connected with the said sequestrated estate.”

Wight lodged answers in which, besides making a statement on the merits, he objected to the competency of the application, in respect that his resignation had been accepted by the creditors, and he was no longer a trustee or officer of Court, so as to be liable to any application in summary form.

LORD BALGRAY.—The process of sequestration is still in dependence. The respondent was confirmed trustee, and it is on account of his acting and intromissions in that character, that the new trustee makes the present application in the depending process. I have no doubt that a summary application is competent.

LORD GILLIES.—I see no room for any doubt about the case. What ground of objection [the respondent might have had] if he had been called to account in any other form, I can see no ground of objection to this.

LORD MACKENZIE concurred.

LORD PRESIDENT.—The new trustee is directed to insist for immediate accounting against his successor. I concur with all your Lordships in holding the competency of this application to be clear.

COURT repelled the objections to the competency of the petition and complaint, and remitted to the Lord Ordinary to proceed *quoad ultra*.

No. 187

Mar. 5, 1836
Boyd v. Reid

JIBSON-CRAIGS, WARDLAW, & DALZIEL, W.S.—J. ADAIR, W.S.—Agents.

ALEXANDER BOYD, Suspender.—*D. F. Hope—Pyper.*

No. 188

JOHN REID, Respondent.—*Keay—Maitland.*

Contract.—Where a bill of suspension and interdict was presented, against certain feu-duties for sale, in respect of an allegation that they were already sold to the suspender;—Held, in the circumstances that the alleged sale had not been completed, and therefore, bill refused.

LEGAL case, in which Alexander Boyd, W.S. presented a bill of suspension and interdict against Alexander Stevenson, S.S.C. and John Reid, his client, to have them interdicted from offering certain feu-duties for sale, which Boyd conceived to have been already sold to him, subject to his approval of the titles which had not yet been duly exhibited.

Mar. 5, 1836
1ST DIVISION
Ld. Cockburn
Bill-Chamber
B.

The respondents contended that there was no concluded bargain of any effect, and the Court adopted this view. The Lord Ordinary passed the bill, on caution, intimating at the same time that he would do so, as he conceived the suspender to be entitled to a fuller title than he could have in the Bill-Chamber, before finally disposing of the cause. But the Court, after calling on the suspender to support the bill, and the Lord Ordinary, altered it, and refused the bill.

A. BOYD, W.S.—A. STEVENSON, S.S.C.—Agents.

JAMES LAIRD, Petitioner.—*A. A. Maconochie.*

No. 189

Factor—Executor.—A party was appointed curator bonis to a lunatic, who after died, leaving a deed of settlement executed at a former period, and in which, whereby the same party was nominated trustee, and he thereafter conducted and managed the estate: Having applied to be discharged from his office of curator, the Court, on the consent of the lunatic's nearest of kin in Scotland being obtained thereto, granted the discharge, although there was no concurrence from the nearest of kin supposed to be resident in America.

On the 18th, 1834, James Laird presented a petition, setting forth, that in the month of May, 1833, he had been appointed curator bonis to John Alexander, who had since died; and that the petitioner had prepared and now presented an account-current between himself and the lunatic's estate, in which it appeared that a balance was due to the petitioner: and he prayed for a discharge from his office in common form. The Court having remitted to the junior Lord Ordinary, and his Lordship having remitted to the Clerk (Mr Beveridge), to report and examine, it

Mar. 5, 1836
2D DIVISION
Ld. Cockburn
F.

No. 189. appeared that Laird, the curator bonis, was also sole accepting trustee nominated by Alexander previous to his lunacy, in a deed of settlement and as such had lodged inventory in the commissary court, had been confirmed, and had managed the estate since Alexander's death. It likewise appeared, that of the deceased's nearest of kin, three were in this country and others supposed to be in America. By order of the Lord Ordinary the petition was intimated to the nearest of kin in this country, which intimation they acknowledged.

Mar. 5, 1836.
Smith v.
Little.

In February, 1836, an accountant, to whom the account above-mentioned was remitted, reported a balance of £460 as due to Laird. Clerk thereafter reported, in terms of the remit, but expressed doubt to the propriety in the circumstances of granting the exoneration clause. A minute of objections having been given in to this report, the Lord Ordinary reported to the Court.

Their Lordships ordered intimation to be made of new to the next of kin in Scotland, with a view to obtain satisfactory evidence of their concurrence. On this order being complied with, and on the petitioner's counsel producing a mandate in his favour consenting on the part of next of kin to a discharge,—

THE COURT granted discharge, and ordered the bond of caution to be delivered up in the usual form.

CUNINGHAMS and BELL, W.S.—Agents.

No. 190.

ROBERT SMITH, Pursuer.—*M'Neill—Shaw.*
JOHN LITTLE, Defender.—*D. F. Hope—Pyper.*

Inhibition—Title to Pursue—Agent and Client.—A party having inhibited in dependence in security of expenses, and decree for these having been allowed to go out in name of his agent, but no payment thereof made,—Held entitled to pursue an action of reduction of an heritable bond alleged to have been granted against inhibition, in his own name, with consent of the agent.

Mar. 5, 1836.
2^D DIVISION.
J. Cockburn.
T.

IN an action by two parties, Muir and James Smith, against the pursuer, Robert Smith, before the Magistrates of Glasgow, decree was pronounced for an account alleged to be due by him to Muir, and by him assigned by indorsation to James Smith. The pursuer thereupon brought an advocacy, in which the Lord Ordinary, on 4th June, 1834, after certain findings, remitted to the magistrates, with instructions “to report to their interlocutor, and to find that the sum in dispute can be proved to be resting-owing only by the writ or oath of the advocator;” and “the respondent liable in the expenses incurred in this Court;” and remitted “the account thereof, when lodged, to the auditor to be taken and to report.”

15th July thereafter, Robert Smith raised letters of inhibition No. 19 dependence, against Muir, which were duly recorded. On the Mar. 5, 18
 November, the Lord Ordinary having approved of the auditor's re- Smith v.
 modifying the expenses to £33, decerned therefor, and allowed the Little.
 "to be extracted in name of Alexander Pirie Henderson, the disburser of said expenses."

He mean while the defender, Little, as indorser of three bills accepted by Muir to James Smith, raised action in this Court against Muir, obtained decree in absence for the sums contained in them, of date March, 1834, and on this decree he used inhibition in the month of following.

On the 27th August of the same year, Muir executed in favour of an heritable bond and disposition in security for £230, being the sum of the bills above mentioned, with the expenses, and of a further sum of £30, alleged to have been advanced, and infestment was taken thereon. Of this bond, Robert Smith, with consent of Henderson, his wife, and libelling on the inhibition and decree above mentioned, brought action ex capite inhibitionis, against which Little stated the following defences:—

The inhibition libelled on, being used at the instance of Robert Smith, on the dependence of his judicial claim for expenses, while the decree libelled on is a decree at the instance of Henderson, a different person, the diligence has fallen, inasmuch as it has not been assigned to either person, and is extinguished quoad Smith by default of any decree in his favour.¹ In order that the diligence may be effectual, the inhibition and the decree founded on must connect with each other.²

Supposing the benefit of the inhibition to have been transferred to Henderson, and the decree to have completed and ascertained the amount of security afforded by the diligence, the diligence and decree ought to have been libelled on as belonging to Henderson, and the action laid at his instance and not at the instance of Smith with his consent only.

The security under reduction was granted in implement of a prior decree, by missive of date 4th April, 1834 (which missive, however, was not stamped), and the security was therefore safe from the effect of Smith's inhibition.

(The fourth defence had reference to the inferior court expenses, and was given up in the course of the action.)

Smith has no interest in reducing the security, in respect that the action at the instance of Little secured the property in question against the debt on which Smith's inhibition proceeded, so as to render Little liable thereon, to the amount of the sums contained in his diligence.

Smith v. Keith, 1668 (6953); *Reids v. Napier*, 1651 (6993); *Stewart v. Earl of Argyll*, 1770 (7004).

Edinburgh v. Davidson, June 5, 1750 (6985).

his third defence was founded to be stamped.

In regard to the first and second defences,—

LORD GLENLEE observed,—The point appears as clear as that two make four that the interlocutor is right. The user of the inhibition allowed the furniture to go out in name of the agent for the expenses, but on his own account. If the defender had paid Henderson under the extracted decree, there would have been an end of the business ; but so long as he does not pay, he just injures the right of the pursuer. If the pursuer had not had Henderson's concurrence, the defender might have objected, but Henderson adhibits his consent, and the decree is protected by the inhibition.

The other Judges having concurred,

THE COURT adhered to the interlocutor, in so far as it repelled the first and second defences ; but their Lordships taking into consideration the circumstance of the missive on which the third defence was founded, and the decree having been stamped, and looking to the nature of the other defences, they adhered to the interlocutor quoad ultra, and remitted to the Lord Ordinary to do as he thought accordingly, reserving all questions of expenses.

JOHN CULLEN, W.S.—JOHN NAIRN, S.S.C.—Agents.

* “ The question raised in the first defence is, whether a party who has been inhibited in security of his expenses, be prevented from following out the inhibition by an action of reduction in his own name, because the expenses were decreed in name of his agent. This point is not known to have been decided ; the cases referred to by the defender certainly don't touch it. The Lord Ordinary repelled the plea, because he holds that although the decree be allowed to stand in an agent's name, and the debtor be ordained to pay to him, the expenses between the debtor and the party, are still due to the party, who continues liable.

OF THE TREASURY, Compearers.—*Sol.-Gen. Cuninghame—A. Murray, jun.*
 BELL'S TRUSTEES, Defenders.—*D. F. Hope—Rutherford—More.*

Mar. 5, 1834.
 Lords of the
 Treasury v.
 Campbell's
 Trustees.

is—Summons—Calling—King—Expenses.—A summons having been raised of the Commissioners of Woods and Forests, and called also in their name intermediate passing of an act declaring the right to sue in such matters as regarded not to be in them but in the Lords of the Treasury, and the latter prayed to be sisted therein,—Held, That the summons was incompetently named in the name of the Commissioners of Woods and Forests, and that there was no way in which the Lords of the Treasury could be sisted. 2. Expenses awarded to the appellants by their Lordships.

is MURE CAMPBELL, a bastard, died on the 21st May, 1834, Mar. 5, 1834.
 by a trust deed of settlement executed on the 26th April preceding, 2d Division
 by he conveyed all his property to the defenders as trustees, for the Ld. Cockburn
 as therein set forth. On the allegation that the deceased was on R.
 d at the date of the execution of the deed, an action of reduction
 in prejudice of the crown as ultimus hæres, was raised in name
 e Right Honourable John Archibald Murray, Esq., our advocate
 interest, for and in name and behalf of Us, and of the Commis-
 of our Woods, Forests, Land Revenues, Works, and Buildings,
 s of an act passed in the 3d and 4th years of our reign, cap. 69,
 therein recited." The summons was signeted on the 24th June,
 nd was executed of dates June 24, and July 7, 8, and 10.

statute 3 and 4 William IV., c. 69, referred to in the summons,
 ered the Commissioners of Woods and Forests, to sue and be sued
 e of the Lord Advocate, but some doubt having been raised as to
 the power of suing in regard to the interests of the Crown, under
 f ultimus hæres, had not been transferred to the Commissioners of
 and Forests by the statutes vesting in them the management of
 l revenues, &c., of the Crown, there was passed on the 9th Sep-
 1835, after the summons in this action had been executed, but
 t was called in Court, the declaratory act 5 and 6 William IV.,
 hereby, on the preamble that "doubts have arisen in consequence
 aid acts, as to the powers and authorities of the Commissioners of
 esty's Treasury, in relation to the recovery, management, super-
 ace, and disposition of the interests of his Majesty, his heirs and
 m, in right of his crown, as ultimus hæres, and in cases of bas-
 Scotland, and it is expedient that such doubts should be removed ;"
 herefore declared and enacted by the King's most excellent Ma-
 y and with the advice and consent of the Lords Spiritual and
 al, and Commons, in this present Parliament assembled, and by
 ority of the same, that all powers and authorities for the ascer-
 l recovering, and for the management, superintendence, and

Advocate, “ for and in name and behalf of his Majesty and of the Commissioners of his Majesty’s Woods and Forests, Land Revenues, and Buildings;” but thereafter a minute was given in craving to the “ Lords Commissioners of his Majesty’s Treasury, and the Right Honourable the Lord Advocate as their mandatary, pursuers in the said process of reduction, in lieu of the Right Honourable John Murray, his Majesty’s Advocate, for and in name of the Commissioners of his Majesty’s Woods, Forests, Land Revenues, Woods and Buildings.”

The Lord Ordinary, on considering this minute, with preliminary defences as to the title of the pursuers, pronounced the following judgment, the locutor, adding the note subjoined :—* “ Allows the said minute to proceed, receives, holds the said Commissioners and their said mandatary and pursuers: Finds that they are entitled to carry on the action; rejects the preliminary defences; and in respect that the defenders have given notice of their intention to bring this judgment under review, finds the pursuers liable in expenses.”

The defenders reclaimed.

Rutherford, in support of their note.—The right of the Crown as ultimate proprietor never was in the Commissioners of Woods and Forests at all; but even if it had been, they were clearly divested by the 5 and 6 Will. IV., before the case was called in Court. It was obviously incompetent, therefore, to call in the name of the Commissioners, and there is consequently no subsisting process in which the Commissioners of the Treasury can sist themselves. The case is the same as if the heir of a private party who had raised a summons but had died before it was called in, should have it called in name of the deceased.

transferred against his heir; and although this was the case of a defender, No. 19
 a principle was applicable, because, unless it had been held that there was
 a legal process, there could have been no transference. Mar. 5, 18
 Lords of th

JUSTICE-CLERK.—There was never a process here. A son could not, Treasury v
 father's death, take up a summons in his name, but not called. It is Campbell's
 Trustees.
 He to resuscitate this action.

MEDWYN.—I have no doubt at all in this case. I would have had great
 in holding that the right to sue was ever in the Commissioners of
 and Forests, and I am confirmed in my view by the declaratory act; but
 lently of that, the summons was raised and executed in June, and on the
 tember an act passed, which declared the right to be vested in the Lords
 Treasury. Then the summons was called on the 12th November. There
 analogy to the case of M'Intosh here, for it is just the same as if a private
 had died before calling. I cannot conceive that a son could call a summons
 of his father, executed before his death. He must raise a new summons.
 He holds here. The summons could not be called in the name of the Commis-
 of Woods and Forests, whose right, if they ever had any, was entirely taken
 This is not at all the same as a case of successive trustees in a private
 nt. In the case of M'Intosh the party did not call as against the son
 mons raised against the father, but he raised a summons of transference,
 ed it at the same time, thus getting the authority of the Court. Then
 d Advocate for the Crown, in a case of this kind, has no title without the
 nual, as decided in 1693, King's Advocate v. Moncrieff,¹ and in the case
 arl of Southesk;² and I have no hesitation in saying the summons should
 ssed.

S GLENLEE.—I have no doubt at all. Calling is a judicial step, and
 missioners of Woods and Forests had no title to take any judicial step
 The summons is sopite.

MEADOWBANK concurred.

of Faculty.—When a public board is the party and not his Majesty, ex-
 re in use to be awarded, and the defenders here are entitled to have them
 to them.

THE COURT altered the Lord Ordinary's interlocutor, and dismissed the
 summons with expenses.

ROD. M'KENZIE, W.S.—W. and D. **ALLESTER, W.S.**—Agents.

¹ Feb. 2, 1693 (7905 and 3460).

² Jan. 20, 1680 (7899).

No. 192.

DANIEL FISHER, S.S.C., Pursuer.—*D. F. Hope—Forsyth.*

Ar. 5, 1836.

JOHN FRANCIS URE and OTHERS, Defenders.—*Rutherford—M'Neill—Patterson.*

Fisher v. Ure.

Prescription, Triennial—Agent and Client—Process.—An Edinburgh solicitor, in use to be employed by a country agent to conduct law business, had a general account current, consisting of various separate branches, for behoof of different individuals, clients of the country agent, unsettled at the death of the latter, the last item being of a date shortly before that event. Thereafter he recovered from the clients of the country agent payment of the more recent business accounts. For the prior parts of the account, the last item of which was dated more than three years before the country agent's death, the Edinburgh agent raised action libelling on them alone, and not founding on the continuation which had been subsequently paid by the clients—Held, That it was competent to refer to the general account containing the continuation to elide the plea of prescription.

Ar. 5, 1836.

1st Division.J. Moncreiff.
F.

FROM the year 1814 down to 1830, the pursuer, Fisher, S.S.C., was employed by the late Alexander Ure, writer in Glasgow, to conduct law business for him, and for other parties, of whom Ure was the ordinary agent. In consequence of this employment, business accounts were incurred by Ure to Fisher, which were annually rendered, each referring back to the balance, as appearing in the previous account. On 25th October, 1830, an account-current, brought down to 31st July of that year, consisting of various branches, according to particular accounts referred to, was given in by Fisher, who, of the same date, wrote as follows to Ure:—"I beg to send your accounts with me up to 31st July last." Ure died in the succeeding November, without any settlement having taken place.

Thereafter, by means of correspondence with Ure's successor in business, and with certain parties for whose behoof the law business had been performed during the last three years of his life, Fisher recovered payment from those parties of the particular sums for which they were liable. Various accounts and articles of charge against Ure and his clients, of an older date, remained still unpaid. In these circumstances Fisher raised action against John Francis Ure, Alexander Ure's son and representative, and against Young, and Maclean, two of the parties for whom he had been employed by Ure to conduct law proceedings, libelling in his summons as follows:—"That, in the course of

and subsequent years, the pursuer was employed by Alexander Ure, writer in Glasgow, now deceased, partly on his own account, and partly on account of others, to conduct various law proceedings both before the Admiralty Court, and Court of Session: That during the dependence of these proceedings, sundry accounts were incurred to the pursuer, for business done, and advances made for, and on account, and for behoof of the said Alexander Ure and others, which accounts were

from time to time duly rendered to the said Alexander Ure, and for which the persons after named and designed are justly indebted to the pursuer, as after specified, each for his own part, and conjunctly and severally, as follows: viz. John Francis Ure, residing," &c. "the sum of £154, 17s. 0½d. sterling, being the balance arising on certain accounts due to the pursuer by the said deceased Alexander Ure, as at the 31st day of July, 1830, including progressive interest to that date, conform to abstract and state rendered, a copy of which, and of the relative accounts, are herewith produced, and here referred to, and held as repeated, *brevitatis causa*: The said John Francis Ure, as representing his said father, as aforesaid, and Alexander Young, chaise-letter in Glasgow, jointly and severally, the sum of £40, 8s. 1d. sterling, being the balance of a business-account incurred to the pursuer, in a process of advocacy, at the instance of Thomas Park, farmer in Newhouse, against the said Alexander Young, commencing the 4th day of July, 1823, and ending the 6th day of October, 1824, including progressive interest to the 31st day of July, 1831, conform to account and state rendered, copies of which are herewith produced, and here referred to, and held as repeated, *brevitatis causa*: And the said John Francis Ure, as representing his said father as aforesaid, and Dr Malcolm M'Lean, surgeon in Glasgow, jointly and severally, the sum of £24, 6s. 3½d. sterling, being the balance of accounts incurred to the pursuer, connected with the taxation and adjustment of certain accounts betwixt him and the late Nicol William Robertson, solicitor of Supreme Courts, and for raising and conducting a process of *cessio bonorum* at the instance of the said Malcolm M'Lean, against his creditors, including progressive interest to the 31st day of July, 1831, conform to account and state rendered, copies of which are herewith produced, and here referred to, and held as repeated, *brevitatis causa*:" and concluding that the individuals above-mentioned should be ordained respectively to make payment of the sums contained in the foregoing accounts.

In defence against the action, Ure and M'Lean pleaded the triennial prescription, the article latest in date in the accounts libelled on being in 1826, and Ure having died in 1830.

M'Lean also averred that he had paid the debt to a party entitled to receive it.

In the course of making up the record, and under a diligence granted after it was closed, and the case had been once heard, Fisher produced various accounts and documents, chiefly from his own repositories, with the view of showing the nature of the dealings between himself and Ure, and proving the existence of a general account between them, current from to July, 1830, embracing the particular accounts of business done on behalf of Ure's clients.

On the closed record, he maintained, in support of his action—

The course of dealing between Fisher and Ure was such as to create

lo. 192. a general business-account, as between an Edinburgh practitioner and a country writer, and forming truly one account, though regarding different processes ;¹ this was current down to a period immediately preceding Ure's death, and embraced the particular accounts libelled on, which, as items thereof, are saved from prescription,—the plea of prescription not being applicable to Ure's own account, although it might be available to some of his clients ; the payments received after the death of Ure are credited in the account-current, and can have no other effect than that of diminishing the balance since his death ; it is competent in support of the summons to bring evidence of the course of dealing between the parties, and to show that the separate accounts libelled on were parts of a general account, this not being an action founding on a particular document of debt, as in the case of a summons laid on a bill.

Ure, on the other hand, contended, *inter alia*—

The pursuer libels on certain accounts, the latest article in which is of a date four years prior to the death of Ure, and which were therefore prescribed at the time of his death ; this plea cannot be elided by facts and reasonings not arising out of matters contained in the summons, just as one cannot sue on a bill and then proceed in the action as for an ordinary debt ;² no account-current having been libelled on, nor any account coming down to a period late enough to save prescription, it is incompetent for the pursuer now to change his ground and vary the form and substance of his action, by maintaining the accounts libelled on to be parts of one general account : Even assuming that the pursuer could found on the whole portions of the account, both paid and unpaid, as forming one account, still, as the recent items thereof were paid, prescription applies to those of anterior date :³ Moreover, there is no evidence of the constitution of the debt in question, but what has proceeded from documents recovered from the repositories of Mr Fisher himself, and partly after the closing of the record, contrary to the provision of the Judicature Act.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : *—“ Finds it instructed by the documents produced

¹ Broughton v. Weston, Feb. 24, 1826, ante, IV., 496, (New Ed. 501).

² Stirling v. Lang, March 4, 1830, ante, VIII. 638 ; Dickie v. Gutzmer, Feb. 27, 1828, ante, VL 637.

³ Beck v. Learmonth, Nov. 30, 1831, ante, X. 81.

* “ This case is rendered somewhat more difficult than it would otherwise be by the form of the summons ; for the pursuer, instead of libelling his summons on the account-current as it stood at the death of Mr Ure, giving credit for the payments made by the Steam-Boat Company since that time, has struck those articles out of the account altogether, and brought his action only upon the old accounts, the latest of which is in 1826. But, though this gives a formal probability to the plea of triennial prescription, the Lord Ordinary conceives that, when that plea is raised, it is not incompetent for the pursuer to meet it by explaining

hat recently before the death of the late Alexander Ure, which happened on the 23d November, 1830, an account-current was rendered to him

No
Mar.
Fisher

the real state of the account at Mr Ure's death, and bringing out the substance of the question between the parties.

" The Lord Ordinary thinks that this case is nice, and in one point somewhat delicate, in the law of prescription. He will endeavour to state shortly the process, upon the decided cases, by which he thinks, on the whole, that the result in the interlocutor must be arrived at.

" 1. It is clear law, that a country agent employing an agent in this Court to conduct processes for other parties, is himself debtor to that agent for the expense incurred. The consequence of this must be, that, when such a country agent trusts an Edinburgh agent with various litigations, the expenses of these may become articles of one account against him, in the same manner as if he were the party engaged in various law-suits.

" 2. By the case of Elder, &c, v. Hamilton or Gray, May 15, 1833, it is determined that the separate accounts of such different branches of law-business must, in the question of triennial prescription, be considered as one continuous account; so that, if the last article is not beyond the three years, the whole account is saved from prescription, whatever may be the dates of the particular proceedings comprehended, at least if there be no complete break of three years in the course of the currency of it.

" 3. By the cases of Syme v. Douglas, Heron, and Company, January 15, 1839; Leslie v. Mollison, November 15, 1808; the case of Elder, and other cases, it is settled that the presumption of the act 1579 is not that the debt alleged to be prescribed has been paid during the currency of the account, but that it has been paid after the closing of the account.

" 4. By the cases of Mollison, Elder, and Broughton v. Weston, February 24, 1826, it appears to be fully ruled that where such an account of furnishing or business is current and outstanding, at the death of the debtor, by the last furnishing or proceeding having been either posterior to the death, or recently preceding there is no presumption of payment in the deceased's lifetime; so that, as prescription had not then run, the question with his representative, upon the years of prescription being allowed to run posterior to the death, must resolve into the question whether the debt was paid after the death. And it appears to have been distinctly held, that it will not bring the case within the statutory prescription, or exclude the inference of resting-owing, that the heir may aver or swear that he does not know whether the debt was contracted or not, or whether it was paid by the deceased or not, or even, in general terms, that he believes that the deceased paid that and any other debt. The case of Mollison, in particular, which was decided upon a deposition of the defender, went fully up to these points. The court just construed the deposition as importing that the defender could not aver payment since the close of the account.

" 5. According to the practical rule adopted in the case of Broughton v. Weston, there is no necessity for any reference to oath, if the substance of the statement on the record imports an admission by the heir that he has not paid the debt.

" Having in view these points of the law decided, let it be considered what the present case is. The defender says in words that he does not admit the employment, or that the business was done. This may be easily said. The defender is a pupil, who can know nothing at all about the matter, and to whose oath it would be absurd to make any reference. But the employment and the business may be proved otherwise: and here the pursuer has recovered out of the repositories of the deceased all the accounts from year to year regularly rendered, being fourteen in number. The last is balanced with interest down to the 31st July, 1830; and the original of Mr Fisher's letter of the 25th October, 1830, is also recovered.

No. 192. by the pursuer for business done upon his employment, consisting of various branches, according to particular accounts referred to and rendered;
 No. 5, 1836.
 Fisher v. Ure.

These accounts, therefore, being held by the deceased, with demands of settlement coming down to within less than a month of his death, the Lord Ordinary conceives that there can be little difficulty as to the constitution of the debt in the employment and the business done. Perhaps Mr Fisher should have produced some of the letters of instructions, and some of the papers in the causes. But the rendered accounts lying in the repositories of the deceased appear to supersede the necessity of this.

“ As the last article of the account-current so rendered immediately before the deceased's death appears to be on the second of June, 1830, there certainly was no prescription at his death, in November following. The account was brought down to 31st July, 1830, and the present action appears to have been raised on the 13th June, 1833, in the notion that that was within the three years from the close of the account. It may be doubtful whether that will do, because, with the exception of the article of £6, 11s. 10d. on 2d June, 1830, in the abstract of the accounts, there is no article in the particular accounts later than July, 1829. And it is in this point that the Lord Ordinary thinks the most material difficulty in the case lies. There would be a possibility left that the accounts might have been paid by the deceased after the date of the last article, if it were not for the other facts proved and admitted. The whole accounts were rendered after the account closed, and had certainly not been settled on the 25th October, 1830. But it is farther clear, that all the accounts for the business of the Steam-Boat Company were paid by those parties themselves, long after the death of Mr Ure. It is certain therefore, that they had not been paid before. But, as they had not been paid before, which constituted the latest articles of the account-current, there is no possibility of presuming that the account had been paid or settled at all.

“ The Lord Ordinary thinks, therefore, that the case is just brought to this, according to the decisions, that at the death of Mr Ure, there was a subsisting debt which had suffered no prescription; and that, if that debt had remained in the same state in which it then was, the case would have been the same in principle with those which have been cited, as well as with that of *Napier v. Balfour*, June 2, 1835. But there is a peculiarity. The later part of the account has been paid since by other parties; and the defender, on the authority of the case of *Beck v. Learmonth and Company*, November 30, 1831, says, that, in consequence of that payment, the case must be taken on the older accounts simply, the latest article in which is in 1826.

“ There seems to be no doubt that if this be the legal state of the case, prescription must be sustained, and must lead to absolutor, reference to the oath of the defender being out of the question. But the Lord Ordinary thinks that this would be a very unjust result, and that there is a great difference in principle between this case and that of *Beck*. In that case *Beck* was alive, and it was he himself who had paid the later account. It would, therefore, have been very dangerous to refuse his plea of prescription on the old account. But how stands the present case? At Ure's death there was one account not prescribed. The pursuer, apparently for the purpose of saving Ure's family, though he made his claim on them, and received letters from Mr MacGibbon, whom he understood to be the person acting for them, distinctly acknowledging the debt, made exertions to obtain payment of whatever he could from the clients. He succeeded in obtaining the payments, by which his claim has been greatly reduced. But it would be a singularly hard measure of justice to say, that, by having done so, he has exposed himself to a plea of prescription, which could not have been stated at Ure's death, and could not have been stated if these payments had not been obtained. The difference in principle evidently is, that here there was no payment by the pursuer or his ancestor. As to him, the account really stands as it did, ex-

and that by a letter of the said pursuer, so late as the 25th October, 1830, recovered from the repositories of the said Alexander Ure, it is established that, of that date, he had demanded payment or settlement of the balance of the account-current so rendered: Finds that the latest article in the said account-current, which was brought down to the 31st July, 1830, being in the years 1829 and 1830, no prescription had run hereon at the death of the said Alexander Ure: Finds it established by the written evidence in process, and not denied by the defender, that, anterior to the death of the said Alexander Ure, certain of the particular accounts which constituted the later articles were settled with the pursuer by payments made by third parties, who were separately liable for them: But finds that such payments could operate no change on the liability of Ure's representatives for payment of the balance of the account-current as it stood at the death of Alexander Ure, except as entitling them to deduction of the payments so made, or of the amount of the accounts thus settled, from the whole claim under the said account-current: Finds it not averred by the defender, John Francis Ure, and his tutor ad litem, that the balance of the said account-current, or the balance of the accounts as now sued for, has been paid since the death of the said Alexander Ure, but on the contrary, instructed by the writings produced, that no settlement thereof has been made by them: Therefore, finds the constitution and subsistence of the debt recently before the death of Alexander Ure sufficiently instructed. And, in respect that there is no averment of payment since his death, Finds that the plea of decennial prescription is elided in the case of the said defender, John Francis Ure; and repels the same accordingly: But, before further answer, remits the accounts sued on to the auditor to be taxed: Sustains the plea of prescription as maintained by the defender Dr Malcolm M'Lean, in respect that he does expressly aver that he paid the debt to a party entitled to receive it; but allows the pursuer, if so advised, to give in a minute of reference to the oath of the said defender: And, in respect of the doubtful nature of the case, finds no expenses due to the pursuer, but reserves the question of expenses in the case of Dr M'Lean."

Ure reclaimed on the merits, and Fisher on the point of expenses.

LORD GLENLEE.—I agree with the Lord Ordinary, that it would have been better had the summons been libelled differently; but, as it is, I do not think the objection fatal. This is an action for payment of accounts, and is different from an action on a bill. The action is in itself competently laid; if prescription be pleaded in defence, is the pursuer not entitled, in his reply to the defence, to produce documents and show grounds whereby the plea of prescription may be repelled?

He must have credit for the sums recovered aliunde; and that the form of the summons ought not to alter this state of the case upon the defence.

— Nothing was said in the debate about the defender Young."

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 Jar. 5, 1836.
 Fisher v. Ure.

be elided? Provided Mr Fisher has shown good ground why prescription should not apply, I do not consider it indispensable in point of form that he should have stated the whole matter in his summons. The ground on which he says it does not apply is, that there was a continuous account between himself and Ure, the last article in which brings it down to July, 1830, and so saves prescription as to Ure, who died the same year. Then Fisher says he received payments of certain articles of the account after Ure's death. Had they been received during his life, I should have held Fisher not entitled to proceed for the balance then due, according to the decision in Beck's case; but, as they were received after his death, this leaves the claim, as against Ure, just as it stood at the time of the death. And now that I am satisfied that the last articles of the general account were truly a charge for which Ure was then liable, I do not see why the account should be prescribed, because Fisher has received payment of these articles since his death. But I am not sure of the stepping-stones on which the Lord Ordinary has proceeded in his note; they are somewhat too slippery for me.

LORD JUSTICE-CLERK.—On the whole, I have come to the same conclusion; but I cannot adopt the reasoning in the note in all its particulars. The summons might have been better laid; but, looking to the documents in process, I think there is evidence to support Mr Fisher's claim.

LORD MEADOWBANK.—I am of the same opinion. The only difficulty I had was as to the summons, which has been removed by what has fallen from Lord Glenlee.

LORD MEDWYN.—I cannot concur with the views in the Lord Ordinary's note, and I rather think we should recal the interlocutor, and word our judgment differently. We have already, in the cases of *Leslie v. Mollison*¹ and *Elder v. Hamilton*,² carried the doctrine as to the eliding of prescription farther perhaps than is warranted by the statute establishing the triennial prescription. *Broughton v. Weston* was a very special case, and differed from those. I had great doubts in this case, from the shape and form of the action; but, on the whole, I concur with the other Judges.

THE COURT recalled the interlocutor; found that the form of the summons did not preclude the pursuer from founding on other accounts than those libelled on, in order to elide the plea of triennial prescription; and remitted to the Lord Ordinary to hear parties farther as to the actual condition of the debt, reserving all questions of expenses.

DANIEL FISHER, S.S.C.—JOHN CULLEN, W.S.—Agents.

¹ November 15, 1808, Fac. Col.

² May 15, 1833, ante, XI., 591.

THE UNION INSURANCE CO., Pursuers.—D. F. Hope—Sandford. No. 193.
CALDERWOOD OR GRAHAM, and HUSBAND, Defenders.—Keay—
Speirs.

Mar. 8, 1836
 Scottish Union
 Insurance Co.
 v. Calderwood

Title to Pursue.—1. In an action to reduce the infeftments of an entailed estate to declare it liable to the debts of the heir in possession,—preliminary objections, that all the heirs-substitute were not called. 2. Circumstances observed, that a defender was sufficiently designed and cited, *dummodo persona.*

Scottish Union Insurance Co., as creditors of William C. C. Mar. 8, 1836.
 the heir in possession of the entailed estate of Gartmore, raised 1st Division.
 a number of various charters, sasines, and other writs in the progress of Ld. Cockburn.
 of that estate. The action contained declaratory conclusions, that the estate was liable to the debts of Graham. The first of the heirs called, was designed “Robert Cuninghame Bontine Graham, residing at Finlaystone house, Renfrewshire, eldest lawful son of said William C. C. Graham.” And there was an enumeration between twenty and thirty substitute heirs, including the whole of the heir in possession. One of the heirs-substitute thus called, Calderwood or Graham, a daughter of the heir in possession, in preliminary defences, and pleaded that the whole heirs-substitute required to be called in an action which contained conclusions so affecting their interests: but that this condition was not complied with, because (1.) the first heir-substitute called was Robert Cuninghame of Ardoch; but he had been erroneously designed by the surname of Bontine, which he could not at present bear, as he was obliged to take the name of Bontine only, whilst he enjoyed the entailed estate of Ardoch; and would contravene the Ardoch entail if he answered to a citation by the name of Graham; and (2.) Nicol Graham, a brother of the heir in possession, as also Mrs Speirs, a sister of his, though both were heirs of a near degree, had not been called; and the family of Mrs Calderwood also been overlooked. In these circumstances the action ought to be allowed to proceed.

The pursuers answered, (1.) that the first heir-substitute called, was the daughter of the heir in possession, and was expressly called as such; and was sufficiently designed, as the pursuers had nothing to do with the Ardoch entail; and (2.) that as the pursuers called the heir in possession himself, they had brought the proper contradictor into the action, who was the representative of the familia of the heirs of entail. That if any prejudice could contingently accrue, from not bringing all the heirs-substitute forward, that was a matter affecting the pursuer alone, and not the defenders; it did not touch the title to pursue.

The Ordinary “repelled the preliminary defences; and in re-

No. 193. spect the defender intimated her intention to submit this interlocutor to the review of the Court, found her liable in this preliminary discussion." The defenders reclaimed.

Mar. 8, 1836. *Wilkie v. Flowerdew.*

LORD BALGRAY.—The heir in possession represents the familia of the heirs of entail; but it is often expedient, in questions of importance, to call all the substitute heirs also.

LORD MACKENZIE.—The heir in possession may sometimes have a fair interest to insist that the heirs-substitute should be made parties, so as to bar them from afterwards alleging that he had made an inadequate defence. But on the other hand, it is frequently impossible to call the whole of the heirs-substitute under an entail. Entire clans are called under some entails; and, after a certain period, the substitutes often branch out to an infinite number.

LORD PRESIDENT.—In regard to the objection to the designation of the heir in possession of the heir in possession, I am satisfied it is ill-founded. Constat de personis and that is enough.

THE COURT considered that there was no sufficient ground to alter the judgment of the Lord Ordinary, and accordingly their Lordships "adhered."

W. A. G. and R. ELLIS, W.S.—J. KNOX—KEE and DICKSON, W.S.—Agents.

No. 194. MRS JANET WILKIE or SMITH, Petitioner.—*Pattison.*
 ——— FLOWERDEW, Respondent.—*Monro.*

Poor's Roll—Process.—Where a party petitioned for the benefit of the poor's roll, in order to raise a reduction of a decree of adjudication, and made relevant averments to support such an action, but adduced no evidence in support of the averments,—Held, in the circumstances, that she ought to be admitted, in respect inter alia, that she alleged she should be able to recover evidence, under the compulsor of a diligence, which compulsor was not competent, till after her action should be raised.

Mar. 8, 1836. MRS JANET WILKIE or SMITH craved the benefit of the poor's roll, to enable her to institute a reduction of a decree of adjudication, which she alleged to have been obtained by a creditor after his debt had been extinguished, by previous intromissions with the rents of the subject adjudged, or at least, so far reduced by such intromissions, that the decree was liable to the objection of pluris petitio. Her application was remitted to the lawyers for the poor, who reported, that though these allegations, if true, afforded a probabilis causa litigandi, yet they were wholly unsupported by evidence, and therefore they could not report that the petitioner was entitled to the benefit of the poor's roll. When this report was moved in Court, the petitioner objected that it was irregular, as the sole province of the lawyers for the poor was to judge of the relevancy of the averment made, as grounds of action: and that at least she should not be turned out

1st DIVISION.

rt for want of evidence, as it was not until after the action should No. 18
 ed, that she could obtain a diligence, and compel the production of Mar. 8, 18
 idence which was necessary to instruct her case. She craved a new Wilkie v.
 to the lawyers for the poor, to reconsider their report. This was Flowerdev
 ed by the party who was to be defender in the proposed reduction,
 no contended that every circumstance affecting the probable issue
 aim, was to be taken into account by the lawyers for the poor, and
 ithin their province: that the total want of proof of an averment,
 render a case as desperate as the absence of the averment altoge-
 and that, both in reference to the trouble and incidental cost im-
 on the agents for the poor, and also in reference to the expense
 oned to the opposite party, the lawyers for the poor were bound to
 there was no probabilis causa, wherever they saw no chance or
 ct of being able to prove any relevant averment.

the Court made a fresh remit to the lawyers to reconsider their report ;

MACKENZIE observing, that, where the defect in the applicant's
 rose from the want of evidence merely, the lawyers would not be
 ed in reporting no probabilis causa, unless where they had reason
 l strongly satisfied that neither then nor afterwards during the pro-
 he petitioner would be able to recover evidence to support her ac-
 and that this was a very delicate thing to hold, while she had not
 ose means of recovering evidence, which a diligence, after the action
 a dependence, would furnish.

the lawyers made a new report, recapitulating the procedure, and stat-
 at the averments were still unsupported by any evidence, and that
 own " impression was, that the petitioner's averments are not cor-
 a point of fact, and could not be substantiated; and, at all events,
 g no farther power to compel production of the alleged evidence, we
 humbly to make the foregoing statement to the Court, that their
 hips may pronounce such order in the case as they shall judge most
 lient."

THE PRESIDENT.—Complete proof, in support of a case, is not to be expected
 the lawyers for the poor ; and the petitioner states that it is the want of a
 ace which disables her, *hoc statu*, from proving her case. She makes at
 me relevant averment, which, if duly proved, will insure success to her ac-

In these circumstances, I think it would be a strong proceeding on the
 f the Court to exclude her from the benefit of the poor's roll, when there is
 i express report of no probabilis causa.

the other judges concurred, and admitted the petitioner to the poor's roll.

— — — J. BURNES, S.S.C.—Agents.

No. 195.

Mar. 8, 1836.
Heriot's Trustees v. Fyffe.

HERIOT'S TRUSTEES, Pursuers.—*Robertson.*
 CAPTAIN JAMES FYFFE and OTHERS, Defenders.—*D. F. Hope—
 Russell.*

Trust.—A testator conveyed his estate to trustees, with directions, in a certain event which occurred, to apply the annual produce thereof to the aliment of his sister, and the aliment and education of her children, the jus mariti of her husband and all right in him or his creditors to interfere with the proceeds being excluded:—of the two surviving and accepting trustees, one resided constantly in England, the other trustee being the husband of the lady beneficially interested in the trust:—In an action at the instance of a party who had been agent in the trust, alleging that he had made advances on the orders of the trustee in Scotland and of the husband for behoof of herself and family—Held, that the trustee in Scotland, acting by himself, could not affect the trust-estate for such advances; but that, in so far as advances were made to the extent of the annual proceeds, and applied according to the directions of the trust, or for the purpose of making up titles, and in the necessary management of the trust, such advances were just debts against the trustee and the trust-estate.

Mar. 8, 1836.

2D DIVISION.
 Ld. Moncreiff.
 T.

THE late Alexander Stevens died in 1825, leaving a settlement, by which he conveyed his whole heritable and moveable property to certain trustees, two to be a quorum, and with power to assume others. In the event of the testator predeceasing his wife, Margaret Stout, and leaving no children, which event occurred, the trustees were directed, upon the death of the widow, “to apply the free annual produce of my heritable and moveable estate to the aliment, maintenance, and support of Jean Stevens, spouse of James Fyffe, my sister, and the aliment and education of her children of the present or any subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her family.” The jus mariti of James Fyffe, and all right in him or his creditors to interfere with the annual proceeds of the trust-estate was expressly excluded. The trustees were specially empowered “to sell any part of my heritable subjects, or uplift any debts due to me, for the purpose of fitting out any of the said Jean Stevens’s children in life, putting them to apprenticeship or such like, or laying out the same in any other way advantageous to her family, on this condition always, that the said Margaret Stout’s consent be previously had thereto.” The fee of the trust-estate was conveyed to the children of Mrs Fyffe, of whom there were eleven. The trustees expressly accepted and acted under the trust.

The testator’s widow having died in 1826, the succession opened to Mrs Fyffe, the only surviving trustees being Captain Fyffe and John Stout, the testator’s brother-in-law, who was resident in England. Thereafter, J. J. Fraser, W.S. was appointed agent for the trust. During his connexion with Fraser, Fyffe’s affairs were in a state of great embarrassment, and he was frequently pressed for money for the

of himself and the individual members of his family. The proceeds of the trust-property were annually applied in terms of the settlement. No authority was ever given by Fyffe and Stout, as trustees, to pledge the fee or reversion of the estate in security of advances to Fyffe or his family. No
Mar. 8
Heriot
tees v.

Fraser continued in the management of the trust-property till 1830, after carrying through a transaction whereby a portion of the estate was conveyed to himself,* he retired from the trust-management, and made a claim against Fyffe for alleged advances to the extent of £100. This claim he assigned to the late Robert Heriot, whose representatives thereafter raised action against Fyffe, as an individual, and against Fyffe, as having a right and interest in the estate of her late brother, and against Fyffe and Stout, as trustees under Stevens's settlement, alleging that, at the request of Captain and Mrs Fyffe, Fraser had made advances, of which he offered to produce vouchers, for their aliment, and for the aliment and education of their children, on the faith and understanding that the property left by Stevens, and also certain property to which Fyffe had succeeded in right of his brother, Baron Fyffe, should be available in security and for repayment of these advances; and demanding for payment of the sum of £2500 so advanced, and to have it decreed, that the whole heritable and other property in the possession of the trust, under the management and control of Captain and Mrs Fyffe, in whatever different characters, was liable to be attached for the foresaid sum. The action contained likewise a conclusion against James Bennet, W.S., as agent for the other defenders, was alleged to have become bound by payment of their debts to Fraser.

In support of their action, the pursuers maintained, inter alia, that one of two trustees is a foreigner by birth and domicile, and though he accepts, neither comes to reside in the country nor acts in the deed, the other trustee is entitled to take the management of himself, and his actings, when warranted by a fair construction of the trust-deed, as in the present case, are valid and effectual; that the advances founded on having been applied for the aliment and support of Mrs Fyffe and her family, in terms of the deed, the trust-property is liable therefor.

It was maintained, in defence,† that, under the summons, there were no *probi habiles* for the action; that the advances in question, even if they could be satisfactorily proved, had not been made in terms of the trust-deed for trust-purposes, nor had they been authorized by an act of the trustees, which alone could bind the trust-estate and affect the funds thereof; that both Stout and Fyffe having accepted and acted, and

* In the next case, Stevens's Trustees v. Fraser.

† Stout and Stout having assumed three new trustees under Stevens's settlement, were listed also as defenders.

No. 195. the former's residence in England being known to the testator at the time of his being appointed, it was impossible that the acting single trustee could create debts against the estate, more especially in favour of a person who held the confidential situation of agent in the trust.

Mar. 8, 1836.
Meriot's Trustees v. Fyffe.

The Lord Ordinary pronounced the following interlocutor, the subjoined note : *—" Finds it admitted that the pursuers,]

* " It is unnecessary to go into much detail in explanation of the above interlocutor, but a short statement seems to be necessary.

" 1. As to the conclusion against Stevens's trustees, the trust-deed is material parts of it, clear and unambiguous. There were four trustees; clearly ascertained that they all accepted. Upon the death of the wife the annual proceeds of the estate were specially appropriated, in the terms of the interlocutor. It was not even a simple liferent that was given to Mrs Stevens; the funds were to be applied by the trustees, even with a discretion in the aliment of herself, and the aliment and education of her children. It unfortunately happened that, after Mrs Stevens died, Mr Rhind, another trustee, died also. Mr John Stout resided in Lancaster—a fact known to the truster and named him. Mr Fyffe was named a trustee, though there was the most complete exclusion of all personal concern by him or his creditors, even in the annual proceeds of the fund. Perhaps he may, notwithstanding, have been entitled as a trustee, though the Lord Ordinary certainly thinks that, if the interests of this family had been properly attended to on the death of Mr Rhind, a proper arrangement should have been made. However, Mr Fyffe did take upon himself to act. If he had merely drawn the annual proceeds, and applied them for the maintenance of the family, there would have been no harm, but he was in peculiar circumstances, beset by creditors, and of improvident habits. In this situation Mr Fraser became his agent. And what is the case now stated? It is, that Mr Fraser, with full knowledge and consideration of the terms of the trust-deed, made large advances to Mr Fyffe, far beyond all the annual produce of the estate; in fact, to the amount of £5000 in the course of three years. The correctness of this statement is not admitted; but taking it to be so, Mr Fraser's case is so advanced, in reliance of the trust-estate. This is said without alleging that Mr Fyffe even by Fyffe, pledging the trust-estate, and far less any trust-act by Mr Stout together. If Fyffe had executed such a deed, the Court must have found it to be an act, not only incompetent for one trustee to do, but beyond the powers of the trust, and a direct violation of his duty as trustee. But nothing of the kind was done, and the pursuers can only rest on a supposed liability by the trustees at common law; for it is no answer to say, that the trustees had power to apply a small part of the estate, for fitting out members of the family, &c.; suppose that power to subsist after Mrs Stevens's death (and the Lord Ordinary should have thought it did), the provision gave no power to the trustee to contract, and the power given was not exercised, and, as an extraordinary act of administration could not be exercised without a regular act with Stout's concurrence. Mr Fraser's absence can make no difference in this matter, for it is not alleged that he attempted to inform him either that money was wanted for such purposes, or that Mr Fraser was making advances such as he now states; and, at the same time, the difficulty would only have rendered it necessary to apply to the Court for other legal remedies. But all this is superseded by the fact, that even Mr Fraser made no attempt to exercise the power.

" Then, what is the plea? On an averment that the money was applied for the aliment of the family and education of the children; it is said that, at law, not the annual proceeds only, but the fee of the trust-estate, must be applied for any advances, however great, that were actually made: That is, that Mr Fraser was so imprudent as to give his money to enable Mr Fyffe, a b

trustees, can only maintain this action as in the right of James John Fraser, from whom they derive right by assignation, and subject to all pleas and defences competent against him: Finds that the defender, John Stout, called by the supplementary summons, having accepted of the trust under the deed of Alexander Stevens, and acted therein, must be considered as having been still a trustee during the whole period within which the debt, by advances of money, is stated to have been contracted to the said James John Fraser: Finds that, by the terms of the trust-deed, in the event which occurred, the whole 'annual produce' of the trust-estate was applicable 'to the aliment, maintenance, and support of Jean Stevens, spouse of the said James Fyffe, my sister, and the aliment and education of her children, of the present or any subsequent marriage, in such way and manner as shall appear to my said trustees best suited to the comfort and advantage of her and her family;' with an express exclusion of the jus mariti of her husband, and of all right in him or his creditors to interfere with the 'rents or annual proceeds' thereof: Finds that, in so far as advances might be made by the said James John Fraser, to the extent of the rents or annual proceeds, which were applied to the aliment of the said Jean Stevens, or the aliment or

to live at the rate of £1500 a-year, all the provisions and obligations of Mr Stevens's trust, made for the very purpose of preserving the estate for the wife and the children, against the husband, were ipso facto, extinguished. The Lord Ordinary sees no possibility of maintaining this; and it would indeed be a very serious view of the law of trust in Scotland.

"It will be observed, that there is no question here as to the possibility of any of the children pledging their rights of reversion of the fee for advances made on their own account. None of the children are made parties to the action; and therefore no such question can be discussed. Neither is there any question raised as to the bond, or the personal obligations in it, to which another process relates.

"The fact is, that the summons was originally laid, on the assumption that James Fyffe was the sole trustee, but without any relevant statement, that even he had in any manner pledged the trust-estate. But, when it has become certain that he was not the sole trustee, even this foundation for the action fails.

"2. As to the conclusion against Mrs Fyffe. It is enough to observe,—1. That there is not produced any writing or obligation by her, binding herself or her estate for these advances: If she had a separate peculium from which the jus mariti was excluded, she might no doubt, by any deed proper for the purpose, have bound it for money advanced for her aliment. But there is no such thing alleged. 2. That a personal obligation by a married woman would not be effectual. 3. That at common law, a married woman living with her husband cannot be sued upon an open account for money advanced for the maintenance of the family, even to the effect of attaching her separate estate; and, 4. That Mrs Fyffe has only a silent interest in the subjects referred to; and yet the summons concludes that the fee shall be declared liable to adjudication.

"3. As to Baron Fyffe's property, it will be observed, that there is no trust over that property. It is therefore manifest, that the pursuers can never touch the shares of it which are vested in Mr Fyffe's children by an action directed against their father only. Many of them are of age; yet not one is called.

"4. It is too clear for argument, that there is no case against Mr Bennet. Indeed, the pursuers scarcely attempted to maintain it."

No. 195.

Mar. 8, 1836.
 Leriot's Trust-
 as v. Fyffe.

education of her children, such advances might become just and lawful debts, exigible from the said trustees, and effectual against the alimentary fund under their management in each year; but Finds, that it was not competent to the trustees, or a quorum of them, except in virtue of the special power conferred on them, and by a regular trust-act in conformity thereto, and altogether incompetent to one trustee, acting by himself, to pledge either the fee or reversion of the said trust-estate, or the future annual rents thereof, for advances, made generally on the orders of the said James Fyffe, or of others of the family, in whatever manner the same might be applied, without prejudice always to the personal liability of the parties giving such orders, or receiving such advances; and that no third party, cognizant of the terms of the trust, can be held to have made any such advances on the faith of the trust-estate, except to the extent above expressed: Finds that the said trust-deed contains a special power to the trustees 'to sell any part of my heritable subjects, or uplift any debts due to me, for the purpose of fitting out any of the said Jean Stevens's children in life, putting them to apprenticeships, or such like, or laying out the same in any other way advantageous to her family,' on condition of the consent of Margaret Stout, the testator's widow, being obtained: Finds that this power could only be exercised by a regular act of a quorum of the trustees, and to the effect and according to the precise terms so expressed; and, in respect that no such act of the trustees was done or executed, and that no such sale or uplifting did take place by authority of the trustees, Finds it unnecessary to determine how far the power fell or subsisted after the death of Margaret Scott: Finds that, in so far as the said James John Fraser may have made advances, for making up titles to the trust-estate, or in the necessary management of the trust, according to the terms and qualities thereof, such advances are just debts against the trustees and the trust-estate itself; therefore, Finds that, in so far as this action and supplementary action conclude against James Fyffe and John Stout, as trustees of Alexander Stevens, or is insisted in against the other trustees now sisted, it cannot be maintained against them, or to the effect of adjudging the trust-estate, except to the extent expressed in the previous findings: Finds, that in so far as the summons concludes against Mrs Fyffe personally, as proprietrix of an heritable estate, for the purpose of attaching that estate, it was incumbent on the pursuer to show, by some act or deed, legally effectual, that the said Mrs Fyffe did bind or pledge her said separate estate for payment of such debt: Finds, that the pursuers have not condescended on any such act or deed; and Finds, that Mrs Fyffe, as a married woman residing with her husband, cannot be made liable, either in her person or in her separate estate, for personal debts contracted by her husband, whether for the support of his family or for other purposes; but Finds, that in so far as any advances may have been made in the management or for the preservation

subjects belonging to Mrs Fyffe, in her own right, such advances constitute a just debt against her and her said estate: Finds, that in as, by the settlements of Baron Fyffe, there was any right and interest vested in the said James Fyffe, in the estate left by him, the pursuer is entitled to obtain decree in this action against the said James for any debt or debts which shall appear to have been legally contracted by him personally, and to the effect of attaching such right or interest in the estate of the said Baron Fyffe; but Finds, that in so far as rights and interests in the estate of the said Baron Fyffe are vested in the children of the said James Fyffe, there is no competent conclusion from the summons under which any judgment can be pronounced to the prejudice of the said children, or their rights and interests in the said estate; and with these findings, before farther answer, excepting as after examination, remits to

the Lord Ordinary to examine the accounts and vouchers referred to in the deed of assignment constituting the debt now sued for, and to report whether, or to what extent, there was a good and subsisting debt in the person of James Fraser comprehended in the said accounts, in conformity to the rules laid down in this interlocutor; with power to him to call for books or writings necessary for explaining the transactions to which the said accounts relate; and to call for and receive all explanations from either of the parties: Finds that no relevant ground has been conceded on, in support of the conclusion of the summons, against the said James Bennet; sustains his defences, assoilzies him, and decerns: Finds the pursuer entitled to expenses, and remits the account, when lodged, to the Lord Ordinary, to be taxed; and reserves all other questions of exception.

Heriot's Trustees reclaimed.

THE LORD JUSTICE-CLERK.—I am satisfied with the interlocutor. I can give no credit when he says that he relied on the trust-estate being security for the advances. The fact must have been all along under his eye, that Stout was accepting and acting trustee. Any advances shown to have been made out of the trust-estate are just debts, for which the proceeds will be

other Judges having concurred,

THE COURT adhered.

ALEX. MILLAR—JAMES LINDSAY—JAMES BENNETT, W.S.—Agents.

No. 19
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Heriot's T
tees v. Fy

No. 196.

STEVENS'S TRUSTEES, Pursuers.—*D. F. Hope—Russell.*

Mar. 8, 1836.
Stevens's Trust-
ees v. Fraser.

JAMES JOHN FRASER, W.S., and CAPTAIN JAMES FYFFE, Defendants,
Robertson.

Trust—Fraud.—A party executed a settlement in favour of certain trustees who accepted and chose an agent to act for them: the agent took a disposition to a certain part of the trust-estate from the heir-at-law (who had only a life interest under the trust, but who, passing it over, made up titles as heir), in security of a debt alleged to affect the trust, took infeftment on the disposition, and conveyed to third parties, and subsequently retired from the agency of the trust;—that the agent had acted in mala fide, and was bound, in the first instance, to await the result of an accounting, to restore the estate in integrum again, and to re-create the real security created by the disposition and infeftment.

Mar. 8, 1836.

THIS was a case connected with the preceding, which see.

2D DIVISION.
J. Moncreiff.
T.

In May, 1830, while the defender, Fraser, was acting as agent for the deceased Alexander Stevens's trust, the only surviving trustees of which were John Stout, residing in England, and the defender, Fyffe, he obtained in security of an alleged debt, from Mrs Fyffe, the liferentrix of the trust-property, a disposition to a house in Charlotte Square, which was a part of this property, and of which Mrs Fyffe's children were in right of the fee. The bond and disposition proceeded on the narrative, that James Fyffe, Esquire, of Larch-hill, in the county of Dumfries, Elizabeth Fyffe, his daughter, and John and James Fyffe, junior, his sons, had constantly borrowed and received from J. J. Fraser, W.S. the sum of £10,000 for security of which, Mrs Fyffe, as sister and heir of the late Alexander Stevens, and heritable proprietrix of the subjects disposed, with the advice and consent of her husband, disposed the house, &c. with the declaration that, in the event of the principal sum not being paid, and the subjects not redeemed by the term of Whitsunday, 1836, the disposers should have a power of sale. The deed bore to be written by a clerk of Fraser's, and the instrumentary witnesses were also so designed. It contained no allusion to Stevens's trust-settlement.

A precept of clare constat in favour of Mrs Fyffe, as heir-at-law of her brother, was taken out from the superiors, the Magistrates of Edinburgh, on which infeftment followed. The trustees had made up no titles on their own persons.

Fraser was forthwith infeft on the disposition, and thereafter conveyed it to certain parties, for valuable considerations, still suppressing the existence and operation of the trust. These parties had their rights completed by infeftment.

On Fraser shortly afterwards retiring from the agency of the trust, the transaction became known; upon which Stout, who had taken no share in the proceedings, and Fyffe, exercising the powers vested in them by the trust-deed, assumed three additional trustees, and gave in a

esignations. The new trustees then brought an action of count No. 19
 reckoning and damages against Fraser and Fyffe, founding on Ste- Mar. 8, 18
 trust-settlement, and on the disposition above mentioned, as in Stevens's T
 m thereof, and concluding, 1st, For an accounting; 2dly, That tees v. Fr
 be ordained to renounce the title created in his favour by the dis-
 on, so far as he himself had any interest therein, and to relieve the
 ty in Charlotte Square of the burden constituted over it by means
 title fraudulently made up in the person of Mrs Fyffe, and also to
 payment to the trustees of the rents of the property since the date
 disposition; and, 3dly, In the event of Fraser failing so to do,
 and Fyffe be ordained to pay to the trustees the sum of £2500
 loss or damage which the trust-estate had sustained through the
 d transaction.

was maintained in defence by Fraser, that the action was improperly
 at the instance of the three new trustees, Fyffe and Stout not having
 effectually excluded from the trust; that there ought to have been
 ction of the bond and disposition in security; and that Fyffe having
 acting as sole trustee, and being virtually such, Fraser, who had
 merely as agent in the matter, could not be called upon to account
 manner in which the trust-funds were expended.

The Lord Ordinary pronounced the following interlocutor, with the
 ed note:—* “ In respect that no plea has been stated on this

The Lord Ordinary is convinced that very little is necessary to be said in
 tion of the above interlocutor. On the merits of the cause, the only diffi-
 s to imagine how it should be defended at all.

The short state of the case is this. Stevens, the brother of Mrs Fyffe, exe-
 settlement, by which he conveyed his whole property, heritable and move-
 the trustees named. The trust was expressly accepted. By the terms of
 was first a liferent to the testator's widow, and then a liferent to Mrs Fyffe,
 her death, a fee to her children, who were eleven in number, at the date of
 position in security; and the jus mariti of Mr Fyffe (he being bankrupt)
 cluded. In this state of things, after the death of the widow and another
 Mr Fyffe being the only trustee resident in Scotland, employed the defen-
 he himself says, as agent in the trust, and it is too clear that the very least
 case is, that schemes were formed for making the trust-estate available to
 himself, or to the defender, and others advancing money to him to the preju-
 the wife's liferent, and the ultimate purposes of the trust, in the disposal of
 sion. Finding that this could not be done directly, the defender devised
 of making a title in the person of Mrs Fyffe, as heir-at-law, in which, of
 the trust was not mentioned. The pursuers do not complain of this, be-
 was in itself useful, and should have been followed by a disposition by her
 trustees. But instead of this, the defender immediately took the bond and
 ion, in security, for a debt stated simply as the personal debt of Fyffe him-
 d three out of his eleven children (even the wife disponent not being stated
 ator at all), and then, having taken infestment, assigned the security to cer-
 ditors of his own, concealing the existence of the trust. How this can be
 ed to be justified, the Lord Ordinary cannot conceive. The defender says,
 had made advances for the better aliment, and for the education and out-
 of family, and that there was a power to the trustees in the trust-deed to
 split part of the estate for the latter purposes. But was this transaction

No. 196. record, objecting to the title of the pursuers to insist in this action, against the competency of the summons on the ground of John Stout not being a party thereto, and that James Fyffe being a party implicated in the transaction which is the subject of the action, is called as a defender. Sustains the action, without prejudice to any question as to the competency of the said John Stout, and James Fyffe, resigning their office as trustees in any other matter or discussion; and, on the merits of the cause, Finds, that, from the nature of the transaction narrated in the summons, no reduction is necessary for enabling the pursuers to maintain the conclusions thereof: Finds, that the defender being in the full knowledge of the trust-deed executed by the deceased Alexander Stevens, and the acceptance and actual operation of that trust, under which he admitted himself to have been the acting agent, was in mala fide to create or accept of the bond and disposition in security, libelled on, whereby Jean Stevens, or Fyffe, by her title completed as heir-at-law of the deceased Alexander Stevens, disposed a valuable part of the trust-estate of the defender, in security of an assumed debt of £2500, said to be contracted by James Fyffe, her husband, who, though named a trustee, was excluded from all personal interest in the trust-estate, and by three children of the said James Fyffe, suppressing altogether the said bond and the rights and interests thereby created: Finds, that the said defender farther acted in mala fide, in so far as he did take infestment

any thing like an execution of such a power? The Lord Ordinary is content, however unwillingly, to think that it was, on the contrary, a very deliberate proceeding for defeating the trust, and creating a security by covert contrivance could not have been created, even by the surviving trustees concurring in the trust-act. But it was known that that could not be even attempted.

“What may have been the state of the defender’s advances to Mr Fyffe, or his family, does not appear to the Lord Ordinary to be very material, or indeed material, to the chief point involved in this action. The defender’s statements on this subject are denied by the pursuers, who state, on very probable grounds, derived from documents in process, that the security was truly meant to be given for money to be advanced, and which never was advanced. But supposing it to be otherwise, and that the pressure of such a state of advance was the stimulus which led to the extraordinary measure adopted, would that at all justify it, or afford an answer to the demand of the trustees, that matters shall be restored to the state in which they ought to have been, whatever other questions may remain?”

“The Lord Ordinary had some difficulty as to the correctness of the process without John Stout concurring in the action,—but,

“1. There is no plea on the title, or on that as a defect in the form.

“2. The defender could not plead such a point, because his own case required that he should say that Stout had ceased to be an acting trustee long before his resignation.

“3. The action is by a full quorum of three trustees: Mr Fyffe is necessarily called as a defender, and the defender, Mr Fraser, has, by his pleadings in the record, rendered it impossible to discuss any question as to the competency of Stout’s resignation, or the necessity of his being a party. The last plea in law rests on Mr Fyffe alone.

“If the defender reclaims, the bond and disposition ought to be printed.”

disposition, and thereafter assign the same to third parties, for valuable considerations, not disclosing to such third parties the existence and location of the said trust: Finds, that, whether the debt acknowledged by the bond was a just debt, for money actually advanced to the parties in-mentioned, or not, and whatever may be the just state of accounts between the defender and the pursuers on the said trust-estate, the defender is bound, in the first instance, and without waiting the adjustment of any such accounts, to restore the estate in integrum against the real security created by the said disposition, and the infestment thereon, as now standing in the third parties, his assignees: Therefore, the Court Decerns, and Declares, in terms of the second and third conclusions of the libel: But, with reference to the first conclusion, Appoints a Commission to be enrolled, in order that it may be put into a proper course of investigation."

never reclaimed.

THE JUSTICE-CLERK.—In regard to the merits of the case, we can have no opinion in adhering. But the case is one of a grave and serious character, and calls for the notice of the court. Having such proceedings before us as appear these papers to have been adopted by a member of the Society of Writers to the Signet, it is our duty to recommend them to the attention of the Keeper of the Signet.

MR. MEADOWBANK.—I think we should send the papers to the Keeper, with instructions to report, and thus leave the matter in the hands of the Court to take what steps are necessary in order to vindicate the purity of professional conduct.

MRS. GLENLEE and **MEDWYN** having concurred,

THE COURT adhered, and ordained the proceedings in the cause to be transmitted to the Keeper of the Signet, with instructions to report thereon.

JAMES LINDSAY—ALEXANDER MILLAR—Agents.

• **THOMAS PATON, Petitioner.**—*Russell.*

Personal Protection—Sanctuary—Witness.—A party who was cited as a haver under process for recovery of writings, having taken refuge in the sanctuary, and being in consequence prevented from having access to his papers, the Court granted him protection from personal diligence for such times as at any diet of examination it should be necessary for him to go to his repositories in order to produce the writs for, and thereafter return to the sanctuary.

An action at the instance of James John Fraser, W.S., against the defender, Paton, and Sandeman, trustees on the sequestrated estate of George Pentland, a diligence was granted for the recovery of books and

No. 1
Mar. 8, 1881
Paton.

Mar. 8, 1881
2d Div.
T.

lo. 197: writings relating to Pentland's affairs.¹ Under this diligence, Fraser cited as a haver, but found it necessary to take the protection sanctuary, before production of the documents, for recovery of which diligence was granted, had been obtained. At a diet of examination in the Abbey Court-Room, he stated to the commissioner that he was ready to produce such of the writings called for as were in his possession, but, from having taken the benefit of the sanctuary, was prevented from having access to his papers, which were in his private repositories.

In these circumstances Paton presented a petition, setting forth that, alia, that the acts 1663, c. 4, 1681, c. 9, and 1698, c. 22, while they strictly limit the granting of protections within due bounds, reserve to the Court of the Supreme Courts full power to give such occasional and limited protection to persons cited to give evidence in a cause as may enable them to fulfil the duty which the law requires of them; and that a haver, by authority of the Court to depone and produce documents, who is cited to be evidence in a cause, is no less a witness in respect to the justice of the case and the principle on which the protection is granted, than a person who were put upon oath to depone to disputed facts. The petitioner referred to the case of Cockburn of Langton (30th July, 1700, 2 Fount. 107), and prayed for a protection to Fraser "against personal diligence for civil debts, for such times only as at any diet of examination the commission and diligence, may be necessary for him to go to his house, or place of business, or where the writs called for may be, in order to produce the said writs, and thereafter to return to the sanctuary for no other or longer space."

In terms of the provision of the act 1681, in regard to the granting of protection to witnesses, the agent of the petitioner who was at London, made affidavit to his belief that the examination of the petitioner and the recovery of the documents for which diligence had been granted were not only material but indispensable to the justice of the cause for supporting the petitioner's case.

THE COURT granted the prayer of the petition.

WILLIAM ALEXANDER, W. S.—Agent.

¹ See ante, p. 377.

No. 198

DAVID MILNE, Petitioner.—*A. Wood.*Mar. 10, 1834
Milne.

Factor—Lease.—Circumstances in which the Court granted authority to factor to accept renunciation of leases; and to re-let the lands.

M'Pherson v.
M'Pherson.

tion by the judicial factor on the estate of Billie, for authority to accept renunciations of the leases" of two tenants on the estate, who in all respects, in the same situation with ten other tenants, as to whom similar authority had been already granted by the Court.¹ After full intimation, and a report from the Lord Ordinary, the Court granted authority to accept renunciations as at the term of Whitsunday and authorized the petitioner to re-let the farms, after due notice.

Montgomerie
v. Boswell.

Mar. 10, 1834

1st Division
D.

H. MACQUEEN, W.S.—Agent.

JOHN M'PHERSON, Pursuer.—*E. S. Gordon.*

No. 199

LACHLAN M'PHERSON, Defender.—*Deas.*

—A pursuer was found entitled to the benefit of the cessio, on Mar. 10, 1834, of vacation: he was incarcerated in the country, so that his name could not be reported before the rising of the Court;—warrant was granted, without the opposing incarcerator's consent, to liberate the pursuer on his finding caution, to the amount of the incarcerator's debt, of £25, that he should return to jail on the expiry of the vacation, and the oath was duly reported, and decree pronounced.

1st Division
S.

R. ROY, W.S.—BROWN and MILLER, W.S.—Agents.

JEW MONTGOMERIE and OTHERS, Petitioners.—*Keay—Penney.*

No. 200

SIR JAMES BOSWELL, Respondent.—*Maconochie.*

—*Appeal*—The Court recalled the interlocutor of a Lord Ordinary, which had placed a cause to the jury roll; one of the parties conceiving himself, by the terms of the interlocutor, to be deprived of all recourse to jury trial at any future stage of the cause, presented a petition for leave to appeal: the Court refused the petition, but held that, "according to the true meaning of their interlocutor," a diligence in the first place, be granted for recovering documentary evidence, but that afterwards, it was open to the Lord Ordinary to judge by what mode of proof any investigation into disputed facts might, if necessary, be conducted.

REL of the case reported Jan. 29, ante, p. 378, which see. Mat.—Mar. 10, 1834
Montgomerie and Others, now presented a petition for leave to 1st Division
S.

¹ Dec. 20, 1834 (ante, XIII. 222).

No. 200. carry to appeal the judgment then pronounced, as they considered it to amount to an unqualified exclusion of their right to have recourse, at any future stage in this case, to trial by jury. The Court intimated that their previous interlocutor was not intended to have this effect, but merely to find, that, *hoc statu*, a remit to the jury roll was premature; that probably such remit might be inexpedient at any future stage of this cause; but that, in the mean time, a farther proof by incident diligence, for recovering documentary evidence, should be resorted to, and, after this was done, it would then be open to the Lord Ordinary to judge how he should proceed in disposing of any disputed questions of fact which might remain. Their Lordships therefore intimated their intention to refuse the petition, and the petitioners thereon moved the Court to insert, in their interlocutor, an explanation of the grounds of refusal, so as to prevent any subsequent dispute as to this, between the parties.

THE COURT pronounced this interlocutor:—"Refuse the desire of this petition, in respect that according to the true meaning of the interlocutor remitting the cause to the Lord Ordinary, diligence should, in the first place, be granted for recovering documentary evidence, and that, in considering such evidence, the Lord Ordinary should judge whether any farther investigation should proceed by a proof on commission or otherwise."

J. COURT, S.S.C.—W. B. CAMPBELL, W.S.—Agents.

No. 201. JAMES BAIRD SCOTT, Petitioner.—*Sol.-Gen. Cuninghame—Milne.*
A B, Respondent.—*D. F. Hope—Robertson—J. Anderson.*

Agent and Client—Summary Complaint—Jurisdiction.—A party held a decree in absence against a country agent, for a business account, which had been incurred to a deceased writer to the signet: the country agent remitted £38 to a solicitor before the Supreme Courts, for the special purpose of settling this debt; after a considerable lapse of time, during which no settlement was effected, the solicitor raised an action against the country agent, for payment of a large balance alleged to be due on their private business accounts, and he refused to apply the £38 in any other way, than in extinction, *pro tanto*, of this alleged balance:—Held, that a summary petition and complaint was competent against the solicitor, and that he was liable in instant restitution of the £38, and should be subjected in the expenses of the petition; but that, in the circumstances, though he had misapprehended his professional duty, the Court were not warranted in pronouncing any harsher finding against him.

No. 202. JAMES BAIRD SCOTT, writer in Glasgow, was a partner of the late firm of Scott and Cumming, writers there. John Court, S.S.C., held a decree in absence, for a sum and expenses, being a business account, due by Scott and Cumming to the executors of the late James Smythe, W.S., for whom Court acted. In January, 1834, after the death of Cumming, his

iving partner, Scott, wrote to A B, who was a solicitor before the No. 1
reme Courts, remitting a sum of £38, to enable A B to effect a settle- Mar. 1
t with Smythe's executors: Scott requested his correspondent, at Scott v.
ing, to "get the debt reduced as much as possible." On 25th Jan-
r, A B answered, "I this morning received your favour, advising the
ittance of £38 sterling, on account of the claim by Smythe's repre-
atives; and, on getting the money, waited on Mr Court, who fixed
nday next for adjusting the amount of the debt."

ome correspondence ensued betwixt A B and Court, as it appeared that
re were several objections to Court's claim which were considered to be
idable, especially against the expenses contained in the decree held by
ythe's representatives. Court, however, at an early period, made a spe-
:statement of the terms on which he was willing to settle, and his offer
under the amount remitted; and, though A B did not agree to the offer,
ay the money to Court, it did not appear that he ever communicated to
t the terms of Court's offer of settlement. After a considerable lapse
me, during which Scott and A B were corresponding on various mat-
, and occasionally referring to this, as an unsettled account, and during
sh time they were also occasionally meeting each other, Scott in De-
ber, 1835, received a letter from Court, threatening diligence on the
ee, unless payment was immediately made. In the mean time A B
raised an action against Scott for payment of a large balance alleged
e due, for business done by him in the employment of Scott and
ming; and when Scott asked re-payment of the £38, in order to
e with Court, A B intimated that he would impute that sum, in ex-
tion, pro tanto, of the much larger balance due to himself, and con-
ed for, in the action at his instance. Scott, after threatening a peti-
and complaint, wrote on 8th February 1836 to A B, stating "all
is asked of you, even at this late moment, is, that you will now pay
to Mr Court the money which was remitted to you for that purpose,
hat you will pay back the cash to Mr Scott. It is impossible to con-
e any thing more reasonable, and yet this is refused." As this de-
d was not complied with, Scott, on February 12, presented a petition
complaint against A B, alleging that he had kept him (Scott) in the
:as to the fact that the sum of £38 was still in his hands; that he had
s this by making many elusory statements and pretences as to the
culty of meeting and arranging with Court; and had finally led the
tioner into the belief that Court had been settled with; that the
ey, though placed in the respondent's hands for a special purpose,
unwarrantably detained by the respondent, which he had no right to
even if the balance claimed by him in his action had been liquidated
decree, in place of being disputed; and that this conduct was a breach
rust and a violation of professional duty. Scott therefore prayed the
at "to find that the respondent had been guilty of a breach of pro-
fessional duty, and is liable in reparation to the petitioner; and to ordain

No. 201. him instantly to pay over the said sum of £38, with interest thereof, from
 r. 10, 1836. and since the 25th of January, 1834, to the said John Court, for behoof
 of Mr Smythe's representatives, or otherwise to re-deliver or pay back to
 the petitioner, the foresaid sum of £38, with interest thereon, and also to
 find him liable in the expenses of this application."

The respondent alleged, that the sum of £38 had been remitted to him, with discretionary powers to effect as good a settlement as he could, and he had endeavoured to do so, but at last the claim lay over for a considerable time without being pressed by Court: that he (respondent) had acted in bona fide throughout, and was ready at any time to have paid the whole sum to Court, if he had been expressly instructed to do so, before he raised his own action against Scott, and ceased to be Scott's agent; but that, since that change in the position of the parties, he was entitled to retain the £38 on condition of giving credit for its amount to Scott, in extinguishing, pro tanto, the claim made in his action against Scott. But even if such plea of retention was ill-founded, in the circumstances, it was still a plea, involving an ordinary question of civil right and interest, totally apart from any question of breach of professional duty, and therefore it was not competent to make a claim of repetition in the form of a summary petition and complaint.

LORD BALGRAY.—When money is put into the hands of an agent for a special purpose, he has no discretionary power over it: he must either apply it to that purpose, or return it to his employer. At the same time, the respondent's situation was peculiar, as he was expressly requested to negotiate for a reduction of the debt; and I think it would be rather harsh to sustain this petition and complaint to any effect which would hurt the character of the respondent, as implying that he had wilfully violated his professional duty: I would incline to sustain the petition and complaint, to the effect of compelling instant restitution of the money; but, I would not sustain its penal conclusions.

LORD GILLIES.—It is impossible to refuse the petition altogether. The respondent should be compelled to make immediate restitution. And, on the face of the earlier part of the correspondence between the parties, I think it sufficiently appears that after the respondent got the money, with instructions to settle with Court; and after learning from Court the precise terms on which he was willing to settle, and that Court agreed to take a smaller sum than the petitioner had remitted, the respondent neither agreed to accept of Court's offer, nor certiorated the petitioner that such an offer had been made. That was a great irregularity. I can see no satisfactory explanation how it was consistent with the respondent's duty neither to accede to that offer, nor to put the petitioner in possession of its having been made. As to the subsequent proceedings and correspondence of the parties, some of it bears one way and some another, but when I see that the last letter by the petitioner, before presenting this complaint, stated "all that is asked of you, even at this late moment, is, that you will now pay over to Mr Court the money which was remitted to you for that purpose, or that you will pay back the cash to Mr Scott. It is impossible to conceive any thing more reasonable, and yet this is refused." I cannot but consider that the respon-

dent, having rendered this application necessary by refusing to comply with his duty in this particular, ought to be subjected in the expenses of the petition. I am far from saying that there is any thing fraudulent in the conduct of the respondent; but the petition and complaint is well-founded as to the instant restitution of the money, and the prayer should be granted, only in such terms as will not impeach the character or integrity of the respondent.

LORD MACKENZIE.—We cannot refuse the petition and complaint altogether. The money was remitted for a special purpose, and the respondent has ended by not applying it to that purpose, although he refuses to pay it back to his employer. He pleads a claim of retention, for a business account incurred to him; and as the petitioner is, notwithstanding, entitled to instant repetition of his money, the petition and complaint should be sustained to that effect. But I do not incline to go farther; and it appears to me that the petition has been couched in harsher terms than the facts of the case rendered necessary.

LORD PRESIDENT.—Besides ordaining restitution of the money, the Court might add a finding that the respondent had fallen into a misapprehension as to the nature of his duty: it would be too strong to find him unqualifiedly guilty of a breach of professional duty, as is craved in the petition.

The other Judges assented to this suggestion, and

THE COURT pronounced this interlocutor:—"Find that the respondent, in the management of the transaction stated in the petition, misapprehended his professional duty: Find him liable to repay to the petitioner the sum of £38, with interest from 25th January 1834, and decern: and Find the respondent also liable in expenses."

GREIG and MORTON, W.S.—Party Agents.

DAVID M'NIVEN, Pursuer.—*Maitland.*

MRS HUNTER or LEITH, and ALEXANDER GRAY, Defenders.—*Penney.*

Heritable Creditor—Personal Objection—Lease.—A party was the tenant of premises belonging to his son; he concurred with his son in stating that his rent was £20, and thereby induced an heritable loan to be made on the subjects; held liable to the heritable creditor, in a subsequent action of mails and duties, for a rent of that amount, though he alleged the premises to be worth less, and to have been let to him for less.

Lease—Stamp.—A contract of lease being unstamped, the Court refused to allow it to be pleaded upon.

In June, 1832, James M'Niven and David M'Niven, jun., brothers, borrowed £1833, 6s. 8d., from Mrs Hunter or Leith, binding themselves to repay the principal, to the amount of £1000, and, for the balance they became liable in an annuity of £100 per annum. In security of these obligations, they disposed some heritable subjects in Glasgow, in which Mrs Hunter was duly infeft. Before making the loan, Mrs Hunter required to see a rental of the subjects, and a rental was exhibited, which, *inter alia*, stated a portion of the subjects, which was occupied by David

No. 202. M'Niven, senior, the father of the proprietors, to be let to him at a rent of £20. This rent was so stated to Mrs Hunter, with the acquiescence of M'Niven, senior, and on the faith of it and the rest of the rental exhibited, Mrs Hunter made the advances. As part of the arrangement with Mrs Hunter, Alexander Gray was appointed factor to uplift the rents of the property. The proprietors got into arrears to Mrs Hunter, and she raised an action of mails and duties before the sheriff of Lanarkshire, in August, 1832. The action was directed against the two brothers M'Niven, as proprietors, and against the tenants, including David M'Niven, senior, whose rent was stated at £20. Decree passed in absence. In August, 1833, Mrs Hunter, with concurrence of Gray, presented a petition to the sheriff for sequestration of the effects in the premises occupied by David M'Niven, senior, in payment of the past year's rent due by him, and in security of the current year, but under deduction "of any contra account of repairs that can be legally instructed by the said David M'Niven, senior." He lodged defences and produced an unstamped contract of tack, bearing to set his part of the premises to him, as from Whitsunday 1832, at a rent of £8. He also claimed deduction of certain repairs. Mrs Hunter answered, that the contract was wholly improbative, being unstamped; that it was an instrument fraudulently concocted for this occasion, and that it was also vitiated in substantialibus; and that the defender was personally barred from stating his rent lower than £20, after having been instrumental in causing her to lend her money on the faith that his rent was of that amount. The sheriff allowed a proof, by which he found it established that M'Niven, senior, had admitted his rent to be £20, when Mrs Hunter required a sight of the rental before advancing her money; and that M'Niven senior's claim for repairs was judicially admitted, to the extent of £3, 9s. 6d., and not instructed, quoad ultra. The sheriff therefore repelled M'Niven's counter-claim, except to that extent, "reserving to him to constitute his claim, quoad ultra, in common form;" and granted warrant to sell for the rents past due, and to sequestrate in security of the rent current, as craved. M'Niven, senior, raised a reduction of the decree, in which the Lord Ordinary "sustained the defences, assoilzied the defenders, and decerned, and found the pursuer liable in expenses."*

* "NOTE.—The defender, Mrs Hunter, having lent a large sum of money to the pursuer's two sons, on the security of property belonging to them, part of which was possessed by the pursuer, their father, was obliged to take measures, by an action of mails and duties, and by a sequestration, for her protection. In this situation the pursuer and his sons had an obvious interest to make his rent appear less than it really was; and accordingly, instead of allowing it to be £20, he produced a pretended lease by which it is made to appear to be only £8. The Lord Ordinary has not the slightest doubt, 1st, That the sum at which it was honestly understood by these parties that he was possessing was £20. Independently of every thing else, his own acknowledgment is conclusive, for the proof:

Even reclaimed; and the Court stopped him from founding on the No. 202
 t of lease at all, as it was unstamped, but their Lordships delayed Mar. 11, 18
 se for a reasonable time, to allow him to get it stamped. He failed Lillie v. F
 p the instrument. Consideration of the cause was resumed, and later.
 art adhered. In respect of the nature of the case, their Lordships
 ame time allowed interim extract of the decree, on the merits, to
 there being no time to tax the account of expenses before the close
 session.

J. CULLEN, W.S.—H. TOD, W.S.—Agents.

JOHN LILLIE, Suspender.—Cook.

ALEXANDER FINDLATER, Charger.—Sol.-Gen. Cuninghame.

No. 203

ision—Expenses—Process.—A suspender objected to a charge by the assign-
 is creditor, that the assignation was written on an inadequate stamp: the
 got it stamped anew in the Bill-chamber, but the Court remitted to pass the
 suspension: the charger then intimated that he abandoned his first charge,
 ave a second charge, of which a bill of suspension was presented, contend-
 the expenses of the first bill should be taxed and paid, before the second
 could be sustained,—plea repelled, and letters of charge found orderly pro-

RE presented a bill of suspension, on caution, of a charge which Mar. 11, 18
 en by Findlater, as assignee to a decree containing the debt charged
 lie pleaded, inter alia, that the assignation was erroneously stamped, 1st Division
 ough Findlater then got it stamped anew in the Bill-chamber, the Ld. Cockburn
 assed the bill.¹ Findlater afterwards gave notice to Lillie that he Bill-Chamber
 D.

establishes that when it was put to him, he stated unequivocally that this
 ent, and that it was upon this statement that the loan was made. 2d, That
 equent lease of £8 was a mere trick to which the pursuer and his sons
 vy, in order to defeat the just claim of the lender. Independently of the
 stamp, the supposed vitiation of the date of the tack, tacit relocation, and
 is other circumstances which are stated against this writing, the whole real
 of the case creates an irresistible impression of fraud in the creation and
 tion of this new title of possession, which is not corroborated by any ver-
 mony; for though there be some variations as to the rent being £20, its
 is reserved for this writing alone.

to the repairs: It is true that the petition only asks for sequestration 'under
 n of any extra account for repairs that can be legally instructed;' and that
 ff did not allow the pursuer to prove them. But the reservation in his
 tor, whereby the pursuer was allowed to constitute his claim in so far as
 isputed, was the best course he could take, not only because the liquidate
 rent could not be set off by any illiquid counter claim, but because the
 not being a party to the sequestration, this process afforded no fair means
 ating what was due for repairs. The disputed sum is only about £6,
 pursuer's complaint is, in substance, that he was not allowed to get in this
 with the creditor into a proof, before sequestration, of this sum being due."

¹ Dec. 10, 1835, ante, p. 127.

No. 203. departed from his first charge, and he gave a new charge for the Lillie presented another bill of suspension, on caution, which the Ordinary refused; and Lillie reclaimed, contending chiefly that the expenses of the previous bill ought to be paid in the first instance, as a condition of having this charge sustained. The suspender would otherwise be exposed to the instant necessity of paying the whole sum contained in the charge, while he would only have reserved to him the right of afterwards recovering the amount of previous expenses from Findlater; this right, he averred to be of doubtful avail, owing to the straitened circumstances of Findlater.

Findlater answered, that the expenses of the previous bill were not awarded to either party: that even if any part was found due to him it was uncertain how much should be so awarded, as the plea of the stamp laws had only been brought forward at a late stage of the trial, and that a claim of this illiquid nature could not be stated as a ground for suspending a charge upon a debt constituted by decree.

LORD PRESIDENT.—I see no sufficient ground stated for passing this suspension. The suspender may expedite the letters, under our interlocutor on the previous bill, and he will then have the question of expenses under the bill duly disposed of. But, in the mean time, this charge, which is founded on assignation, no longer liable to any objection on the stamp laws, must be orderly proceeded.

The other Judges concurred, and their Lordships adhered, with a finding of additional expenses against the suspender.

L. M. MACARA, W.S.—W. WALLACE, W.S.—Agents.

No. 204.

WILLIAM CRAWFORD, Suspender.—*Maitland.*

ALEXANDER DAWSON, Charger.—*H. Bruce.*

Prisoner—Aliment—Diligence—Agent and Client.—Intimation was made, on 4th February, to the agent of an incarcerating creditor, that the sum for aliment signed under the Act of Grace, was exhausted on 4th February; the debtor was liberated on 8th February, there being no farther aliment yet lodged; on 10th February, the creditor, alleging that the failure to lodge aliment, arose from his neglect of instructions, reincarcerated the debtor under the same diligence: at passing a bill of suspension and liberation, 1st, That the creditor could be permitted to plead that the failure to lodge aliment arose from mere inadvertence, and, 2d, That where a creditor deliberately allowed the aliment to be exhausted and liberation to ensue, it was irregular to reincarcerate the debtor, within two weeks thereafter, where no change of circumstances had occurred in the interval.

Jan. 11, 1836.

1st Division.

J. Cockburn.

11-Chamber.

ALEXANDER DAWSON, merchant in Glasgow, was the holder of a bill for £350, accepted by William Crawford, weaver in Paisley. Dawson raised diligence on the bill, and, on 4th January, 1836, threw Crawford into the Paisley jail. Under the Act of Grace, Crawford was allowed

by the magistrates, at the rate of 1s. per day, and on Thursday, 4th February, the sum consigned for aliment became exhausted. On Saturday, 6th February, the assistant jailer notified this to a writer in Paisley, who was the agent of Dawson, and, on Monday, 8th February, no farther aliment being lodged, Crawford was set at liberty. On Wednesday, 10th February, Dawson reincarcerated Crawford, under the same caption, and Crawford presented a bill of suspension and liberation, in support of which he pleaded,—

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Mar. 11,
Crawford
Dawson.

That intimation to the Paisley agent of Dawson was equivalent to intimation to himself; and that Dawson, therefore, could not plead he omitted, through inadvertency, to lodge the requisite aliment.¹ Over he was barred from doing so, independently of any intimation, as he knew the rate of aliment awarded, and the amount consigned. He must therefore have known when it would be exhausted, and it must accordingly be held as his deliberate act, that he suffered the aliment to be exhausted, on the 4th February, and the suspender to remain incarcerated without aliment, till the 8th February, when he was set at liberty.

Even if the charger could be suffered to plead that it was through inadvertency that no farther aliment had been lodged, still, he must take the consequences of such inadvertency, and not the suspender; for a man, enforcing incarceration, was not to be permitted to be negligent, in a matter affecting the aliment and subsistence of his prisoner.

The charger being therefore barred from availably pleading inadvertency or mistake, he had no right to reincarcerate the suspender on the diligence, until either a considerable time had elapsed, or a decisive change of circumstances in other respects had occurred. But in this case there was no change of circumstances, and the interval of time was only a few days: so that the re-incarceration was irregular and oppressive.²

The charger answered, 1st, That he had not personally received any notice of aliment being exhausted, and did not know the fact, and instructed his agent in Paisley to lodge aliment, which the agent neglected. 2d, In these circumstances, it was through inadvertency alone that aliment was not regularly lodged, and that the suspender escaped the squalor carceris for any interval at all. 3d, It was therefore no oppression to re-incarcerate the suspender, as soon as the charger was informed of his being at liberty. Had the proceeding been dictated by a wanton or injurious purpose, the diligence would undoubtedly have led to suspension; but, in the total absence of any such purpose, the

¹ *McKenzie*, Jan. 14, 1830 (*ante*, VIII. 306).

² *Macdonald*, Dec. 10, 1709 (11803); *Bogle*, July 8, 1724 (11808); *Abercromby*, June 10 (11811); *Boyd*, Dec. 21, 1811 (F.C.); *Morrison*, June 3, 1826 (*ante*, IV. 675, *New Ed.*); 4 *Ersk.* 34128.

No. 204. right of incarceration was of extreme importance to a creditor, and not to be interfered with.¹ And there was no precedent for suspending a diligence in circumstances parallel to the present.

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Wason.

The Lord Ordinary "refused the bill, and found the suspender liable in expenses." *

The suspender reclaimed.

LORD PRESIDENT.—I assent to the doctrine in the case of *Mackenzie* where an agent is employed to execute the diligence of imprisonment, the employer resides at a distance, intimation to the agent, in regard to aliment equivalent to intimation to the employer. In this case due intimation was given to the agent for the creditor, and yet the aliment was allowed to be, for several days, exhausted, before the suspender obtained his liberty. He was then incarcerated in two days thereafter, and I think this was a proceeding which the suspender was entitled to redress by a process of suspension and liberation.

LORD BALGRAY.—Every case of this sort, is a case of circumstances, and it is difficult to find one which is quite in point, as a precedent to another. In the circumstances of the present case, I agree with your Lordship, and will allow this interlocutor.

LORD GILLIES.—I am of the same opinion. The charger pleads that it was an accidental omission, on his part, by which he failed to lodge aliment. I do not consider that a party, who puts in force extreme personal diligence against another, for whose aliment he is found bound to provide, is to be permitted to tell the Court that he has left his prisoner for several days without aliment, and that this was a mere mistake. Where the starvation of a prisoner is proved, I will not allow the charger to beg the whole question, and plead that it was an accident.

¹ *Inglis*, July 10, 1833 (ante, XI. 955).

* "NOTE.—The Lord Ordinary considers it as fixed, that the mere fact that a debtor has been once liberated on the act of grace, does not prevent him from being imprisoned again, and immediately after, on the same diligence, and for the same debt; and that his protection consists in the power of the Court to check an abuse of the diligence, where it is attempted to be used oppressively. In *Inglis*, 10th July, 1833,² there were four incarcerations in ten months, and suspension and liberation was refused, and with expenses. Now the Lord Ordinary sees no attempt at oppression or hardship in the present case. Almost all the cases referred to by the complainer, besides, were cases where the creditor refused to aliment. Here he had not only not refused, but had actually alimeted, and meant to go on doing so when there was an inadvertent failure to lodge money by the incarcerator's agent, unknown to the incarcerator himself. The Lord Ordinary can discover no authority for holding that a momentary liberation, following this accident, operates as a protection from re-imprisonment the very thing that the creditor hears of it. The complainer's arrangements, or alleged arrangements, with his creditors, do not interfere with the rights of the respondent to his diligence."

² Ante, XI. 955.

was a mere oversight. Holding the charger therefore to be in the same position as if the liberation of the suspender took place through no inadvertency of his, but by his deliberate act; and that he re-incarcerated the suspender in two days thereafter, without any change of circumstances having occurred, I am of opinion that the diligence should be suspended. I think the law on this subject is well laid down by Lord Balgray, in the case of Mackenzie, where his Lordship says,¹—"After a debtor has obtained his liberation under the act of grace, and has executed a disposition omnium bonorum, his creditor holding that disposition must be cautious in re-incarcerating for the same debt, and must be able to show solid grounds to justify him in such a proceeding, for although he may re-incarcerate his debtor on the very day after the liberation, he cannot justifiably do so unless some decisive change of circumstances has occurred, such as the debtor's succession to an estate, or the discovery of some impropriety in his conduct." Where a re-incarceration occurs, with little or no interval of freedom to the debtor, I think the onus lies upon the creditor to instruct such a change of the debtor's circumstances as will justify the re-incarceration. I am therefore altering this interlocutor.

LORD MACKENZIE concurred in altering.

H. Bruce, for the charger, moved that the suspender should at least execute disposition omnium bonorum in his favour as a condition of liberation.

Maitland, for suspender, assented to this.

THE COURT accordingly altered, and remitted to the Lord Ordinary to pass the bill, on this condition.

DUNDAS and JAMIESON, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

WILLIAM THOMAS CARRUTHERS, Pursuer.—*D. F. Hope—Ivory.*

JOHN THOMSON, Defender.—*G. G. Bell.*

Et e contra.

Lease—Compensation—Retention—Process.—While mutual actions were depending between a landlord and tenant, three half-years' rent fell into arrear: the Court ordained the tenant to consign all these, in the mean time, although he alleged that his action of damages at his instance was ready to be sent to the jury roll.

SEQUEL of the case reported ante, p. 464, which see. The pursuer now asked interim-decree for payment of the rents of one year and a half, ending Martinmas, 1835, which were now past due; or at least for order to consign their amount.

Thomson objected, that his action of damages against Carruthers was ready to be sent to the jury-roll, and therefore he should neither be decreed to pay nor consign, till the issue of that action.

The Lord Ordinary, "in respect that the processes for mutual da-

¹ Ante, VIII. 309.

No. 205. **Stewart v. Carruthers.** Damages are in a state for being sent to the jury-roll, and that Mr Thomson expresses his willingness to this being done, refuses, in hoc statu, the motion of Mr Carruthers, for an interim decree."

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Carruthers reclaimed.

LORD PRESIDENT.—There are seven or eight years of this lease yet to run: the rent is £236; surely these rents will more than cover any claim of damages by Thomson, so as to secure him even if he was ordained to pay the past-due rents to his landlord. But, at any rate, the landlord has a right to see the past-due rents placed in a state of security, by being consigned in the mean time, whatever may be the issue of the action of damages. I think the interlocutor should be altered.

The other Judges concurred, and

THE COURT "altered the interlocutor, and appointed the respondent to consign in the Royal Bank of Scotland, the rents, with interest, specified in the prayer of this note, and that against the 4th of April next."

MACLACHLAN and IVORY, W.S.—JARDINE, STODART, and FRASER, W.S.—Agents.

No. 206.

JAMES STEWART, Pursuer.—D. F. Hope—Thomson.
ALEXANDER SCOT, Defender.—Rutherford—Sandford.

Expenses—Appeal—Jurisdiction.—Held by a majority composed of seven judges, 1st, That where a judgment of the House of Lords exhausts the whole merits of a cause, and contains no remit or special finding as to expenses, it is incompetent for this Court to dispose of the expenses prior to appeal, although the judgment of the House of Lords contains a general remit "to proceed in the cause as shall be consistent with this judgment:" 2d, That where a judgment of the House of Lords does not exhaust the whole merits, and the cause returns to this Court for farther discussion on the merits, after applying the judgment, it is competent for this Court, after such discussion, to dispose of the whole expenses incurred by this Court whether before or after appeal; though no special remit or finding may have been made by the House of Lords on the subject of expenses. 3. Circumstances in which, held incompetent to dispose of the question of expenses prior to appeal.

Jurisdiction—Process.—Held, notwithstanding the peculiar phraseology of 6 G. IV. c. 120, § 24, that, when the judges of one Division, require the Opinions of the judges of the other Division, and of the permanent Ordinaries, on questions in writing, the judgment to be pronounced is not to be according to the opinion of the majority of the judges so consulted, where such opinion is opposed to that of the majority of all the judges taken together.

ar. 11, 1836.

1st Division.
Lord Jeffrey.
B.

THE late James Stewart of Brugh died in 1811, leaving one child, James, in pupillarity. A gift of tutory-dative was expedited in 1814, in favour of Mrs Stewart, the widow, Thomas Strong, merchant in Leith, and Alexander Stevenson, writer in Edinburgh. James Baikie of Tankerness became bound as cautioner for the tutors. In 1819 a factory

ted by Thomas Strong and Mrs Stewart, in favour of their co- No. 206
 Stevenson, on which occasion, Alexander Scot, W.S. became Mar. 11, 1832
 cautioner for the intromissions of Stevenson. Strong died in Stewart v.
 Stevenson continued his intromissions, and it was said that at Scot.
 7, 1825, when the pupillarity of Stewart expired, he was liable
 as a tutor for a balance of about £2000. He afterwards became bank-
 rupt, and Stewart, having now chosen curators, brought an action of
 account and reckoning against Baikie, the cautioner for the tutors, and
 also another action against Stevenson and his trustee, and also
 against his cautioner, Scot, for the balance due at the expiry of the

Baikie and Scot, in their respective actions, pleaded that, by the
 death of Strong in 1820, the tutory fell, and consequently the factory in
 the hands of Stevenson. And Scot accordingly contended that he was
 not liable from any liability under his bond of caution for Stevenson's
 subsequent intromissions, as they were not made by him in his character
 of tutor for the tutors.

The Lord Ordinary "found the defender, Alexander Scot, liable for
 the balance of the intromissions of Alexander Stevenson, under the
 bond in question; appointed a state thereof to be lodged in process,
 to be done within eight days; and found the pursuers entitled to ex-

penditures claimed, and the Court remitted the action, ob contingentiam,
 to the Lord Ordinary before whom the action against Baikie was in de-
 pending; and ultimately the Lord Ordinary ordered Cases, and report-
 ed to the Court.

The Court¹ "found the defender, Alexander Scot, liable as cautioner
 for Alexander Stevenson, factor appointed by the tutors-dative of the
 said factor for all the acts and intromissions of the said Alexander Steven-
 son; found him also bound to relieve James Baikie,
 cautioner for the tutors-dative, of all responsibility falling upon him
 in respect of the said factor's intromissions, and remitted to the Lord
 Ordinary to proceed farther in the cause as to him shall appear just; and
 found the pursuer entitled to expenses."

The pursuers brought these judgments under appeal, and the House of Lords
 allowed the appeal² and adjudged that the several interlocutors complained of in
 the appeal be, and the same are hereby reversed: And it is decla-
 red that the tutory expired with the death of Thomas Strong, one of the
 tutors, and that the survivors did not take the office; and it is further
 ordered that, with this declaration, the cause be remitted back to the
 Court of Session in Scotland to proceed therein as shall be consistent
 with the said judgment."

¹ Feb. 29, 1832 (*ante*, X. 392).

² April 7, 1834 (*Supp. S. D. B.* 145).

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St.

Scot then presented a petition to the Court "to apply the above judgment of the House of Lords; to reverse the interlocutors appealed from, in terms of said judgment, and to find the petitioner entitled to the expenses of this application, and to sustain the defences and to absolve the petitioner from the whole conclusions of the libel, with expenses, and to decern."

The Court applied the judgment, and remitted the cause to the Lord Ordinary, before whom the pursuer admitted that a decree of complete absolvitor must follow on the judgment of the House of Lords.

Parties were at issue whether this result arose necessarily from the frame of the summons, and its conclusions, as not fitted to reach any balance which might be due by Stevenson, at the death of Strong, even if such balance had existed: or whether it followed merely from the actual circumstance, that, at Strong's death, no such balance was due. But in point of fact, the pursuer admitted that he could insist in no conclusion against the defender, after the judgment was applied, and he consented to decree of absolvitor.

The defender then moved for expenses, both before and after appeal; and the pursuer objected that it was incompetent to entertain the demand for the expenses prior to appeal.

Pleaded by the Defender—

1. According to some of the earlier cases it had apparently been held, that wherever a judgment of the House of Lords was silent on the subject of expenses, or where no special remit was made regarding them, it was incompetent to moot the question here. But many later decisions had departed from this principle, and it was now fixed that a special remit was not indispensable: and that wherever the judgment showed that the House of Lords contemplated some farther judicial procedure in this Court, the claim for the expenses prior to appeal, remained open for discussion under the remit, like any other point not decided by the Court of Appeal.¹ And it was only where there was no remit at all, or where the remit limited this Court to proceedings of a ministerial rather than a judicial nature, such as where the remit was "to repel the defence and decern,"² that the prior expenses could not be disposed of in this Court.

2. In this cause the House of Lords, on reversing the judgments complained of, did not pronounce another judgment concluding the cause. They merely delivered a declaratory finding on one point of law, which was, that the tutory fell by the death of Strong: and with that finding they remitted the cause back to this Court "to proceed therein as shall

¹ *Maberly*, March 11, 1826 (ante, IV. 550;—or 559 new ed.); *Dick*, Jan. 19, 1830 (ante, VI. 396); *Stirling*, Jan. 14, 1831 (ante, IX. 276); *Clyne*, Dec. 14, 1831 (ante, X. 132); *Torrance*, Jan. 17, 1832 (ante, X. 193).

² *Reid*, Nov. 18, 1825 (ante, IV. 198;—or 200 new ed.)

be consistent with this judgment." Under this remit there might have been a prolonged discussion in the cause, which was only prevented by the pursuer's consenting to absolvitor, as the effect of this judgment was found to be sufficient to destroy all his grounds of action. But it might have been otherwise: and, in a question of competency, the right of this Court to take up the question of prior expenses could not be affected by the incidental circumstance of a pursuer's consenting to absolvitor, in place of making an obstinate litigation. The House of Lords had refrained from deciding on any of the expenses, as it was not then apparent what would be the ultimate effect of their judgment on the various pleas of the parties: but as that was now ascertained, it was open to this Court to decide on a question of expenses which had been left open for them, apparently *ex proposito*.

Pleaded by the Pursuer—

1. By a series of decisions, which were in reality uniform, though apparently contradictory, it was fixed that wherever a cause was exhausted on its merits, by the judgment of the House of Lords, and no special remit or finding was made as to prior expenses, it was incompetent for this Court to entertain the question. It was expressly so held in seven consecutive cases.¹ But if the cause was not exhausted on the merits, and farther procedure on the merits was left for this Court to dispose of, it was open for this Court, at the end of such procedure, to decide the whole question of expenses, including those prior to appeal. It was so held in five consecutive causes.² And although there were two decisions in variance with this last series, it appeared from one set of the reports, that in them the point of competency had not been discussed or decided by the Court.³ And there was a strong reason why the House of Lords, in exhausting the merits of a cause, should also dispose of the expenses; that Court was then in a fit condition to do so, and it was not to be presumed that it would leave this question to be a source of farther discussion in the Court below, leading thereby to a re-hearing of the cause on the merits, in order to enable this Court to dispose of the expenses. A special remit could alone warrant this Court in entertaining the question of prior expenses, therefore, after the cause on the merits was exhausted by the Court of Appeal. In regard to a mere general remit "to proceed as shall be just," or "consistently with this judgment," it

¹ *Pringle*, March 6, 1799 (Dict. v. Expenses, App. No. 1); *Geddes*, Feb. 16, 1816 (F.C.); *Wilson*, June 18, 1818 (F.C.); *Reid*, Nov. 18, 1825 (ante, IV. 198;—or 200 new ed.); *M'Tavish*, Feb. 12, 1831 (ante, IX. 431); *Agnew's Executrix*, June 24, 1831 (ante, IV. 757;—or 764 new ed.); *Wilson*, June 12, 1832 (ante, X. 640).

² *Clyne*, Dec. 14, 1831 (ante X. 132); *Torrance*, Jan. 17, 1832 (ante, X. 193).

³ *Maberly*, March 11, 1826 (ante, IV. 550;—or 559 new ed.); *Lord Fife*, July 8, 1826 (ante IV. 818;—or 825 new ed.); *Speir*, May 30, 1827 (ante, V. 729); *Dick*, Jan. 1, 1828 (ante, VI. 396, and IX. 93); *Stirling*, Jan. 14, 1831 (ante, IX. 276).

206. was quite immaterial whether such remit was contained in the judgment or not, as it was always implied, when not expressed. And the procedure of this Court was always of a judicial nature, in implying a judgment containing such a remit, whether there remained much ulterior procedure under it or not.

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2. In this cause the judgment of the House of Lords had exhausted the whole merits, so that nothing remained for the pursuer on applying it, except to consent, as he had done, to an unqualified absolvitor. It was therefore incompetent to entertain the defender's application for expenses prior to appeal.

The Lord Ordinary, "of consent, assolizied the petitioner from all the conclusions of the action, and decerned; and found him entitled to expenses." *

* "NOTE.—The defence ultimately sustained being, in substance, that there was from the beginning no competent ground of action, the Lord Ordinary had no doubt that expenses were due on the merits, and this, indeed, seemed scarcely disputed by the respondent. The only point of contention was the competency of awarding such expenses prior to the appeal, which issued in a judgment of reversal, with a general remit 'to do what was consistent with that judgment.'

"In conformity with the decisions in the cases of Clyne, 14th December, 1831; Dun and Stirling, 14th January, 1831 (S. and D. IX. 276); and Torrance, 17th January, 1832 (S. and D. X. 193), the Lord Ordinary, even if his own opinion had been at variance with those judgments (which it is not), would have had no choice but to repel the objection to the competency, and find the petitioner entitled to his whole expenses. But it is impossible to disguise, that the distinction between these cases and some others, about the same period, is very thin; and that the practical rule by which a single judge must now be guided in all such cases, is far from resting on a clear or satisfactory principle. In the case of Reed, 14th November, 1825 (S. and D. IV. 198), a reversal, with a remit 'to repel the defences, and decern;' and in those of Mactavish, 12th February, 1831 (S. and D. IX. 431), and Wilson, 12th June, 1832 (S. and D. X. 640), a simple reversal (leading necessarily to the same conclusion), but without any remit whatever, were held to render a claim for expenses incompetent, though clearly just and irresistible on the merits. In the present case, and in those first mentioned, there was a judgment of reversal, with a general remit to do what was consistent with such judgment; and in all of these, there was nothing to be done on that remit, but to repel (or sustain) the defences, and decern. Now, it is not easy to see why an express remit to repel the defences and decern (or a simple reversal without any remit, but leading necessarily to the same result) should render an award of expenses incompetent, when it is competent, under a reversal with a remit to do what was consistent with that reversal, and there was nothing consistent with it (or to be done) but to repel the defences, and decern. The truth is, that the substance and effect of the judgment is the same in all those cases; and that the terms of the remit, or the existence of any remit at all, are not of the slightest importance—a remit is always implied in every judgment of the House of Lords, because, after judgment, the record necessarily comes back to this Court, and it is only here that any warrant or diligence for carrying it into execution can be obtained; and, accordingly, the judgment is always applied in this Court, whether there be a remit or not. It is also plain enough that nothing inconsistent with the judgment can ever be done here, after the case comes back, and consequently that a remit to act consistently with such subject is in effect a redundancy, and has no operation.

The pursuer reclaimed, and the Court ordered minutes of debate, No
 er which their Lordships, “ before answer, desire to have the opinions Mar.
 the other Judges, on the competency of finding expenses, under Stew
 judgment of the House of Lords pronounced in this case; and ap- Scot.

The present case, therefore (as well as those of Dun and of Torrance), is truly
 atical with those in which there was a mere reversal, without any express re-
 at all; and in the same way, in this and the analogous cases, as the reversal,
 by itself, led necessarily to a judgment, sustaining the defences and decern-
 there is no real difference (in such cases) between a simple reversal, or a re-
 al with a general remit to do what was consistent with it, and a special re-
 to sustain the defences and decern; and yet, as the decisions now stand, the
 competency of a claim for expenses prior to appeal must be decided, according as
 judgment of the Lords, though in substance identical, shall happen to be ex-
 sed in the one form or the other. The Lord Ordinary cannot but wish, there-
 , that the whole of these decisions could be reconsidered, and the rights of litigants
 ich circumstances settled on more satisfactory principles. If the House of Lords
 s to adopt the practice of making some special remit or deliverance as to ex-
 es, in every case which comes before them, there would be no difficulty in
 re; but as this is scarcely to be expected, it would seem expedient to follow out
 or other of those two maxims—i. e. either, 1st, to extend to the judgments of
 House of Lords the rule which is now established as to the decisions of the
 r-House, viz. that, where the merits of the case, or any great branch of it, are
 ly determined, without any thing being said of expenses, no claim for those previ-
 y incurred should afterwards be competent; or, 2d, to hold that, in every case
 reversal, the question of expenses should be open (where not specially deter-
 ed) when the Court comes to apply the judgment, and to pronounce an exe-
 rial decree. Of these rules, the last would seem, on the whole, the most
 itable, and safest in its application; as the other would plainly lead to frequent
 stice, unless the House of Lords could be supposed as fully aware of its ex-
 nce and effects, and to keep it as constantly in view in framing their judgments
 be Inner-House now do.

If there was less ground for hesitating as to their general import, it would
 be difficult to reconcile the decisions in the cases of Mactavish and Wilson,
 h the express terms of the judgments of the House of Lords in these cases,
 ich specially reversed interlocutors of this Court refusing expenses to the ap-
 lants. It might be going too far to hold that this reversal was equivalent to
 ling expenses due, but it seems strange to say, that it did not make the claim
 them at least competent.

But the Lord Ordinary cannot, with the greatest deference, enter into the
 eral view on which the cases of Reid, Mactavish, &c. appear to have been de-
 ed, viz. That, after an appeal, this Court has no power over the cases which
 me back to it, except what may be conferred by the remit accompanying the
 lgment. If they can judicially apply the judgment and make the only opera-
 e decerniture, when there is no remit at all, it seems to him that they must in
 ry case have a power to make any decerniture which the justice of that case
 pires, not inconsistent with the judgment of the Court of Review; and with
 rd to expenses in particular, the decret as to which is always an accessory
 ces only, and, in fact, a mere corollary, form, or explication of their general
 ediction and right of control over the litigants before them, he cannot
 think that, if they can can decern for those, although there be no conclusion
 that effect in the summons, or to an extent beyond such conclusion, they must
 re the same power when applying a judgment of the House of Lords, whether
 s judgment be accompanied by an express remit or not, or by a remit confined
 the merits of the principal question.”

No. 206. point the parties to furnish the other Judges with copies of the p
for applying the judgment, and of the minutes of debate.”

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LORDS JUSTICE-CLERK, GLENLEE, MEADOWBANK, FULLERTON, J^r
and COCKBURN returned this Opinion :—

“ We are of opinion that it is competent to entertain the appellant’s cl
the expenses incurred prior to the appeal.

“ In some of the earlier cases, as in those of *Pringle v. Tod’s Legate*
March, 1799, and *Wilson v. Laidlaw*, 18th June, 1818, it appears to ha
held that such a claim was incompetent, unless the judgment of the H
Lords contained a special remit for that purpose. The successful argu
the case of *Pringle* was, ‘ that when the House of Lords think the ap
entitled to the expenses of the litigation in the Court of Session, a remit
special instruction to that effect is inserted in the judgment : when it i
upon the subject, they are meant to be refused ; and it would be produc
much confusion if any supposed grounds of the judgment were taken in
which are not expressed in it.’ And in the case of *Wilson* against L
‘ the Court ’ (13th May, 1818) ‘ in respect that the judgment of the H
Lords is silent upon the subject of expenses,’ found ‘ it incompetent t
them.’

“ But by the later decisions, the principle so broadly laid down has be
much narrowed, if not entirely departed from. In the cases of *Maberly*
March, 1826, of *Lord Fife*, 8th July, 1826, and *Dick v. Cuthbertson*, 1st
January, 1828, the competency of the claim was sustained without any
remit. It is true that in these last mentioned cases the judgment
House of Lords was not absolutely conclusive ; and that the application
judgments necessarily led to farther procedure in the Court of Session.
is difficult to see how that circumstance could have had any effect, consi
with the principle laid down in the cases of *Pringle v. Tod’s Legatees*, an
son v. Laidlaw. If the silence of the judgment of the House of Lords
subject of expenses were held to imply a refusal, it would seem to follow
however necessary farther procedure in the Court of Session might be, sti
judgment, without a special remit, would be as decisive in one class of c
the other, against the claim for expenses prior to the appeal. For the H
Lords, though ignorant of the future course to be adopted in the Court
sion, and the merits of the litigants in the mode of conducting it, have
the means of ascertaining which of the parties has been to blame in the p
stages of the cause. Upon this point the case of *Dick* against *Cuthber*
very strong. There the main question discussed previously to the appe
whether the respondent, the trustee, ‘ was bound, at the expense of the
rupt’s estate, to make any addition to the title offered to *Dick*,’ the app
The House of Lords ordered and adjudged that the finding of the Court
sion on this should be reversed,—‘ And it is declared, that the respond
bound to make the representer a good and valid title, and that the title
to the respondent is not such good and valid title ; and with this rever
declaration, it is ordered that the cause be remitted back to the Court of
in Scotland to review the several interlocutors complained of in the said
and to do therein as is consistent with this reversal and declaration.’ He

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“ In the case of Reid the judgment was reversed ; and though there was a remitt, it was merely a ‘ remit to repel the defences, and to decern.’ In the case

“ But during the same period, another set of cases occurred, in which a different rule was followed, and the claim for expenses prior to appeal was sustained. Such was the case of *Stirling v. Dun*, in which the judgment of the Court was reversed, with a remit ‘ to do farther therein as may be consistent with this judgment, and as may be just,’ but without any special intimation to decern, or any finding as to expenses. It appears from the report that the claim for expenses prior to appeal was objected to, precisely on the ground maintained here, viz. that ‘ where the House of Lords have had the whole cause before them, and decided it out and out without saying any thing as to expenses, their silence in such a case was tantamount to a refusal.’ But the objection was disregarded, and the expenses allowed. The same course was followed in the case of *Clyne v. Schlater*, in which the interlocutor of the Court had been reversed, and the case remitted ‘ to do farther therein as shall be just and consistent with this judgment.’ It is true that, according to the report of that case, ‘ the competency of such demand was not disputed,’ but the fair construction of the passage of the report appears to be, not that the question of competency was unnoticed, but that the competency was admitted, a circumstance which does not deprive the case of its authority on a point of practice. Lastly, in the case of *Torrance v. Crauford*, under a remit of the same kind, the question of competency was raised and debated before the Lord Ordinary, who found that there was no incompetency in the claim, and Mrs Torrance, the party against whom the judgment was pronounced, and who reclaimed against it, ‘ intimated at the bar that she did not question the finding as to the competency.’ In other words, she acquiesced in the interlocutor of the Lord Ordinary sustaining the competency, but objected to the expenses on the merits, on which last point she was successful.

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" Now, it appears to us that it is by the rule adopted in the last class of cases that the present must be determined. Indeed, the special terms of the judgment of the House of Lords render this a case of comparatively little difficulty, and bring it, in principle, as near as possible to those of *Maberly, Dick, &c.* in which the competency cannot now be disputed. By that judgment 'the interlocutors complained of in the said appeal are hereby reversed, and it is declared that the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take office; and it is farther ordered that with this declaration the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be consistent with this judgment.' It is clear that under this judgment, the Court were not confined to the merely ministerial extrication of the reversal by a decerniture. On the contrary, the terms of the remit necessarily imply that farther procedure in the Court of Session was in the view of the Court of Appeal, and that the whole case was sent back, subject only to the effect of the 'declaration.' Whether the bearing of that declaration upon the final judgment of the case was direct or indirect, absolutely conclusive or not, or led to a longer or shorter procedure, is of no importance with reference to the present dispute. Those matters are left to be decided by the Court of Session under the remit. The remit is so broad as to comprehend the whole points of the cause, and claims of the parties not expressly decided by the House of Lords, and 'consistent with that judgment;' and as the appellant's claim for expenses clearly falls within those limits, we think it is competent for him to bring it under the consideration of the Court."

LORDS MRDWYN and COREHOUSE returned this opinion:—

" We are of opinion, that it is not competent for the Court in this case, to entertain the claim of the defender Scot, for the expenses incurred prior to the appeal.

" The judgments of the House of Lords, on appeals from the Court of Session, are seldom framed, so as to admit of a decree being extracted, without the intervention of the Court below. The cause, therefore, necessarily returns, that the judgment may be applied; and this is done, sometimes by an express remit, but more frequently without any remit, except that which is held to be implied in the judgment itself. Whether the remit be express or implied, it imposes, upon this Court, the performance of the judicial acts requisite to complete the procedure; for, in the first place, the Court must consider, whether the judgment of the House of Lords has exhausted the whole cause, or whether any points remain to be decided; and, secondly, if they are of opinion that the cause is exhausted, to frame such an interlocutor as is best adapted to carry the judgment into effect. The first is often a doubtful point, admitting of argument. In the present case, parties are at issue upon it in the minutes now before us, though on considering these minutes, we are of opinion that the cause is exhausted. The second also, though less frequently, may be questionable, and require deliberation. But in the decision of both, the Court performs, not a ministerial, but a judicial function—that is, they proceed in a manner which, they are of opinion, is consistent with justice, and proper to make the judgment effectual.

" Now, the rule of the law, with regard to expenses incurred before an appeal, as laid down or recognised in a very numerous series of cases, we apprehend to be this, that, if the cause is not exhausted on the merits by the judgment of the House of Lords, but if further procedure may still be had with regard to them,

is competent for this Court to entertain the question as to expenses incurred before the appeal, because the final issue of the cause, that is, the time when the taxation of expenses properly arises, had not occurred when the judgment of the House of Lords was pronounced. And, 2dly, although the cause has been exhausted on the merits, if there be a special direction or remit to this Court to the question of expenses, the Court is, of course, authorized and bound to do so. On the other hand, if the cause has been exhausted on the merits, and there is either no remit at all, or merely a general remit, to do as shall seem fit, or to proceed as shall be consistent with the judgment, it is incompetent for this Court to entertain the question. The reason has been already given, namely, that a remit in these general terms is equivalent to no remit; it is a mere expression of what is necessarily implied in the affirmance or reversal of the judgment. "It is a natural and very plausible notion, that, if the question of previous expenses has not been expressly disposed of in the House of Lords, the cause in itself is not exhausted, and consequently, that it is expedient that that question, in such circumstances, should always be competent here. But the answer is, that the point is no longer open, having been set at rest by a numerous and uniform train of decisions. Farther, with regard to expediency, we think it is not fit for the losing party in the House of Lords, who may have been successful in the cause, to have the whole cause argued over again on the merits, perhaps at the distance of years, for the purpose of trying the question of expenses, when the successful party might have moved for expenses in the House of Lords at the time of the reversal, and obtained either a decision, or a special remit with regard to them—a thing which has been frequently done in the practice of that House.

"In the case of *Kennedy v. Cumming*,—Judgment is reversed, and it is ordered, 'That the Lords of Council and Session do direct the expenses in these suits to be taxed according to the course of their court, and paid to Sir Andrew Kennedy (the appellant), by Sir Alexander Cumming (the respondent).' Thus, too, in a suspension *Dunbar v. Erskine*, the judgment of the House of Lords orders, that 'the appellant shall have his full costs for all his subsequent proceedings before the said sheriffs and Lords of Council and Session, since the taxation of his costs by the said sheriffs.' In *Bogle and others v. Cumming, &c.* the judgment bears, 'That the respondents do pay to the appellants their cost of suit in the court below, and that an account thereof be given.' The same thing was done in *Hamilton v. the University of Glasgow*; in *Douglas v. Dalrymple's Trustees*; and in *Ross v. Macdonald*. More recently, in the case of *Little v. Oswald and others*, in a judgment of reversal by the House of Lords, it is ordered 'that the said Court of Session do and shall make such orders, and give such directions, relative to the costs already paid, or ordered to be paid, by any of the parties in this cause, as to such court shall seem meet.' It is a mistake, therefore, to suppose, that the House of Lords, on a reversal, never entertains or decides the question as to expenses incurred in the Court of Session prior to the appeal. These, and many other instances which might be cited, show that the practice has been otherwise, from the Union, down to the present day. It is true, that in a great proportion of cases of reversal, there is no finding either as to expenses in the Court below, or as to the costs of the appeal, because, in general, it is held, that the judgment brought under review is of itself sufficient evidence that the party was *not temere litigans*.

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“ With regard to the question now before us, it will be observed, that a series of no less than seven cases, in which the rule, we have stated, laid down or acted upon—the claim for expenses having been found incompetent when the cause had been exhausted on the merits, and when there had been a special remit. The series begins with the case of *Pringle*, in which the point was fully considered on a reclaiming petition and answers, when ‘ the Court was clearly of opinion, that the claim was incompetent.’ It was followed by others,—viz. *Geddes*, *Pettigrew Wilson*, *Reid*, *Agnew’s Executors*, *Macdonald* and *Wilson v. Sinclair*.

“ It will be particularly observed, that although in four of these cases there was no remit, yet, in the other three, there was an express remit, in terms as same or more comprehensive than in the present case. In that of *Pringle*, the leading case upon the subject, the House of Lords, after reversing, and annulling the reasons of reduction, ‘ ordered the cause to be remitted back to the Court of Session, to proceed accordingly.’ In that of *Pettigrew Wilson*, they ‘ remitted back to the Court of Session to do therein as shall be just.’ And in *Agnew’s Executors*, it was ordered ‘ that the cause be remitted back to the Court of Session to execute this judgment, and further, to proceed as shall be consistent with this judgment, and shall be just.’ In the present case the cause is remitted back, not to do as shall be just, but simply ‘ to proceed therein as shall be consistent with this judgment.’ The precedent in the case of *Agnew’s Executors* is exceedingly strong, for, notwithstanding the remit in express terms to do as shall be consistent with the judgment, and shall be just, it is reported, that the Lordships were generally of opinion, that as, in the reduction, the House of Lords had the whole question before them, and did decide it out and out, they might have judged of expenses (in which this case differed from that of *Macdonald* but as they did not award them, this Court was not warranted in doing so.)

“ Let it be considered next, whether this long series *rerum judicata* in any way shaken by the cases cited on the other side. They are seven in all also. Of these the first five are—*Maberly*, *Lord Fife*, *Speirs*, *Dick*, and *Stirling v. Dun*.

“ Now, in all these five, the cause was not exhausted upon the merits, but remitted back with ulterior questions, which either were actually tried, or might have been tried, had the parties thought fit, and, therefore, they are all in conformity with the rule. This is evident with regard to the first four, but it is certain with regard to the fifth, *Stirling v. Dun*. It was a reduction of the entail for 300 years, on an entailed estate, on three grounds:—1st, Facility, or imbecility, and lesion; 2d, Grassum; 3d, Contravention of the prohibition; and there was a conclusion in the summons not only for reduction, but also for violent profits. Parties were at issue on the facts as to imbecility, grassum, and those two reasons of reduction were never discussed at all; the Lord Ordinary reported, and the Court here, and the House of Lords, exclusively on the third ground, namely, the import of a prohibition to the entail. The House of Lords reduced, and the cause came back; but the conclusion for violent profits remained, which had not been disposed of, or tried upon, either here, or in the House of Lords. That question had to be tried and actually was tried and decided, after the remit, upon a long argument whether the defender was in bona fide, or, if in mala fide, at what time his name

iced. Farther, if the Court had been in favour of the defender on those No. 20
 it would still have been competent for the pursuer, if he had thought fit, Mar. 11, 1
 tack on the first two reasons of reduction, imbecility and fraud, and gras- Stewart v.
 and both might have been very material in the question of expenses, the Scot.
 excluding bona fides altogether, and the other in fixing the period at
 it ceased. This, therefore, was a cause clearly not exhausted; in point
 it did proceed on the merits after its return, and might have given rise
 h litigation. It may be added, that, in one of these five cases, that of
 ife, the distinction between exhaustion and non-exhaustion was distinctly
 wn on the bench, in the same terms in which it had been, in the case of
 's Executors, a short time before. Lord Alloway says, ' If the House of
 decide the case out and out, and do not give expenses, then I would not
 them here; but if they do not so decide the cause, but remit to proceed
 , the question of expenses is open.'

ie two remaining cases, namely, Clyne and Torrance, or rather one
 n, is in a somewhat different situation. In Clyne's case, in the report
 r and Dunlop, it is stated ' that the competency of the demand was
 puted,' though the Faculty Collection is silent on that point. In that
 rance, the pursuer reclaimed against the Lord Ordinary's interlocutor,
 id found that the claim was competent, and had awarded expenses. But
 porter says, that she ' intimated at the bar, that she did not question the
 as to the competency.' It was proposed on the bench, that the Court
 adhere to the Lord Ordinary's finding, sustaining the competency; but
 illies observed, that the point of competency had not been argued before
 urt; and accordingly the proposal was given up, and the Lord Ordinary's
 utor, which had both found the competency and awarded expenses, was
 altered. This case, therefore, was not a decision on the competency; on
 trary, that question was distinctly waived.

may be conjectured, that the counsel, both in the case of Clyne and that
 rance, were induced to give up the point of competency in consequence of
 ewton's note in the latter case, which was issued a short time before both
 ame into the Inner-House. His Lordship states, that it ' seems to be
 shed by various late cases, particularly that of Stirling v. Dun, 14th
 y, 1831, that it is competent to give expenses prior to appeal, when the
 ent of the House of Lords is silent as to the matter.' His Lordship had
 ked the distinction, that Stirling v. Dun was an unexhausted cause, and
 re in perfect conformity with the rule, and with every one case that had
 ecided before. He rests his opinion chiefly, if not exclusively, on the cir-
 uce, that there was a general remit in the case before him, as there had
 n the case of Stirling, to proceed as should seem just, and was consistent
 he judgment,' without observing that remits in those general terms—in
 s's case, in that of Pettigrew Wilson, and in Agnew's Executors—had
 disregarded, the cause having been exhausted, or, as is elsewhere expressed,
 ed out and out on the merits.' It may be remarked also, that the Lord
 ry, in his note here, classes the case of Stirling with those of Clyne and
 ce, and considers it as opposed to the previous decisions in M'Tavish v.
 and Wilson v. Sinclair, when, in truth, it is quite consistent with all the
 men, and concurs with them in establishing the rule which we have

No. 206. “ The result is, that, out of fourteen cases, twelve are in strict accordance with the rule, and the remaining two cannot be considered as precedents, but the plea was expressly abandoned at the bar in both before they were admitted, and in one of them, the Court refused to consider the question of competency on the ground that it had not been argued before them, and altered the Lord Ordinary’s interlocutor, in which the competency had been sustained. It is but a fact that there are very few points in the law of Scotland which have been ruled so numerous and so consistent a series of decisions.”

To this Opinion LORD MONCREIFF subscribed an assent in the following terms:—

“ Though I had some doubt on this question, from the terms of the remission of the apparently conflicting decisions, I am now entirely satisfied that the opinion is the right judgment, and that there is really no case in which the decision of the Court was at all adverse to it, except that of Clyne, in which the point was expressly withdrawn from the consideration of the Court. I therefore concur in the opinion, that it is not competent for the Court, in this case, to entertain the claim of Mr Scot for the expenses incurred prior to the remission, and for the reasons so fully stated.”

The consulted Judges being divided, six against three, the consideration of the cause, along with their opinions, was resumed by their Lordships of the First Division.

LORD GILLIES.—After considering the opinions of the consulted Judges, we have come decidedly to concur with the minority.

LORD BALGRAY.—I have formed the same opinion also.

LORD PRESIDENT.—I concur with the minority also.

LORD MACKENZIE.—By one of the ancient statutes of Scotland, 1592, a general provision was made, ordering in substance, that the expenses of appeal are to be decided on, and “ liquidat by the decret” in every case, “ by the judges within this realm.” That order is, and always must have been, intended to mean, an award of expenses in those cases where expenses were justly incurred. But to that extent it seems to me to be the existing law at this day. I submit, however, it is not held to reach the House of Lords, which is a British Court, and which does not pronounce decret, nor hold its sittings within Scotland. Then, the House of Lords, in all cases, does expressly, or by implication, require of us to pronounce decret according to their judgment or findings. And in doing this, the operation of the Scottish statute seems to reach us. But there obviously arises a practical difficulty, which, in almost all such cases, takes away from us any safe grounds for giving decret for the expenses prior to appeal, under such remits. We have nothing before us but the decision and the judgment of the House of Lords, which judgment, in the case under consideration, says nothing about expenses. We have no other means of knowing the views which the House of Lords entertained in this case, as to its having proceeded on a *probabilis causa litigandi*, or the contrary. We have, therefore, in the ordinary case, no safe ground for awarding the expenses prior to appeal, for we do not know what the Court of

on this subject, and our own views are of no relevancy. Our own views were superseded by the removal of the cause to the Court of Appeal. judgment of reversal is pronounced, this is obvious, for our previous judgment must be abandoned, as having been erroneous. But even where there is a decree of affirmance, the House of Lords may agree with us in our decision on the merits of the case, and yet differ from us on the question of expenses; their views only which are to receive effect. Our sole province is to give our judgment, and, in doing so, we should be acting without a warrant to give a decree for any thing which we were not certiorated that the House had judged right. In general, therefore, it seems plain, that, when a case is sent back to us, on a remit, implied or express, but without any finding or direction by the House of Lords regarding expenses, we have no grounds on which we can give a decree for expenses. And, accordingly, it is, I think, very much the ordinary practice of this Court not to give them. The deduction of expenses in the opinion of Lords Medwyn and Corehouse, I think, demonstrates the practice of the Court. It is true, that there may be exceptions to the ordinary course. As for example, when a case is remitted for farther consideration, and where we, consequently, have the cause again depending before us for judgment, including, as part of it, no doubt, the judgment of the House of Lords.

The cause is then before us, and it may be that we have grounds for giving a decree for expenses. And there may be other exceptions, wherever it obviously and necessarily follows from the libel, and the judgment of the House of Lords, that expenses must be justly due. Suppose, for instance, that it was provided by statute that the defender, if assoltied, should have his expenses: that we decern against the pursuer, but the House of Lords reversed and assoltied, but said nothing regarding expenses. I still think, in our decree, applying the judgment of the House, we should decern for expenses, in obedience to the statutory injunction. Or, again, that a reduction of a deed was brought on the head of forgery; the pursuer assoltied; but that the House of Lords reversed, and found the deed to be valid by the defender, and remitted the case to us to proceed as should be done with that judgment, but not saying any thing regarding expenses. In such a case, we might be warranted to find expenses due, because the finding of such a finding necessarily resulted from the libel, and the judgment of the House of Lords. Possibly we might do this even under a tacit remit, in such a case, being acting under the authority of the Scottish statute requiring expenses, to be liquidated by the decree in the cause. But, in all ordinary cases, the rule seems to me to be pretty clear, both in reason and in practice, that we cannot give expenses. The present is, in this respect, just one of the ordinary cases. There is a reversal of our decision, and a general decree to proceed as shall be consistent with the judgment of the House of Lords, and nothing is said by the House of Lords as to expenses. How then can we award expenses any part of our interlocutor which applies their judgment? We know nothing of the views of that Honourable House, except through the medium of their judgment. Our own views are out of the question. Can we say that the judgment of the House of Lords necessarily implies that expenses ought to be decerned for? I cannot see it. It is a decision on a point of fact, finding no blame on the unsuccessful party. The Lord Ordinary notices the discussion was on a point of competency. But can there not be a pro-

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No. 206. *babilis causa litigandi* on a point of competency? May there not be the blameless and unavoidable litigation on such points? I cannot admit the variation of the Lord Ordinary to be decisive, and as I see no other ground I think that, in this case, we ought not to decern for expenses.

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Rutherford, for defender.—There is still a peculiarity affecting the force of the interlocutor on this question of expenses, to which I beg to call the attention of the Court. Where the Opinions of the whole Court are taken, hearing in presence, the statute (6 Geo. IV. c. 120, § 23) has enacted “judgment shall in all cases be pronounced according to the majority of Judges present: and the interlocutor shall bear to be the judgment of the Division before which the cause depends, after consulting with the other Judges.” But there is a different phraseology employed in that part of the statute which regulates the judgment to be delivered when one Division of the Court requires the opinion of “the other Division,” with or without the opinion of the “permanent Ordinaries,” upon questions stated in writing. The orders in that case, that “the judgment to be pronounced in the cause, shall be according to the opinion of the majority of all the Judges so consulted, and shall bear to be the judgment of the Division before which the cause depends, after consulting with the other Judges.” By these last words the Court are enabled by statute to deliver a judgment conformably to the opinion of “the majority of all the Judges so consulted.” These Judges are expressly described, in the latter part of the section, as the Judges of the other Division, and the permanent Ordinaries: and independently of this, the consulting Judges could not be considered as any constituent portion of the “Judges so consulted.” It was therefore imperative on their Lordships of the First Division, whatever might be their opinions, to give judgment in terms of the opinion of the six consulted who had given a concurrent opinion: and this was certainly not more anomalous than the former practice, under which, a majority of the Judges of one Division, after consulting the other Judges, pronounced a decision according to their views though in the face of the majority of the whole Court.

Dean of Faculty, for pursuer.—If there was any real difficulty here, it might be got over, by the Court ordering a hearing in presence, pro forma, bringing the case within the provisions of the 23d section of the statute: and the practice of the Court has already interpreted the section now founded upon as the only way that is consistent with the obvious intention of the Legislature in making the majority of the opinions of all the Judges, decide the terms of judgment to be given.

Rutherford.—There have been previous cases where the opinions of the Court have been taken on written questions: but the defender denies that there has ever been a case in which this objection was taken, or in which the Court was divided in such a manner as to make it for the interest of any party to take it.

LORD PRESIDENT.—The Court has frequently delivered judgment, after consulting upon written questions, and we have uniformly acted on the principle that the opinion of the majority of all the Judges, whether consulted or not, should determine the judgment to be pronounced. I think we ought to act upon that principle now.

The other Judges assented, and the Court pronounced this interlocutor:— No.

“Find, conformably to the Opinion of the majority of the whole Judges, that it is incompetent for the Court, in this case, to entertain the claim for expenses incurred prior to the appeal; and therefore alter the interlocutor of the Lord Ordinary, reclaimed against, in so far as it finds expenses due to the defenders,” &c. The Court adhered quoad ultra. Mar. 11 Macgreg Macgreg

J. M'Cook, W.S.—A. Scot, W.S.—Agents.

ROBERT MACGREGOR, Petitioner.—*G. G. Bell.*

JEAN HOWIE or MACGREGOR, Respondent.—*R. Thomson.*

restment—Husband and Wife.—A wife having raised an action of adherence against her husband, and having used arrestments on the dependence, thereafter obtained decret of adherence and aliment which was for some regularly paid by the husband; and having subsequently, on the decret, arl certain funds “to remain under sure fence,” &c., till he should adhere: Iligence held to be incompetent, and the arrestments recalled without cau-

HE petitioner Macgregor and the respondent Howie were married in Mar. 11

In 1823, Macgregor separated himself from her society, and, September, 1825, she raised before the Court of Session an action adherence and aliment against him, and at the same time used tments on the dependence, in the hands of Sir William Forbes Company, who were Macgregor's bankers. Next year she raised a action of adherence and aliment before the Commissary Court, on pendence of which she, in 1827, used new arrestments in the hands r William Forbes and Company, and thereafter she judicially aban- d the first action. In the procedure before the Commissaries, it ap- ed that Mrs Macgregor was in right of a small separate estate, and her husband's income amounted to nearly £100, his property con- g of personal funds, and of a pension of £80 per annum, as a reduced in the barrack department. The Commissaries decerned in the rence, and awarded an aliment of £40 per annum, payable half- y, “until the defender adhere to the pursuer;” which aliment regularly paid by Macgregor in advance. 2^d Div T

1832, Mrs M'Gregor having raised and executed letters of horning areatment on this decret, again used arrestments in the hands of Sir lann Forbes and Company, to the extent of £2000, “to remain un- pre fence and arrestment, until the said Robert Macgregor adhere and said complainer, his wife, her society, fellowship, and company, it, converse with, treat, cherish and entertain her at bed, board, and wise, as a married man should do to his wife, and that during their lives, after the form and tenor of the decret.”

No. 207. In these circumstances Macgregor, having without success made
ous remonstrances and overtures to his wife, presented a petition, p
to have the arrestments used at her instance in 1825, 1827, and
recalled. In support of this petition he maintained that the arrestments
unwarrantable and ruinous in themselves; that the diligence was n
upon the pecuniary finding in the Commissaries' decret, and to
the aliment, but upon the formal decerniture for adherence, ex f
order to enforce a decree ad factum præstandum, incapable of b
secured; that the character of the proceeding was demonstrated
evident reason which had recommended the adoption of this an
style of arrestment, viz. that no arrestment in the common form
be used for past aliment, which had been all paid, nor for future s
unless under a special application, and upon showing either that M
gor was vergens ad inopiam, or that there existed some other s
cause to sanction an arrestment in security for a future debt.

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Smith.

Mrs Macgregor answered, that she was willing that the arre
should be recalled, but only on caution, her husband having no fix
dence, and having manifested a disposition to conceal his residence fr
so that were it not for the arrestment, he would elude her claims fo
aliment; that by living separate, notwithstanding the decree, he ac
gally, and deprived her of that security for aliment which adherenc
afford, and she was therefore entitled to take what security the la
her by using arrestment to enforce the decree, this proceeding b
itself competent.¹

The Court, holding the style of the arrestments in 1832 to be u
dented, and the diligence incompetently used,

RECALLED the whole arrestments without caution.

SCOTT, RYMER, and SCOTT—W. HUNT, W. S.—Agents.

No. 208.

FRANCIS MACGILL, Suspender.—*More.*

DONALD SMITH, Charger.—*Rutherford—W. Bell.*

Bill of Exchange—Proof.—Terms of an oath on reference which held
the indorsee of two promissory notes to have been an onerous holder.

ar. 11, 1836.
D DIVISION.

FRANCIS MACGILL brought a suspension of a charge at the ins
Donald Smith, as manager and for behoof of the Western Bank
land, for payment of the sums of £120 and £116, respectively, c
in two promissory-notes granted by Macgill to Malcolm Huz
Company, with whom he was connected in business, and inde

¹ M'Donald v. M'Leod, Jan. 15, 1811 (F. C.); Mor. v. Stirling, July 5, 1811 (I. 547 N. E. 502).

Smith. Macgill alleged that although the proceedings were nominal in the instance of Smith, they were truly for behoof of Hunter and myself, who he alleged had given no value for the notes, and were in his debt, the notes not having been discounted, but merely with the bank agent that he might recover payment, and this pointed to Smith's oath.

He submitted the following deposition :—“ Appeared Donald Smith, the charger, who being solemnly sworn and interrogated, Whether the deponent discounted in the ordinary course of business the two promissory notes for £120 and £116 respectively, both of which are now in his hands, Depones, That these notes were not discounted in the ordinary course of business. Interrogated, Whether the deponent advanced money upon the security of the said bills or either of them? Depones that he did not do so. Interrogated, Upon what date the bills or promissory notes in question came into the deponent's hands? Depones, That the notes came into the deponent's hands on or about the 3d day of March last (1835). Interrogated, Who placed them in the deponent's hands? Depones that they were placed in the deponent's hands by Mr James Steele, junior, writer in Glasgow, one of the agents for the creditors of Malcolm Hunter and Company. Interrogated, Whether they were handed to the deponent, or enclosed in a letter? Depones, That the deponent cannot say whether they were handed to the deponent or enclosed in a letter, but the books of Messrs M'Pherson, M'Lachlan, and James Steele, writers in Glasgow, will show that. Interrogated, Whether the said bills were handed or sent to the deponent that he might collocate the proceeds? Depones, That said bills were lodged in the bank for the purpose of the proceeds thereof being applied in payment of a composition which had been offered by Malcolm Hunter and Company at 10s. per pound, and accepted by the bank and other creditors of Malcolm Hunter and Company. Interrogated, What was the amount of the debts due by Malcolm Hunter and Company to the deponent and the bank of which the deponent was manager? Depones, That Malcolm Hunter and Company did not owe any debt to the deponent individually, and that the amount of which that company stood indebted to the bank, was £428, 12s. 6d., the contents of two bills, viz. John Cannon and Company's acceptance of William Hunter, indorsed by Malcolm Hunter and Company, dated 1st February, 1835, per £250, 1s. 6d, and Malcolm Hunter and Company's acceptance to William Hunter, due the 4th day of said month 1835, 11s. Interrogated, Whether the bank had agreed to accept a composition of 10s. per pound of the debts so deponed to be due to Malcolm Hunter and Company, before the bills charged on the bank were lodged with them as aforesaid: Depones, That they had agreed to said composition before these bills were lodged: Depones, That Malcolm Hunter and Company had not been sequestrated, and the arrangement by composition was a voluntary transaction betwixt them and

No. 208

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No. 208. their creditors : That Malcolm Hunter and Company have not yet been discharged of the original debts, to which the composition applied. Interrogated, Whether, supposing the contents of the bills charged on to be recovered by the deponent, he is bound to account for the proceeds to the creditors of Malcolm Hunter and Company? Depones, That he is so bound. Interrogated, Whether the bills charged on belong to and form part of the assets of Malcolm Hunter and Company? Depones, That they belong to the creditors of Malcolm Hunter and Company, and the proceeds, when recovered, fall to be applied in payment of said composition : Depones that it was in security of said composition that Mr Steele lodged the bills charged on with the deponent : Depones, That the deponent has now made a search, and finds that the bills charged on were not transmitted to him enclosed in a letter, and the deponent feels satisfied that they were delivered to him by Mr Steele personally."

The Lord Ordinary having passed the bill, Smith reclaimed, and maintained that his deposition proved him to have been an onerous indorser in behoof of the bank, and that his right could not be affected by any claim which the granter of the note might allege against Hunter and Company.¹

THE COURT altered, and "refused the bill in respect of the oath."

W. A. G. and R. ELLIS, W.S.—GRAHAM and ANDERSON, W.S.—Agents.

No. 209. ADAM GIBSON, Complainer.—*Sol.-Gen. Cuninghame—Moncrieff.*
DIRECTORS OF TAIN ACADEMY.—*D. F. Hope—Buchanan.*

School—Interdict.—The Directors of an Academy established under a royal charter, which required a quorum of seven Directors—appointed votes to be taken by ballot, and gave no power to vote by proxy, removed a master by an unanimous open vote of a meeting, at which, unless proxies were counted, there was no quorum, and the master was thereafter excluded from the Academy : The Court passed a bill of suspension, and granted interdict against any proceedings in virtue of the resolution of that meeting. 2. Question as to the powers of Directors in such Academies as to the dismissal of masters.

Mar. 11, 1836. THE Tain Academy was established in 1809, by Royal Charter, which vested the management in a body of directors, of whom a certain number were official persons ; eight were to be chosen by subscribers of ten guineas and upwards, and the remainder were the subscribers of £10 and upwards, with the heirs of subscribers of £100 and upwards. In this charter it was inter alia provided, "That seven directors shall be a quorum, and all questions shall be determined by ballot, at the meeting."

¹ Herries and Company v. Crosbie, Feb. 22, 1775 (2577).

the Directors." There was no provision in it as to the dismissal of No. 2
 ers; but it contained the following power as to making bye-laws:—
 and we, by these presents, give and grant to the subscribers to the
 amount of ten guineas and upwards, being members of the said incorpo-
 n, and their successors, at their general meeting on the 30th day of
 l, or 1st of May as aforesaid, full power to make such other and so
 r bye-laws, regulations, rules, and orders, as they or the majority of
 present at such meetings shall judge proper, and think necessary for
 better government and direction of the said Academy, and the said
 lations herein above recited, as well as the bye-laws, regulations,
 , and orders to be made in future, or any of them, to alter and annul,
 ay, the members of the said incorporation so assembled, or the major
 of them present shall deem proper and requisite: Provided always,
 when any new bye-law, or any alteration on any of the then exist-
 ye-laws shall be intended to be made at such annual meeting as
 said, notice of such intention shall be inserted in one or more of the
 on evening newspapers, and in one or more of the Edinburgh news-
 s, one month at least previous to the day of such meeting; and we
 nd direct that all bye-laws, regulations, rules, and orders, made as
 said, shall, until altered, be duly observed and kept, provided that
 me are nowise contrary to the laws of the realm, and the general
 rt and meaning of our said charter and letters patent."

Mar. 11,
 Gibson v
 Directors
 Tain Acc

the buildings of the academy were not completed till 1812, and in
 er of that year, the directors, preparatory to the election of masters,
 d to a set of regulations, of which one was in these terms:—"In
 t shall be found necessary to discontinue any of the teachers, which
 ly be done by a special meeting of the directors, regularly called
 e purpose by their preses for the time being; it is understood and
 ed that such teacher shall receive three months' previous notice
 h intention, before his services are declared at an end; and in the
 of any of the teachers wishing to leave the institution of his own
 l, such teacher shall be obliged to give three months' previous no-
 the preses of the directors for the time being, before the close of a
 1, of his intention of giving up his charge."

the complainer, Gibson, was on the 16th of December, 1812, elected
 r of Latin, subject to a condition of his being found qualified by the
 al and two professors of the University of Edinburgh, and "subject
 to the rules and regulations adopted by the directors, for the go-
 ent and management of the institution, as well as the bye-laws
 the directors have laid down for the internal regulation of the in-
 m."

son and the other masters having been found qualified, the academy
 ened on the 15th February, 1813; and at the annual meeting of
 bers on the 30th April thereafter, the regulations prepared by the
 rs were laid before them, and the minutes of the meeting bear,—

No. 209. “ Mr William Murray, the secretary, represented to the meeting, that, as formerly intimated to the rector and teachers, they had got a copy of the regulations, and that they were then desired to mention any thing in these regulations that, in their opinion, would require any alteration, as well for their comfort as for the benefit of the students : That he had accordingly received a letter, signed by the rector and all the masters, dated the 24th current, which he now produced, and which, being publicly read to the meeting, they think it unnecessary fully to engross the same in their minutes, but think some alteration in the former regulations necessary ; and having carefully gone over the same with the rector and masters’ remarks, they have unanimously adopted the following regulations which they direct and appoint to be the standing regulations of the Tain Royal Academy, until cause shall be shown to any future general meeting for any alteration.” One of these regulations was that above quoted.

—
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 the Academy.

The complainer, Gibson, had continued ever since teacher of Latin in the academy, but at different times, causes of dissatisfaction arose, and latterly his class had become almost entirely deserted: On the 18th June, 1835, the following requisition was published by advertisement by Mr Ross of Glastulich, preses of the academy :—“ As preses, I hereby call a general meeting of the Directors of the Tain Royal Academy, to be held within the hall of the institution, upon Friday the 28th day of August next at noon, for the purpose of taking into consideration, and disposing of a motion to be made, for discontinuing the Latin teacher in the said Academy. (Signed) HUGH ROSS, Preses.”

A meeting was accordingly held on the day appointed, at which there were present four directors personally, with proxies from four others, three of whom were directors by subscription. The following procedure took place, as detailed in the minutes :—

“ Mr Ross, the Preses, stated that it was with extreme regret, he observed that Mr Adam Gibson, the teacher of the Latin and other languages, had for some time back, but particularly for the last three sessions lost the confidence of the parents and guardians of the pupils who attended the seminary, as well as that of the directors, in so much that, during the said period, he, Mr Gibson, had no children under his tuition, while the parents not only engaged a Latin teacher, and paid him over and above the fees exigible, a sum equivalent to an ordinary salary. Besides, it is well known to the directors, and supposed by them as one of the reasons for the loss of confidence in Mr Gibson, that his moral character is the reverse of correct ;—he, besides various other defaults, having on wet days, as well as on the Lord’s day, drunk along with guests in his classroom in the Academy, while a strict order existed, that he should not be in possession of the key : he, therefore, moved that the services of Mr Gibson, as teacher of languages in the seminary, be dispensed with, and that he should receive intimation thereof, in strict conformity with the charter and bye-laws of the institution.

“ Which motion being seconded, was unanimously agreed to, and Mr Gibson’s services are accordingly dispensed with, and the secretary is hereby directed to give Mr Gibson notice of this resolution, all in terms of the charter and bye-laws, and to send him a copy of this minute.”

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Gibson
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At the expiry of the three months, Gibson was excluded from the Academy, and he thereupon presented a bill of suspension and interdict, advising which, with answers, Lord Balgray, Ordinary, pronounced the following interlocutor :—

“ In respect it appears to the Lord Ordinary, the respondents, as Directors of the Academy, appointed in terms of, and by authority of a royal charter, dated 10th May, 1810, whereby also full power is granted to make such others, and so many bye-laws, regulations, rules, and orders, as they or the majority of those present at such meetings shall judge proper and think necessary for the better government and direction of the said Academy, and whereas, by a bye-law, legally and regularly passed, on the 16th December, 1812, it was declared, ‘ In case it shall be found necessary to discontinue any of the teachers, which can only be done by a special meeting of the Directors, regularly called for the purpose, by their preses for the time being, it is understood and declared that such teacher shall receive three months’ previous notice of such intention, before his services are declared at an end ; and in the event of any of the teachers wishing to leave the Institution of his own accord, such teacher shall be obliged to give three months’ previous notice to the preses of the Directors for the time being, before the close of a session, of his intention of giving up his charge ;’ which bye-law was approved of by all the masters, and inter alios by the complainer ; were vested with the right and power of dispensing with the services of the complainer, and that the authorities referred to by the complainer do not apply to the circumstances of this case : And in respect, further, that it appears to the Lord Ordinary, from the admissions contained in the complainer’s letters, that the Directors exercised their power and authority with due prudence and caution, and discharged their duty for the good and benefit of the institution : Therefore refuses the bill, and recalls the interdict ; reserving, however, entire to the complainer, to claim from the respondents any arrears of salary due to him, or to wage against them by an ordinary action, if so advised, and to the respondents their defences, as accords ; and lastly, prohibits the clerk from issuing the certificate of refusal, till the first sederunt-day of January next, to afford an opportunity to the complainer to reclaim, if he shall be so advised.”

Gibson then presented a second bill, in which he maintained—

1. That the Directors had no power to dismiss the Masters of the Academy, seeing no such power was given by the charter, and the privilege of making bye-laws was qualified by a proviso that they should not be inconsistent with the laws of the realm.

2. That, at all events, they could not dismiss except upon sufficient

No. 209. cause shown, which he denied that they had been able to do in the present case.*

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n Academy.

* Clark v. Directors of Irvine Academy, November 30, 1830 (ante, IX. 97) Adam v. Directors of Inverness Academy, July 7, 1815 (not reported). In the case the directors had power by their charter to dismiss on "proper grounds." Having dismissed Adam, one of their teachers, he presented a bill of suspension which was passed, and the following notes of the opinions of the Judges are given in the bill for Gibson:—

"LORD ROBERTSON.—I have no difficulty at all. By the charter of erection, the Directors are empowered to appoint salaries for the masters, to dismiss any of them on proper grounds, and to elect others in their room. The question therefore is whether they had proper grounds here? No doubt, they have set up a preliminary ground which seems to be very extraordinary. They say that though they are entitled by the charter to elect teachers, and to turn them out on proper ground they have taken upon themselves to elect to the office during pleasure. I see no evidence that they told Mr Adam that he was to be elected during pleasure, and even if they did so, I am clearly of opinion that it was not legal. I have no idea, that they can take it upon them to elect any teachers to the academy during their own pleasure. They say they can make bye-laws, and so they can; but I deny that they can make any bye-law in contradiction to the powers under which they themselves were incorporated; and farther, I conceive that such an election would be contra bonos mores. I conceive it most important that persons charged with the education of youth, should not hold their office subject to the pleasure or the caprice of any body of men whatever. This has often been settled, but more particularly in the case of Duff v. Grant of Monymusk; a case which is not taken notice of by either of the parties. Duff did not hold his appointment in consequence of any special minute of election, but he succeeded to a person who had acknowledged by a writing under his hand, that he held the situation during pleasure, and it was maintained that Duff just came into the situation, and under the same conditions as his predecessor, and I believe it was the unanimous opinion of the bench that such an election was a pactum illicitum; that it was a thing that no court of law could sanction.

"Having got rid of this question, the other question remains open, What are the grounds on which they have dismissed him? Now, my Lords, really, after reading these papers with all the attention in my power, I cannot find any tangible ground on which I can lay my hands. He did right in bringing what the other gentlemen had done under the notice of the directors. It was the incumbent duty of the rector to do so; no doubt, the directors did not seem to think that the conduct of the gentlemen who had been complained of was of a nature to call for the interference; but after all, that was only the opinion of a majority of the directors.

"I don't see that there was any proper ground for dismissing the suspended from what may be considered as his freehold, which, in terms of the charter, he was entitled to hold ad vitam aut culpam.

"Another thing is, that he had made a statement which three of the directors did not recollect. Is that to be held as a ground for dismissal from his office? Certainly not.

"LORD MEADOWBANK.—I entirely concur with my brother. I see nothing stated in these papers at all like an argument, excepting the extravagant one, that the Court has no jurisdiction. It occupies, with some show of argument, a great part of the Directors' pleading. You cannot find out from their statements what this person did amiss; and then because he did something which they do not explain, they took the opportunity of dismissing him without accusation, and without trial. It is the strangest species of justice this, that is held up to the Court, a thing too sacred to interfere with, and that you are to bow to these wise gentlemen who act with so much temper, and so much moderation. It is a question that is ridiculous, in the way in which it comes before the Court, but it is monstrous

3. That the proceedings were irregular, inasmuch as the notice had N reference to the discontinuance of a Latin class rather than the dismissal of one of the teachers, and inasmuch as there was not a quorum of seven Mar Gib present at the meeting of 28th August, unless proxies were taken into Direc Tal account, while the Directors were nowhere authorized to vote by proxy.

4. That at all events the resolution was invalid, not having been taken by ballot as required by the charter ; and .

5. That until the questions here raised were determined, the state of possession could not be inverted, and that he was entitled therefore to an interdict in the mean time.

To this it was answered—

1. It is no way inconsistent with the laws of the realm that Directors

serious to the country. Mr Adam appears to be an able teacher, and a most respectable man. It is of great consequence that respectable persons should be employed in the education of youth, and I am sure that no person of respectability would accept of it on such terms as are here contended for. It has always been a matter of regret to me, that the ultimate reward of schoolmasters was so small in this country. They have no scale as they have in England, where they rise to the first situations in the state. The bench of Bishops is filled with them. (Yes, my Lord, said Mr Cranstoun, and even the House of Peers.) We have but a very scanty opportunity of giving them any reward, but we at least have the common law of Scotland, giving them independence and protection from the caprice of any set of men. I concur completely with my brother, that it is contra bonos mores to appoint a man to a school, during the pleasure of any set of gentlemen. It is making him like a shoe-black, whose situation depends upon the will of a gentleman ; and worse than a shoe-black, for it leaves him to the disposal of a numerous open body, who always to a proverb have no conscience.

“ LORD BANNATYNE.—This is one of the most important cases that ever came under the consideration of the Court. No body of men in the kingdom are better entitled to protection than those who are employed in the education of youth. It was a just remark, that the provision made for them was extremely scanty, and that they really have little or no reward but protection from the law. The case before us is no doubt said to stand in a different situation from a parish school, at least it apparently does so ; it rests entirely upon a charter ; and we are told that we are to judge of the power of the Directors, not by the law of the land, but by the tenor and contents of their own charter. But in reality this institution is the parochial school, at the same time that it is the academy, and thus has the protection both of the common law and of the charter. We all know what the common law is, and that schoolmasters hold their situations *ad vitam aut culpam*. They cannot make a bargain under it that will deprive them of their right. Then the charter leaves a power of removing upon proper cause, but on proper cause only, and I need not say one word as to whether this was a proper cause or not. There is a long appendix annexed to this memorial, and I am sure of one thing, that if there was a proper cause for dismissing the rector, there would have been a proper cause for dismissing the others also. But there was not.

“ LORD JUSTICE-CLERK.—My Lords, there can be no doubt that the Directors are entitled to dismiss on proper grounds, and on proper grounds only ; but what are their grounds in this case ? for I can see none in their memorial, and no bye-law, which is contrary to the charter, or to the law of the land, is binding. I am therefore clear for passing this bill.

“ LORD GLENLEE of the same opinion.

“ THE COURT unanimously passed the bill.”

No. 209. of such academies as that here in question should have the power of dismissing the teachers at pleasure, and the complainer in this case accepted his situation subject to that condition.

Ar. 11, 1836.
 Beeson v.
 Directors of
 an Academy.

2. The intemperate habits of the complainer, and the utter desertion of his class afford sufficient grounds for his dismissal as on cause shown.

3. The object of the meeting was sufficiently apparent from the advertisement, and Directors who are so by virtue of subscription have always been in use to vote by proxy, and by the charter all subscribers are allowed to vote by proxy at general meetings.

4. There can be no necessity for a ballot when the meeting are unanimous ; and

5. The complainer having ceded possession, there is no competency in an interdict.

The Lord Ordinary (Cockburn) refused this second bill also, but the Court considering the questions raised to require more deliberate consideration, pronounced the following interlocutor :—

“ Recal the interlocutor, and remit to the Lord Ordinary to pass the bill, and to grant interdict to the effect of preventing any further proceedings under or in virtue of the resolutions of the 28th of August, referred to.”

A. M'BEAN, W.S.—H. M'QUEEN, W.S.—Agents.

JURY SITTINGS.

MRS HUNTER or NIVEN, Pursuer.—*Robertson—Gowan.*
 EDINBURGH AND GLASGOW UNION CANAL COMPANY, Defenders.—
D. F. Hope—More.

No. 210

Mar. 16, 18
 Hunter v.
 Edinburgh
 Glasgow Un
 Canal Co.

Statement—Real Injury—Master and Servant.—Circumstances in which a Canal Company were found liable in damages to the amount of £100, in consequence of an injury sustained by a woman who was crossing one of the drawbridges of the canal, when the bridge was raised, without warning, by the bridge-keeper in the service of the Canal Company.

MRS HUNTER or NIVEN, a widow, raised an action of damages against the EDINBURGH and GLASGOW UNION CANAL COMPANY, stating, that on August, 1834, she had occasion to cross a drawbridge over the canal, near the basin at Port-Hopetoun, which was kept by William Cunningham, a person in the service of the Canal Company: that, when she had got a good way along the draw-bridge, Cunningham suddenly raised the bridge, without giving her due warning; that he recklessly and boldly raised it to such a height that she could no longer retain her footing of it, and was obliged, for her safety, to attempt to leap from the bridge, elevated as it was, to the opposite bank of the canal: that she fell in the leap, and, being of corpulent habit and advanced in years, received a shock at alighting, from which she sustained so much injury in her limbs and person, that she was confined for some time to bed, and required medical attendance for three months. She alleged that this interrupted her in the exercise of her trade of sick-nurse, and exposed her to the cost of medical attendance, besides causing much personal suffering; and she concluded for £300, in name of damages and expenses.

The Canal Company alleged in defence, that it had been necessary to raise the bridge just before the accident, to allow one of the heavy passenger boats to pass; that the bridge was in the act of rising, and was actually raised about two or three feet, before the pursuer went on it at all; that she had due warning to keep off; and that as the bridge had a span of seventeen feet, and lifted entirely from one side, being that from the side the pursuer was going, she could have come back with safety, even if the bridge had begun to rise, and was guilty of the utmost recklessness

No. 209. of such academies as that here in question should have the power of dismissing the teachers at pleasure, and the complainer in this case accepted his situation subject to that condition.

Mar. 11, 1836.
Gibson v.
Directors of
Tain Academy.

2. The intemperate habits of the complainer, and the utter desertion of his class afford sufficient grounds for his dismissal as on cause shown.

3. The object of the meeting was sufficiently apparent from the advertisement, and Directors who are so by virtue of subscription have always been in use to vote by proxy, and by the charter all subscribers are allowed to vote by proxy at general meetings.

4. There can be no necessity for a ballot when the meeting are unanimous; and

5. The complainer having ceded possession, there is no competency in an interdict.

The Lord Ordinary (Cockburn) refused this second bill also, but the Court considering the questions raised to require more deliberate consideration, pronounced the following interlocutor:—

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A. M'BEAN, W.S.—H. M'QUEEN, W.S.—Agents.

JURY SITTINGS.

MRS HUNTER or NIVEN, Pursuer.—*Robertson—Gowan.*
 EDINBURGH AND GLASGOW UNION CANAL COMPANY, Defenders.—
D. F. Hope—More.

Reparation—Real Injury—Master and Servant.—Circumstances in which a Canal Company were found liable in damages to the amount of £100, in consequence of personal injury sustained by a woman who was crossing one of the drawbridges over the canal, when the bridge was raised, without warning, by the bridge-keeper in the service of the Canal Company.

MRS HUNTER or NIVEN, a widow, raised an action of damages against the Edinburgh and Glasgow Union Canal Company, stating, that on 17th August, 1834, she had occasion to cross a drawbridge over the canal, near the basin at Port-Hopetoun, which was kept by William Cunningham, a person in the service of the Canal Company: that, when she had got a good way along the draw-bridge, Cunningham suddenly raised the bridge, without giving her due warning; that he recklessly and culpably raised it to such a height that she could no longer retain her hold of it, and was obliged, for her safety, to attempt to leap from the top of it, elevated as it was, to the opposite bank of the canal: that she made the leap, and, being of corpulent habit and advanced in years, received a shock at alighting, from which she sustained so much injury in her limbs and person, that she was confined for some time to bed, and required medical attendance for three months. She alleged that this interrupted her in the exercise of her trade of sick-nurse, and exposed her to the cost of medical attendance, besides causing much personal suffering; and she concluded for £300, in name of damages and solatium.

The Canal Company alleged in defence, that it had been necessary to raise the bridge just before the accident, to allow one of the heavy passage-boats to pass; that the bridge was in the act of rising, and was actually raised about two or three feet, before the pursuer went on it at all; that she had due warning to keep off; and that as the bridge had a span of about seventeen feet, and lifted entirely from one side, being that from which the pursuer was going, she could have come back with safety, even after the bridge began to rise, and was guilty of the utmost recklessness

No. 210. in going forward and leaping, in place of returning. The defence therefore pleaded, that the pursuer, having acted with so little regard to her own safety, must herself bear the consequences of her folly; and alleged that the present action was an attempt at extorting money by threat of a jury trial.

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r. 16, 1836.
nter v.
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agow Union
al Co.

The following issue went to trial:—

“ It being admitted that, on the 17th day of August, 1834, and subsequent thereto, one William Cunningham was employed by defenders to manage the draw-bridge near Edinburgh, No. 2, on Union Canal.

“ Whether, on or about the said day, by the fault, negligence, or want of skill of the said William Cunningham, in the management of the bridge, the pursuer suffered severe bodily harm, to the loss, injury, damage of the pursuer?”

From the evidence of the pursuer, it appeared, that, about eight o'clock in a foggy morning, three women, including the pursuer, went together upon the draw-bridge, which was rather slippery at the time. They were going to shear, and one or more had their shearing-hooks with them. At this time the bridge was quite down, and it was only after they were half across that they felt the bridge rise under their feet. The bridge was raised by machinery, which was worked by Cunningham, standing on the bank which they had just quitted. The bridge was of one piece, and its farther end rose up from the bank towards which they were coming. The women had seen no boat on the canal approaching the bridge, and got no warning. They were thrown into alarm and confusion when the bridge began to rise, and they made a rush forward. The first man had a leap of about three feet to make from the end of the bridge in order to gain the opposite bank. The second had to make a leap of somewhat more difficulty. The pursuer was the last, and made her spring after the bridge was very considerably elevated. She lighted upon the person of the woman who had leaped first, and who thereby received injury for which she was bled and blistered. The pursuer was a young woman, and was so much hurt in her limbs, by the violence of the concussion she received, as to be unable to rise without assistance, and was carried on a hurley to the nearest police-office, from which she afterwards conveyed home. She was confined to bed for some time, though her illness was not dangerous, it was very painful. She was obliged, on first going out, to use crutches; and though now in perfect health, she was less able for exertion than formerly. Two medical men had attended her, and one of them had continued his attendance for a three months. Their accounts amounted to about £15. The pursuer was also proved to have been in employment as a sick-nurse; but no evidence was led as to the amount of her earnings.

From the evidence of the Superintendent of Public Works at Edinburgh, and also of another witness, it appeared that the bridge was

in such a manner as to provide adequately for the safety of the public, there was no chain or rope to throw across and warn the public the bridge was about to be lifted.

The defenders proved that their servant, Cunningham, had an excellent general character for steadiness and attention to his duty. But they could not prove that warning had been duly given to the pursuer, or that the danger into which she fell had been of her own seeking, or imputable to her own recklessness on her part.

LORD PRESIDENT, in charging the Jury, observed, inter alia, that, under the facts of the issue, it was implied that the Canal Company were responsible for the conduct of their servant, Cunningham, and should be found liable in damages if the pursuer had sustained injury through his fault, negligence, or want of skill. The whole charge and care of the bridge had been devolved on him, and he should have informed the defenders, his employers, if the bridge was not in a safe condition as rendered it safe for the public, as, for instance, it would have been if it wanted a railing on either side. For the same reason, if the bridge wanted a rope or chain at either end, so as to protect the public (during the time that he was occupied in raising the bridge, and engrossed perhaps too much with the machinery to observe passengers sufficiently), he ought, in that case, to have informed his employers that such chain or rope was wanting; and that it was one of his duties if he omitted this. In the whole circumstances of the case, it certainly seemed as if, when the operation of raising the bridge began, it should have been more natural and easy as well as safe for the pursuer to have stood round and run back to the bank, where Cunningham was standing, than to rush up the bridge and leaped across from its farther extremity. It seemed as if she had acted foolishly in rushing forwards: but the Jury would not forget the circumstances of alarm and trepidation in which she had been suddenly placed by the raising of the bridge when she had got about half way across. She had got no warning from Cunningham, and thus it was not imputable to any fault of her own that she was thrown into confusion and jeopardy. It rather seemed, that the whole party of women, in their alarm and flurry, had conceived it to be the safest course for them to rush forward as they did. And as the pursuer was caught above the woman who sprang first, it was not improbable that her fall might have been much more severe had she not thereby broken her fall. It was now for the Jury to say, on the whole evidence, whether the injury sustained by the pursuer had arisen from fault on the part of Cunningham; and if so, they would then assess the damages at a reasonable amount.

THE JURY found for the pursuer, and assessed the damages at £100.

C. SPENCE, S.S.C.—DAVIDSONS and SYME, W.S.—Agents.

No. 21

Mar. 16, 18

Hunter v.

Edinburgh

Glasgow U

Canal Co.

No. 211.

Mar. 16, 1836.
Reid v. Hutchison.

GEORGE REID, Pursuer.—*Robertson—Whigham.*
JOHN HUTCHISON, Defender.—*Keay—H. G. Bell.*

Wallace v.
Gray.

Proof—Process.—Where excerpts from the books of a party were recovered under a diligence against havers, and the party was in attendance on the Court at the subsequent jury trial; held, that the excerpts could not be put in evidence without calling the party as a witness to give any requisite explanation as to his books.

Mar. 16, 1836.
Ld. President.

THIS was a case of a special nature, involving a question whether the defender had purchased certain cattle and lambs from the pursuer for £380, 10s. and was still owing a balance of £33, 13s.; or whether the defender had purchased merely as the commission-agent of another party, and the pursuer was certiorated of this at the time.

The pursuer, in leading evidence, tendered the report of a commission under which a diligence against havers had been executed; and excerpts from the books of Matthew Hutchison, a haver, had been obtained; as to which the haver had deponed, in common form, that they were correct excerpts.

Keay, for defender, objected—

Because the haver was himself in attendance on the Court, and it was incompetent to put in evidence these excerpts from his books without calling him, so that every requisite explanation regarding the excerpts might be obtained, in presence of the Jury.

LORD PRESIDENT.—As the witness is not only alive, but ready to appear instantly if called on, I shall not allow these excerpts to be laid before the Jury, by a party who keeps back the witness from being examined before them as to his books.

The pursuer failed to establish his case, and

THE JURY found for the defenders.

T. JOHNSTONE, S.S.C.—A. GIFFORD, S.S.C.—Agents.

No. 212.

GEORGE WALLACE, Pursuer.—*Robertson—G. G. Bell.*
ROBERT GRAY and OTHERS, Defenders.—*More.*
ALEXANDER ROBERTSON and OTHERS, Defenders.—*D. F. Hope*
—*Thomson.*

Church—Contract.—1. A bullder contracted with a Committee of Management of a Congregation of the United Associate Secession Church, to erect a chapel: after erecting it, he raised an action against the Members of the Committee and of the Congregation, for payment of a balance of the price; the Lord Ordinary found, in an interlocutor in which the pursuer acquiesced, "That all the Members of the Committee, &c., and all persons who were not merely hearers or communicants in

ing-house or chapel, but were Members of the said Congregation," during No. 212.
 period, were liable: it appeared that some of the defenders had acted as
 of the Congregation in various ways, and particularly by signing a call to Mar. 17, 1839
 which designed them as Members, and which none but Members had a Wallace v.
 sign. Held, by the presiding Judge, in charging the Jury, that, the question Gray.
 the defenders were "Members" of the Congregation, must be decided
 to the rules and constitution of their own Church; that the evidence led
 subject showed they were not Members, in that sense; and that, according
 perlocutor already quoted, they were, therefore, not liable: and verdict
 accordingly.

Trial.—Held, that, although there are several defenders in a cause, the
 ly of defenders have right only to four peremptory challenges of jurymen,
 they formed, quoad hoc, but one party defender.

qf.—The oldest son of a deceased defender held admissible as a witness,
 tement, that he did not represent his father; the son of another deceased
 held not admissible, on his statement, that he did take up a heritable suc-
 om his father.

qf.—A pursuer concluded against a large number of defenders, and obtain-
 in absence against one of them: at a subsequent jury trial, with the other
 , the pursuer tendered him as a witness, and offered to discharge all claim
 m: the defenders objected, that, the witness, while under decree, had an
 render them liable for the same sums, and so diminish his own share of
 liability; and if all claim against him was now discharged, that would be
 a good deed for his evidence: objection sustained.

IL of the case, reported ante, pages 205 and 541, respecting the Mar. 17, 1839
 s' liability to pay the balance of contract-price for building a 1st DIVISION.
 which see. The new trial which was formerly allowed, now Ld. President
 d. The defenders formed a very numerous body, and there
 re of them for whom no appearance was made.

lloting the jury, the *Dean of Faculty* (who appeared for four
 s, named Alexander Robertson and Others), after making four
 ury challenges, proceeded to challenge a fifth juror. To which
 son objected, that his challenges were exhausted. It had been,
 statute 55 Geo. III., c. 42, § 21, enacted, that "each party
 e four challenges allowed, without assigning any cause." The
 arty" here meant the party pursuer, or party defender, without
 shing whether there were many individuals forming co-pursuers,
 enders, or whether there was only one individual holding either
 spective characters. Were it otherwise, it must happen, that,
 case as the present, where the whole defenders formed a very
 s body, they could peremptorily challenge all the jury, because
 nited number of jurors could be summoned, and that number
 rithin the peremptory challenges which would be competent to
 iders, if each individual defender had four. They might thus
 trial as often as they chose.

qf Faculty answered, that the statute gave the right of challenge
 arty; this plainly meant each individual; and, indeed, the right

No. 212. of making four peremptory challenges could not be distributed acc
 ar. 17, 1836. to any intelligible rule, among a number of co-pursuers or defender
 Wallace v. of whom claimed it for himself.
 Gray.

Upon referring to the Clerk of Court as to the practice, he was
 stood to state that he had never seen the point raised.

LORD PRESIDENT.—I consider that the *Dean of Faculty* has exhaust
 right of peremptory challenge, and I disallow the last challenge made by

Dean of Faculty.—This decision is of much importance in practi
 I request your Lordship to take a note of it, as it may be for the
 of the defenders eventually to try how far it will affect the val
 any verdict which may be found in the present case.

His Lordship took a note of the finding accordingly.

The trial then proceeded, and the pursuer put in the missives o
 ment, which were now duly stamped. He also led evidence to pr
 he had finished the chapel in a workmanlike manner, and to the
 tion of the congregation. Among other witnesses he tendered
 M'Ewen, to whom

The defenders objected, that he was a party defender in this a

The pursuer answered, that decree had gone against him in a
 he had an interest, therefore, adverse to the pursuer, which wa
 down the whole action if possible, as he could soon be reponed a
 decree in absence if the action was unfounded. But the purs
 mated that he was ready, if necessary, to grant a discharge of a
 against M'Ewen, and thereby render him as admissible as any
 to the cause.

The defenders replied, that M'Ewen must be presumed to hav
 ed decree to go against him, because he had no good defence
 he had, therefore, a manifest interest to get the other defenders
 for the same sums, and thereby diminish the share of loss to f
 himself. And as for the offer to discharge a party who stood at
 in the position of debtor to the pursuer, it was just giving a good
 reward for evidence, and was an inadmissible proceeding.

LORD PRESIDENT.—I think that the witness is inadmissible, and
 proposed discharge would not habilitate him.

At the pursuer's request, a note of this judgment also was t
 the Court, with a view to a bill of exceptions.

The pursuer afterwards tendered James Gray, against whom

The *Dean of Faculty* objected, that he was the eldest son of o
 defenders.

Gray stated that his father's estates had been sequestrated b
 death, and that he did not represent his father.

as then admitted without farther objection.

Kedsley was afterwards tendered as a witness by the pursuer, to
 was similarly objected, that he was the son and representative of
 ed defender.

No. 212

Mar. 17, 183

Wallace v.
 Gray.

ated, on examination, that his father had left some heritage, and
 e no settlement to put it past him, and that he was the eldest son.
 witness was then rejected.

rial involved many details of a special nature, but one of the chief
 a which the defence finally rested, was, that, according to the true
 tion of the interlocutor of Lord Corehouse,¹ the defenders were not
 ers" of the congregation. The pursuer had acquiesced in the interlo-
 d it found that "all persons who were not merely hearers, or com-
 ts, in the meeting-house or chapel, but were members of the said
 Associate Secession Congregation," during a certain period, prior
 me when the new chapel was taken possession of by the congre-
 vere liable to the pursuer in payment of the work, so far as duly
 l by him. It appeared as if the new chapel had been taken pos-
 of, about September or October, 1825.

reater part, or the whole, of the defenders appeared to be hearers
 municants.

ther proof of their membership, the pursuer not only referred to
 of proceedings relative to the business of the chapel, at which
 the defenders had attended, but also proved, as to others, and
 y the four persons for whom the Dean of Faculty appeared, that
 subscribed a call to Mr Arneill, the minister, which call was
 l by the Presbytery, on 6th September, 1825, and he was induct-
 bruary, 1826. He was the first placed minister there. This call,
 eamble, specially set forth that the subscribers were "members"
 ngregation. The names of these parties also appeared in certain
 re congregation, made up at different times, and one of which had
 de up by the minister. The date of his list, however, was poste-
 ie period fixed in the interlocutor of Lord Corehouse.

rneill was examined as a witness, and deponed, inter alia, that he
 e out his list merely in reference to the persons who were com-
 ts: that, by the constitution of the United Associate Secession
 none but members of a congregation had a right to sign a call
 inister, and their signatures would vitiate a call. Mr Arneill
 at he had several years ago broken off connexion with the Seces-
 rch, and had returned his license to them.

earred that the Portobello congregation was a new one, and had
 ned in September, 1824. The defenders, in proving that they
 properly "members," in the sense of the interlocutor, adduced

¹ Quoted ante, p. 206.

No. 212. John Brown, D.D., minister of the United Associate Secession and the Rev. John Smart, another minister, who was also a clerk. These gentlemen stated the law of their church to be, that where a person was already the "member" of one congregation, he could not regularly or effectually become the "member" of another congregation, without obtaining a "certificate of disjunction" from the minister and session of the first congregation, or from the minister in the absence of the session: that until this was obtained, a man continued a member of the first congregation, and was amenable to its minister and kirk-session in matters of ecclesiastical discipline, even although he might remove to another place, and become a hearer and communicant under another minister: that his subscription of a call along with that congregation would be an irregular and invalid act, but would not make him a member of the congregation: that such a subscription would be deleted from the records of the Presbytery, for invalidity, if it were pointed out to them: that a man could not possibly be a member of two congregations at the same time, and, until disjoined from the first congregation, he could not be a member of the second.

The defenders also proved, by the evidence of the minister and elders of the session of the United Associate Congregation at Portobello, that the four defenders, Robertson and Others, were admitted members of that congregation, and had never been disjoined from it. Robertson had been one of its managers for a considerable time, including the period when the Portobello chapel was built.

The pursuer, in addressing the jury in reply, contended, that as the defenders had subscribed a call, which specially designated them as "members," and which none but members had a right to sign, and, as they had taken a share in the business-meetings of the congregation, they could not be permitted to escape from the civil liability attaching to membership, by merely proving, that, according to the rules of the church, they had committed the ecclesiastical irregularity of not obtaining a certificate of disjunction from a previous congregation, before they acted as members of the congregation at Portobello. This irregularity might expose them to ecclesiastical censure, but it could not at all affect their liability for the civil obligations attaching to members.

The LORD PRESIDENT, in charging the Jury, observed, inter alia,

* It was understood that the other defenders, who did not prove they were transferred members of other congregations, rested their defence upon the proof of their ever having been duly admitted members of the congregation at Portobello, according to the forms of their church; at least before the new chapel was in possession of. But the evidence on this point, hinc inde, involved a review of multifarious documents, alleged admissions, &c., which can only be given in detail in the charge of the Lord President.

As it appears that the chapel was completed by this pursuer in a workman-like manner, it will be a great hardship on him if he fails to recover payment of the contract price. But it would be an equal hardship on the defenders, if they were subjected to pay, without being legally liable for the debt. In regard to the description of persons, to whom alone legal liability in this instance can attach, I must refer you to the terms of the interlocutor of Lord Corehouse, which was acquiesced in by the pursuer, and which is now the law of this essential branch of the cause. His Lordship has defined them to be "all persons who were not merely hearers or communicants, in the meeting-house or chapel, but were members of the said United Associate Secession Congregation," during a certain specified period. Now, whatever liability a person might contract towards third parties, by holding himself out as a member, and acting as a member, I apprehend that the only question left under this interlocutor is, not, what persons acted as members during this period, but, what persons were the members? If the pursuer was to attempt to found a liability against parties, though not members, because they subscribed calls, and attended business-meetings, he ought not to have acquiesced in the interlocutor of Lord Corehouse. But he did acquiesce in it; and that leaves the question now for you to determine, on the evidence, what is it which makes membership in this congregation? To answer this, the rules and the constitution of the United Associate Secession Church must be referred to. I should have been apt to conceive, that every communicant was a member of the congregation; for so we consider it in the Established Church of Scotland. But in this country, where every form of worship is free, it is the right of the United Associate Secession, to establish their own ecclesiastical rules, and to declare what shall suffice to constitute a man a member of any of their congregations. The law of that church has been clearly stated to-day. Attendance at the business meetings of a congregation will not make a man a member of it. Subscribing to a call will not. On the contrary, if discovered, the invalid subscription will be deleted, just because the subscriber is no member, and the subscription has not the effect of rendering him one. And where a person has been regularly admitted a member of one congregation, he requires to be disjoined from it by a "certificate of disjunction," before he can become a member of another congregation. Applying these tests of membership to the defenders, you will decide whether any of them were members during the period specified by Lord Corehouse's interlocutor.

His Lordship added some observations as to the precise period, during which alone membership could found liability; and also remarked that no proof had been led to show who were the constituents of the Committee with whom the pursuer contracted, or whether they had any constituents, or were a self-elected body. His Lordship concluded by stating that it appeared to him, that the pursuer had failed to prove, what was requisite in his case against any of the defenders who had made appearance: but that a verdict should of course be returned against the defenders for whom appearance was made.*

* After his Lordship's charge, the pursuer submitted, that, as to several of the

o. 212. THE JURY found for all the defenders, excepting three persons for whom no appearance was made : as to whom, they found for the pursuer.

18, 1836.
Swayne v.
Fife Bank-
Co.

FERRIE & JAMIESON, W.S.—W. A. G. & R. ELLIS, W.S.—HOTCHKIS & MEIKLEJOHN, W. S.—
Agents.

o. 213. HENRY SWAYNE and MANDATARY, Pursuers.—*D. F. Hope—Marshall.*
FIFE BANKING COMPANY and WILLIAM DRUMMOND, Defenders.—*Robertson—H. J. Robertson—Shand.*

Proof—Onus Probandi—Reparation.—1. In an action for wrongous apprehension on a meditatio fugæ warrant, with a view to a suit which ultimately failed,—Verdict for the defenders.—2. Evidence which held not sufficient to throw upon the defenders in such action the onus of proving probable cause.

18, 1836. THIS was an action of damages at the instance of Henry Swayne, merchant in Lima, against the Fife Banking Company, for wrongous apprehension on a meditatio fugæ warrant.¹ The defence was, that the Banking Company had probable grounds for believing that the action at their instance against Swayne, on which the warrant was rested, was well founded ; and that the application for the warrant was made bona fide, and the proceedings under it conducted regularly and without unnecessary hardship.

DIVISION.
of Justice-
Court.

The following issue was sent to trial :—

“ It being admitted by the defenders that Messrs Cheyne and Mackersy having, as cashiers of the Fife Banking Company, in whose right the defenders now stand, presented an application to the sheriff of Edinburgh against the pursuer, as in meditatione fugæ, to answer to a claim to the amount of £100, 11s. 11½d., or thereby, and interest, and obtained a warrant thereon to bring him before the said sheriff for examination, caused the said pursuer to be apprehended in Glasgow, on or about the 4th day of September, 1828, and detained him until he granted a letter of presentation by George Reid, merchant or manufacturer in Glasgow, binding him to produce the pursuer in Edinburgh within one or two days. It being also admitted that the pursuer having appeared before the said

defenders, there was an express admission on the record, of their being “ members : ” the defenders thereon denied that they had admitted themselves to be members, in the sense required by the interlocutor of Lord Corehouse : and the Lord President was understood to assent to the construction of the admission which was contended for by the defenders.

¹ See ante, XIII. 1003.

sheriff, on or about the 5th day of the said month of September, was again detained until he granted a letter of presentation by his agent, Mr Andrew Scott, W.S., binding him to produce the pursuer in Edinburgh within one or two days; and that the pursuer afterwards, on the 8th day of the said month of September, in consequence of a warrant for incarceration, found caution, *de judicio sisti*, in any action to be brought for payment of the said sum, and it being also admitted that in an action, afterwards instituted for payment of the said sum, decree of absolver was pronounced by Lord Corehouse on the 13th December, 1833, and subsequently adhered to by the first Division of the Court,—

“ Whether, in the said proceedings or any of them, the defenders acted wrongfully, injuriously and oppressively, to the loss and damage of the pursuer ?

“ Damages laid at £2000.”

From the proof led by the pursuer (the defender having adduced no evidence), and from the record, which, as already before the Court, was referred to by both parties, the state of the facts appeared to be as follows:—

The late James Swayne, brother of the pursuer, Henry Swayne, was for some time agent for the branch of the Fife Bank at Kirkaldy, and died in 1821, largely indebted to the bank. Thereafter a confirmation was expedite in name of his daughter and only child, and of her paternal uncle and tutor-at-law, George Swayne, who employed Petty, a writer in Kirkaldy, to act as agent in the affairs of his niece. In the list of debts made up on this occasion as due to the deceased, including such as were doubtful and of small amount, no claim was stated against Henry Swayne. By an agreement in March, 1823, followed by a conveyance in January, 1824, the Fife Bank were constituted trustees for the creditors of James Swayne, but did not receive possession of his books and accounts for more than a year after the date of the agreement. In July, 1824, Henry Swayne went to America, and returned to this country in June 1828. When in Kirkaldy in August of that year, he received from Petty, acting under directions from the Fife Bank, two letters, of date the 27th and 29th, requesting, in the ordinary terms of civility, a meeting for the purpose of arranging as to the liquidation of a debt due by him to the estate of his brother, James Swayne, of which debt a memorandum was at the same time sent. To these letters Swayne returned no answer. On the 30th August, he went to Edinburgh, where he openly avowed his intention of returning shortly thereafter to America. In the beginning of September, the Edinburgh agents for the Fife Bank received instructions to have Swayne apprehended on a *meditatione fugæ* warrant, a statement of the claim on the part of the bank, but no evidence in support thereof, having been communicated to them; after which the proceedings set forth in the admissions prefixed to the issue took place, Petty being the agent employed on the occasion, though not the ordinary country agent of the Fife Bank. Following up those proceedings, the Fife Bank,

Robertson, for the Defenders, contended, that, looking to the circumstances of the case, there was nothing in the conduct of the bank which indicated harshness or oppression in the use of the diligence in question, the action being in itself no ground for damages—that there was no evidence of having been instituted without probable cause, but if there had been evidence as to make it incumbent on the defenders to establish probable cause, this was abundantly made out by the nature of the grounds of action stated in the Lord Ordinary's note as to the conflict of authorities.

LORD JUSTICE-CLERK, in charging the Jury, observed—The fact upon which the pursuer's case rested was that the legal proceedings and diligence used, would be such as to satisfy you that the bank, in using the diligence of, had been influenced by improper motives. Now it is clear that the proceedings were in themselves irregular, and there appears to be no evidence either the bank, or their agent Petty, having been actuated by vindictive feelings towards the pursuer. That a party has failed in an action is no ground for a claim of damages against him; and, as far as I can discover from the facts in the action with a view to which the diligence was used, there is nothing which would entitle one to say that it was a baseless action. On the other hand, Lord Corehouse's note shows that the case met with the greatest attention from that learned judge, and in the reported Opinions of the First Division there is no hint that the claim was reprobated as an action on the part of the bank. In regard to the use of the diligence, did the bank proceed in a way to show they were acting oppressively? Petty, employed as their agent, writes two letters to the pursuer which evince enmity towards him, and requests to know if any explanation is to be

clusion that they have satisfactorily discharged themselves of it. My own No
impression on the whole case is, that there is not sufficient evidence to warrant
in finding that, in adopting the proceedings in question, "the defenders Mar.
we acted wrongfully, injuriously, and oppressively, to the loss and damage of Ogilvie
a pursuer."

THE JURY found for the defenders.

ANDREW SCOTT, W.S.—JOHN SHAND, W.S.—Agents.

ROBERT OGILVIE, Pursuer.—*Rutherford—Robertson—Sutherland.* No

PETER SCOTT, Defender.—*D. F. Hope—Maitland.*

Proof—Issue—Reparation.—1. In an action for slander, contained in a letter
arguing the pursuer with a crime which deserved the gallows, the defender having
his defences adhered generally to the substance of the charge, and stated cir-
cumstances which went not properly to justify, but only to palliate, the writing of
the letter—held that evidence of those circumstances was admissible, although there
is no issue in justification.

2. In an action for written slander where the defence was that the pursuer had
used indecent liberties with the defender's female servant—verdict for the
defender.

THIS was an action of damages for slander, founded on the following Mar.
letter addressed by the defender Scott to the pursuer Ogilvie:—

Disgusting Brute,

"Edinburgh, Feb. 6, 1835.

"Washed and anointed, as you have been, in the jaw-hole of my
nose, it is for your parents' sake alone I now call upon you to remem-
ber you have committed a crime which the laws of society reward with
the gallows. Your neck has made a very narrow escape. Repent—
make your peace with Heaven, and beware lest your vice draw you
down to eternal perdition, with a rope around your neck. With the
most detestation, I am,

(Initialed)

"P. S."

Scott gave in defences against the action, setting forth that "on or
about Tuesday the 3d of February last, the pursuer called at the defen-
der's house, when he was informed by the servant, Elizabeth Binny, an
innocent and inexperienced girl between sixteen and seventeen years of
age, that both the defender and his sister were from home. The defender
was at the time at Traquair in Peebles-shire, and Miss Scott was out
shopping. Availing himself of these circumstances, and under the pretext
of getting a glass of water, the pursuer followed Elizabeth Binny into the
kitchen, and after using indecent familiarities towards her, attempted for-

2d I
Lord
Clerk.

No. 214. cibly to violate her person. She screamed for assistance ; and, after a considerable struggle, escaped from the grasp of the pursuer, and ran down stairs into the street. Shortly after this the pursuer left the house, when Elizabeth Binny returned and secured the door on the inside.

Mar. 19, 1836.
Gilvie v. Scott.

“ All this happened during the forenoon, and immediately on Miss Scott coming home, Elizabeth Binny, who was in a state of great agitation and alarm, informed her of what had taken place, and described the particulars of the pursuer's conduct, as now stated. She continued seriously unwell for several days in consequence of the violence of the pursuer's assault upon her, and the state of terror into which she was thereby thrown.

“ The pursuer returned to the defender's house both on the Wednesday and Thursday following, and Miss Scott, who was resolved not again to meet with him, having been denied by Elizabeth Binny, he attempted to get in, but was refused admittance, with a distinct intimation that his scandalous conduct had been made the subject of a complaint to her mistress. The defender having been made aware, on his return from Fife-shire, of all that had taken place, wrote the letter libelled to the pursuer. He did so under the influence of those feelings of excitement and indignation which the disgraceful conduct of the pursuer was naturally calculated to produce ; and while he does not defend either the terms or taste of the communication, he adheres to the substance of the charge contained in it against the pursuer, as in all respects well founded.”

The defender thereupon pleaded, that, “ in the circumstances of the case, he (the defender) was justified in addressing the letter libelled to the pursuer ; and that, at all events, its terms, however strong, are palliated by the excitement under which it was written, and of which the pursuer's guilty assault upon the defender's servant was the sole cause, to exclude the pursuer's claim of damages, and entitle the defender to be assoilzied with expenses.”

Thereafter an issue was sent to trial, whether the defender wrote and transmitted to the pursuer the letter in question, and whether it was true and concerning the pursuer, and was false and calumnious, and to what injury and damage ?

Damages were laid at £1000.

The pursuer put in the letter, the authorship of which was admitted by the defender, and adduced evidence of his moral character.

The defender, in support of his case, proposed to call as his first witness the servant-girl above-mentioned.

Rutherford, for the pursuer, objected, that this was an attempt to lead evidence in justification, without having taken an issue in justification ; that in his defence Scott adhered to the charge contained in the letter in question, as substantially true, and thus raised the defence of justification, in support of which

the issue on it had been taken, no evidence could be led:¹ that not having taken such an issue, was tantamount to confessing that the libel was false; and that was not entitled, by omitting to do so, to have the whole benefit of this issue of defence without the corresponding risk of failure. No. 2
Mar. 19,
Ogilvie v.

The *Dean of Faculty*, for the defender, answered, that had there been an issue of justification, it must have been taken in the very terms of the letter, and have in question the truth of the exact words in which the slander was conveyed; the defender was not, from the nature of his defences, called upon to take an issue, the amount of his statement being that the pursuer's conduct was such as to entitle him to express himself strongly, though not exactly in the terms which had been used; he could not, therefore, be precluded from adducing best and only evidence in support of his case.

THE JUSTICE-CLERK.—I am inclined to think this evidence competent. Now the law may be as to the necessity of an issue in justification being where there is matter which has been met by a particular justification, the case is different, as the defences contain merely a narrative explanatory of facts which led to the writing of this letter,—facts indicating that an act of a certain description had been committed, but certainly short of a capital offence. The defence is not, I will prove that a capital crime was committed, but, that circumstances occurred which go to palliate the offence of the letter having been written. Under these circumstances, I cannot exclude this evidence.

The witness was accordingly admitted.

The defender's evidence established that the pursuer had, on the occasion stated in the defences, used indecent liberties with his female servant, and had subsequently given contradictory accounts of the proceedings on that occasion.

THE JUSTICE-CLERK, in charging the Jury, observed:—Although the letter written by the defender is not attempted to be justified, in the proper sense of the word, yet his statement goes to show that there were circumstances in the case such as to palliate the fact of his having used the expressions in question. As to the evidence with reference to this statement, you will have to consider whether there were not grounds which amount at least to a palliation of the writing of the letter. There is no evidence of the expressions having been said by the defender to any third party; and no proof of his having been actuated by malice and ill-will, and an intention to destroy the peace of the pursuer.

The facts of the assault sworn to by the first and principal witness for the pursuer, whose evidence appeared to me to be perfectly trust-worthy, although they do not amount to a capital crime, were such as justly to create in the mind of the defender an impression that an offence of a different description, amounting to intent to ravish, had been committed. Now, when a party seeks justice in a court of law, either for verbal or written slander, he must, as has been often and truly said, come into Court with clean hands. But there are circumstances here undoubtedly to satisfy you of the pursuer's improper conduct,

¹ *Paterson v. Shaw*, June 7, 1830, 5 Mur. 273.

"The pursuer returned to the defender's house both on the Wednesday and Thursday following, and Miss Scott, who was resolved not to meet with him, having been denied by Elizabeth Binny, he attempted to get in, but was refused admittance, with a distinct intimation that his scandalous conduct had been made the subject of a complaint to the sheriff. The defender having been made aware, on his return to Glasgow, of all that had taken place, wrote the letter libellous to the pursuer. He did so under the influence of those feelings of rage and indignation which the disgraceful conduct of the pursuer was calculated to produce; and while he does not defend the terms or taste of the communication, he adheres to the substance of the charge contained in it against the pursuer, as in all respects founded."

The defender thereupon pleaded, that, "in the circumstances of the case, he (the defender) was justified in addressing the letter to the pursuer; and that, at all events, its terms, however atrocious, were palliated by the excitement under which it was written, and of the pursuer's guilty assault upon the defender's servant was the sole cause to exclude the pursuer's claim of damages, and entitle the defender to be absolved with expenses."

Thereafter an issue was sent to trial, whether the defender transmitted to the pursuer the letter in question, and whether the letter was true and concerning the pursuer, and was false and calumnious, and whether there was injury and damage?

Damages were laid at £1000.

The pursuer put in the letter, the authorship of which was admitted by the defender, and adduced evidence of his moral character.

no issue on it had been taken, no evidence could be led:¹ that not having taken such an issue, was tantamount to confessing that the libel was false; and that he was not entitled, by omitting to do so, to have the whole benefit of this defence without the corresponding risk of failure. N
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The *Dean of Faculty*, for the defender, answered, that had there been an issue in justification, it must have been taken in the very terms of the letter, and have put in question the truth of the exact words in which the slander was conveyed; but the defender was not, from the nature of his defences, called upon to take such an issue, the amount of his statement being that the pursuer's conduct was such as to entitle him to express himself strongly, though not exactly in the words which had been used; he could not, therefore, be precluded from adducing the best and only evidence in support of his case.

LORD JUSTICE-CLERK.—I am inclined to think this evidence competent. However the law may be as to the necessity of an issue in justification being taken, where there is matter which has been met by a particular justification, in the case is different, as the defences contain merely a narrative explanatory of the facts which led to the writing of this letter,—facts indicating that an assault of a certain description had been committed, but certainly short of a capital offence. The defence is not, I will prove that a capital crime was committed, but, that circumstances occurred which go to palliate the offence of the letter having been written. Under these circumstances, I cannot exclude this evidence.

The witness was accordingly admitted.

The defender's evidence established that the pursuer had, on the occasion stated in the defences, used indecent liberties with his female servant, and had subsequently given contradictory accounts of the proceedings on that occasion.

LORD JUSTICE-CLERK, in charging the Jury, observed:—Although the letter written by the defender is not attempted to be justified, in the proper sense of the term, yet his statement goes to show that there were circumstances in the case such as to palliate the fact of his having used the expressions in question. Looking to the evidence with reference to this statement, you will have to consider whether there were not grounds which amount at least to a palliation of the writing of the letter. There is no evidence of the expressions having been repeated by the defender to any third party; and no proof of his having been actuated by malice and ill-will, and an intention to destroy the peace of the pursuer. The facts of the assault sworn to by the first and principal witness for the defender, whose evidence appeared to me to be perfectly trust-worthy, although they do not amount to a capital crime, were such as justly to create in the mind of the defender an impression that an offence of a different description, an assault with intent to ravish, had been committed. Now, when a party seeks variation in a court of law, either for verbal or written slander, he must, as has often and truly said, come into Court with clean hands. But there are circumstances here undoubtedly to satisfy you of the pursuer's improper conduct,

¹ Paterson v. Shaw, June 7, 1830, 5 Mur. 273.

No. 214. and his illegal assault on the person of the defender's servant. If you think there are sufficient grounds for finding for the pursuer at all, it is in your power to find the smallest possible sum of damages. My own opinion on the whole case is, that this was a most impudent action on the part of the pursuer.

Mar. 19, 1836.
Rutherford v.
Boak.

THE JURY found for the defender.

WOTHERSPOON and MACK, W.S.—THOMAS RANKINE, S.S.C.—Agents.

No. 215. JOHN RUTHERFOORD, Pursuer.—*Sol.-Gen. Cunningham*—*G. G. B.*
WILLIAM BOAK, Defender.—*Rutherford*—*J. Anderson*.

Process—Issue—Reparation.—1. In an action of damages by a leather-japper for seducing a workman from his employment, and bribing or inducing the workman to reveal secrets connected with his employer's trade, the pursuer has declined to specify in his condescendence the nature of the secret which he charged the defender with thus obtaining—held that he was not entitled to an issue on the allegation of the defender having unlawfully got possession of such secret. In an action for seducing a workman from his employer—verdict for the defender.

Mar. 19, 1836.
2D DIVISION.
Lord Justice-
Clerk.

RUTHERFOORD, leather-japper in Edinburgh, brought an action against Boak, tanner and leather-japper there, setting forth that the defender had, by himself or others, seduced one of the pursuer's workmen from his employment, and had bribed or induced him to reveal certain secrets connected with the pursuer's trade, and was therefore liable in damages.

The defence was a denial of the allegations on which the action was founded.

In his condescendence the pursuer declined specifying the nature of the alleged secret, which related to the mixing and boiling of the materials for japanning, farther than that it was a method peculiar to the pursuer, "consisting in the ingredients and proportions thereof used for giving the first and second coatings to the leather."

In these circumstances the Lord Ordinary (Jeffrey) refused to allow an issue on the averment that the defender had bribed or induced the pursuer's workman to reveal the secret in question. His Lordship pronounced the following interlocutor, with the subjoined note :—“ For that the pursuer having declined to specify in his last revised condescendence

* “ It may be a hardship on the pursuer to be obliged to give additional publicity to his invention by setting it forth on the record of this cause. But for he may recover a greater measure of damages from the jury, while, on the other hand, it may be obviously impossible for the defender (who has the presumption and favour of the law with him *huc usque*) either to prove the most complete defence, or to show the damage to be merely illusory, if he is obliged to proceed to trial without knowing in the least what that alleged discovery or secret is which he is accused of having stolen from the pursuer.”

once the nature of the secret or discovery in his manufacture which he there charges the defender with having obtained from his servant by bribery or other unlawful means, is not entitled to an issue upon the allegation of the defender having unlawfully got possession of such secret."

Thereafter the following issue was sent to trial:—"Whether one Charles Bryan was engaged by the pursuer for a year, from 5th April, 1834, until the 5th April, 1835, to assist the pursuer in his trade as a leather-dressmaker; and whether, on or about the month of May, 1834, the defender being in the knowledge of the said engagement, by himself, or another, or others, wrongfully seduced the said Charles Bryan from his said service, and caused him to desert the same; whereby the pursuer was deprived of the service of the said Charles Bryan from the 26th day of May, 1834, until the 11th day of September, 1834, or during any part of the said period, to the loss, injury, and damage of the pursuer?"

"Damages laid at £1000."

THE JURY found for the defender.

M. & J. LOTHIAN, S.S.C.—THOMAS LANDALE, S.S.C.—Agents.

JAMES HENRY and OTHERS, Pursuers.—*D. F. Hope—M'Neill.*

ANNE MILLER, Defender.—*Rutherford—Monteith.*

THIS was an action to reduce a settlement on the ground of facility and circumvention.

VERDICT for the pursuers.

E. & A. M'MILLAN, W.S.—SMITH, NEIL, & HUTCHISON, S.S.C.—Agents.

ANDREW HENDERSON, Pursuer.—*D. F. Hope—Robertson.*

CAMPBELL'S TRUSTEES and ALEXANDER CAMPBELL, Defenders.—*Keay—M'Neill.*

THIS was an action for payment of a land-surveyor's account, the sum claimed being £612, 19s. 5½d.

THE JURY found for the pursuer, and assessed the balance due at £497, 9s. 5½d.

THOMAS RANKEN, S.S.C.—DAVIDSONS & SYME, W.S.—Agents.

No. 218.

ALEXANDER WATSON, Pursuer.—*D. F. Hope—Robertson.*MRS ANN WATSON OF GLASS, and MRS ISOBEL WATSON or M'CALL
Defenders.—*Rutherford—M'Neill—Pyper.*May 10, 1836.
Watson v.
Watson.

Proof—Witness—Process.—1. Circumstances in which, (1) a deposition which had been emitted in an unopposed service, was afterwards rejected at a jury though the deponent had died in the interim; (2) a deposition which had been taken in presence of both parties, to lie in retentis, was held not to be admissible, though the deponent could not attend in Court; and (3) the objections of interest and relationship were sustained in a trial involving a question of pedigree. 2. Observe that a record of burials, containing the gratuitous addition of the age of the person buried, which addition was inserted on hearsay, could afford no evidence of the age.

May 10, 1836.

SEQUEL of the case reported ante, XIII., 543. The cause went to appeal, and a judgment was pronounced, which this Court applied, and directed the following issues to be tried by jury:—

1st Division.
Ad. President.

“1st, Whether the defenders, Ann and Isobel Watson, are related, in what degree of propinquity they are related, to the deceased Alexander Watson, sometime town-clerk of Port-Glasgow?

“2d, Whether the pursuer, Alexander Watson, weaver in House, is related, and in what degree of propinquity he is related, to Alexander Watson, town-clerk of Port-Glasgow aforesaid?”

The Court also declared that the defenders, Glass and Watson, should stand as pursuers of the first issue, and that Alexander Watson should stand as pursuer in the second issue. The first issue having come on for trial, the pursuers of that issue (Glass and Watson), besides other evidence, tendered the deposition of Margaret Mill, a party now dead, who had been examined on oath at the time when they expedited their service.

Dean of Faculty objected. The service of Alexander Watson was first expedited. Glass and Watson, though in the knowledge of this, afterwards expedited a service, without giving any notice to Alexander, and thereby obtained their service without opposition. The testimony now tendered was therefore liable to the combined objections, that it was *ex parte*, when there was no opportunity to cross-examine; that it was given after the competing claims of parties were truly sub judice, as Alexander Watson's service had been previously expedited; and that it was the fault of Glass and Watson themselves that this testimony was *ex parte*, as they ought in fairness to have given notice to Alexander Watson, who would have attended when their brief of service was before the inquiry.

Rutherford, in answer. The hearsay of a deceased party was admissible, though the words had not been spoken on oath, and though there could, of course, be no check of cross-examination: but the evidence now tendered was a deposition judicially emitted on oath. The deposition was not truly made *pendenti lite*; but even if it had been so, yet as Glass and Watson were under no obligation to expedite their service to the pursuer, their omission to do so could not have the effect of forfeiting all right to use the depositions then emitted, where the deponents had subsequently died.

LORD PRESIDENT.—This is a point of considerable importance in the law of evidence, and, although I do not think it free of difficulty, yet I have formed a pretty decided opinion that the testimony now tendered ought to be rejected. Hearsay of a party deceased is generally admissible by our law; but I was

not receive the hearsay of any person after the matter referred to was submitted to the jury. I regard the evidence now tendered as being in this position, and, though emitted on oath, I cannot allow it to be received, because it relates to a matter as to which there was substantially a legal contest already proceeding.

The deposition was therefore rejected, as well as the deposition of several other deceased parties which were in the same situation.

Glass and Watson afterwards tendered the deposition of Elizabeth Gardner or Black, which had been taken in this cause, in 1831, to lie in re-
sponse. Her examination had been conducted in presence of both parties, and she had been cross-examined at the time. At a former jury trial in this cause, the deposition had been read. There was an admission in process that the witness was unable to attend the Court.

Dean of Faculty objected. The witness should have been re-examined with a view to this trial, as her mind is still entire. We have taken anew the examinations of a great many witnesses, but Glass and Watson avoided this, *ex proposito*, in order to exempt their witness from being cross-examined on many points which Alexander Watson has learnt since her former examination, to be essential to test her evidence, and its application to this cause. What is now tendered is no longer the best evidence which it was in the power of Glass and Watson to produce.

Rutherford, in answer. We conceive it to be the very best evidence, short of having the witness here; and she, confessedly, cannot attend. We exhausted the witness's knowledge of the case at the first examination, and she was then cross-examined. It was unnecessary for us to have re-examined her, and would probably have been incompetent; but, if Alexander Watson thought it for his interest to have a fresh examination, he should have applied to the Court for authority to take it. It would be a dangerous precedent to lay down any general rule as to the necessity of thus re-examining a witness, especially where the subject under discussion had been frequently canvassed in the interim by all the witnesses among themselves and their neighbours.

LORD PRESIDENT.—I think the evidence should be rejected, and on this ground. The deposition was taken in 1831. Five years have since elapsed, and parties have become much more fully acquainted now with the bearings of the case than they were then. It is highly probable that many circumstances have occurred in the interval which would have enabled Alexander Watson to cross-examine the witness much more efficiently than he could formerly do. I look on this evidence, therefore, as not being the best which Glass and Watson could and should have offered to-day, and on that account I reject it.

Glass and Watson then proposed to read the deposition of Elizabeth Duff, a witness said to be above ninety years of age, when Alexander Watson intimated that the witness was in attendance, and ought to be personally examined, if capable of emitting a deposition. She was brought into Court, and, at the close of her evidence, the Lord President observed, that she gave her testimony in a very distinct manner.

Glass and Watson tendered a witness named Mrs Cameron.

Dean of Faculty objected. By the genealogical tree which our opponents are now proving, this witness is their aunt, and is nearer in kin to the deceased town-clerk of Port-Glasgow, whose succession is in dispute, than our opponents

No. 218. themselves. She will therefore be one of the executrices of the town-clerk, if she proves their case. This renders her objectionable on the ground of interest. But she is farther objectionable on the ground of relationship, being their aunt; and there is no *penuria testium*, seeing that above twelve witnesses have been already examined by them.

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Rutherford, in answer. The legal test of the objection of interest was, whether a witness could be benefited by the issue of the action, in which such witness was tendered. But though his clients obtained a verdict in their favour, it could not be used by the proposed witness in her behalf, in support of her own alleged relationship. Such relationship would require to be proved by legal evidence, independently of this verdict. The objection of interest, therefore, did not apply. As to the objection of relationship, it was excluded by the nature of the question in issue, which was one of family pedigree. That necessarily implied such a *penuria testium* as rendered relations admissible. And any question of pedigree could seldom be fairly disposed of if relations were excluded. They ought to be held admissible, leaving their credibility to the jury.

LORD PRESIDENT.—I consider, on reference to the genealogical tree, that the propinquity of the witness is involved in the propinquity of Glass and Watson. I think she has an interest in supporting their propinquity, which renders her inadmissible for them. I also consider her inadmissible on the separate objection of relationship. There is no *penuria testium* in this case. On the contrary, all the residents in the neighbourhood of the parties seem to be under examination.

Another witness, Mrs Lockhart, was tendered, and rejected on the same grounds.

Glass and Watson were afterwards opening a line of evidence to prove that a certain record of burials, in Perth, was kept in such a manner as to afford no legal evidence whatever of the true ages of the parties buried, though the record purported to state their ages. They did this, in the belief that Alexander Watson was about to found on this record, in subsequently maintaining the second issue. An objection to this line of evidence was cut short by an intimation on the part of the Court, that, as such a record merely stated on hearsay, or common report, the ages of the persons interred, and as this was a gratuitous addition to the record of burials, it could not be referred to as legal evidence of the ages of the persons. It might prove the date of a burial, but not the age of the person buried.

The LORD PRESIDENT intimated, that if this record should be founded on by the pursuer, in trying the subsequent issue, he would direct the jury to disregard it.

After some farther evidence was adduced, and the jury had been charged by the LORD PRESIDENT, they found a verdict for the pursuer of the cause, who was defender in the issue.

The second issue did not go to trial at these sittings.

CASES

DECIDED IN

THE COURT OF SESSION.

SUMMER, 1836.

OF DUNDONALD and OTHERS, Pursuers.—*Rutherford—Marshall* No. 2
—*Milne.*

DYKES OF MACKENZIE and OTHERS (Boyes' Trustees), Defendants.
—D. F. Hope—Maitland.

scription—Heritable Right.—1. One of two daughters, passing by her father's will, took inheritance under a precept of clare constat as eldest heir-portioner, &c. by submission between the daughters, and decree-arbitral in 1780, the extent of the præcipuum of the eldest was fixed; forty years elapsed before the son and youngest daughter executed a service and was infeft as heir-portioner of property under his grandfather's settlement, and challenged the decree-arbitral, alleging that the eldest daughter had no right of præcipuum under her father's settlement, and that his right to impugn the decree-arbitral was cut off by the negative prescription, and that it was competent to the defenders to plead this, whether the negative prescription had run in their favour or not. 2. Question whether a title is justified by the positive prescription.

PTAIN GILCHRIST of Annsfield had two daughters, the eldest, May 12, 1771, and the youngest, Ann. In 1770 he executed a settlement disposing his lands to his wife in trust, under an injunction to convey them to the said Grizel and Ann Gilchrist equally, share and share alike, the heirs of their bodies respectively," so soon as the youngest daughter Ann should attain the age of twenty-one years. His other property and effects were also to be divided equally between them. The settlement provided an annuity of £100, as a real burden, in favour of Grizel Gilchrist, and gave her the liferent of "the dwelling-house, office, and gardens of Annsfield, together with the parks or enclosures

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lying next adjacent to my said dwelling-house, to the extent of twenty Scots acres of ground or thereby." The deed reserved power of revocation, declaring that this should only be exercised "by an express writing under my hand, recalling this present disposition and assignation, or altering the same in whole or in part." It contained procuratory of resignation and precept of sasine.

In 1774 the late Lord Dundonald married Miss Ann Gilchrist, and Captain Gilchrist became a party to the contract of marriage, which contained a disposition by him of a just and equal half of his estates to his daughter Ann. Apparently also it contained a declaration* "that at the death of the said Captain James Gilchrist, Miss Gilchrist, his eldest daughter, besides and over and above the other half of the foresaid lands and other subjects which the said Captain James Gilchrist intends to settle upon her, shall be entitled to a præcipuum in terms of law, in the event that he shall make no deed to the contrary thereof."

In 1777 Captain Gilchrist farther executed a bond of provision of the annuity of £100, in favour of his wife, together with a disposition of his lands of Annsfield, &c. in security, and a disposition also of the mansion-house, offices, and twenty acres of the adjacent parks above specified, in liferent. The bond also contained an acknowledgment to Mrs Gilchrist for a loan of £1100. Captain Gilchrist died in the same year, and Mrs Gilchrist immediately took infestment under the liferent disposition in this bond. She possessed her liferent house and lands till her death in 1803.

In a few months after Captain Gilchrist's death, the late Mr Boyes senior, of Wellhall, married Miss Grizel Gilchrist, the eldest daughter. In 1778, Mrs Boyes obtained a precept of clare constat "as eldest daughter and one of the two heirs-portioners" of her father, directing infestment to be given to her, in "all and whole the just and equal half of all and whole the foresaid twenty shilling land of old extent of Burnhouses of Eddlewood (now called Annsfield), which is part of the ten pound land thereof, with houses, biggings, yards, and pertinents thereof, &c. In the same year, sasine was given to her conform to the precept "in the just and equal half of all and whole the foresaid twenty shilling land of old extent of Burnhouses of Eddlewood (now called Annsfield) which is part of the ten pound land thereof, with houses, biggings, yards, and pertinents thereof:" and also in the "just and equal half" of the several other lands left by her father. In 1779, Lady Dundonald and Mrs Boyes entered into a submission by which they referred "to the

* The contract itself was lost, many years ago, while in the hands of an agent of the late Lord Dundonald. But its purport appeared, inter alia, from an old copy which had, at an early period, been furnished to Mr Boyes after mentioned, by the writer of the contract, who was apparently the then agent of Lord Dundonald; the accuracy of which copy was supported by various adminicles.

decreet-arbitral to be given furth and pronounced by Adam Rolland, Esq. advocate, sole arbiter mutually chosen by them for ascertaining the extent of the præcipuum of the said Mrs Grizel Gilchrist, as the eldest heir-portioner of the said Captain James Gilchrist, her father, and all questions betwixt the said parties respecting the time from which the said præcipuum is to commence, and all objections and defences competent to the said Ann Countess of Dundonald, and her said husband, to the extent of the said præcipuum, and the time the same is to commence."

In 1780, Mr Rolland gave decree in these terms:—"I find that Mrs Boyes has right to the following subjects as a præcipuum:—First, The house and offices of Annsfield, the court and garden adjoining, with that small gushet of ground called Bryceon's Mailing, and the washing-green, and several small spots of ground interjected among these," &c.—"These subjects I adjudge to the said Mrs Boyes, and declare to be her sole and exclusive property, in full of her claim for a præcipuum as the eldest daughter and heir-portioner of the deceased Captain Gilchrist: And further, I find that the said Mrs Boyes had right to the fee of the above subjects from the death of her father, but that the same is burdened with the liferent of Mrs Ann Robertson, her mother, without any claim to her or Mr Boyes, her husband, against Ann Countess of Dundonald, or her husband, the Earl of Dundonald, on account of the subjects being burdened with the said liferent."

Lady Dundonald died in 1784, leaving her eldest son, Lord Cochrane, a pupil of the age of nine years. His Lordship attained majority in 1796.

In May, 1785, Mrs Boyes and her husband conveyed to Thomas Buchanan the just and equal half of all the several lands to which she had succeeded from her father, including "the just and equal half of all and whole the twenty shilling land of Annsfield, with houses, pertinents," &c.—"And in like manner, all and whole the houses and offices of Annsfield, the court and garden adjoining, with that small gushet of ground called Bryceon's Mailing, and the washing-green," &c., "as the said houses, offices, gardens, and pieces of ground are more particularly bounded and described in a decreet-arbitral pronounced by Adam Rolland, Esq., advocate, by which decreet-arbitral the said subjects last mentioned were adjudged to the said Mrs Boyes, and declared to be her sole and exclusive property in full of her claim for a præcipuum as the eldest daughter and heir-portioner of the said Captain James Gilchrist deceased."

Buchanan immediately took infestment under this disposition, and in August, 1786, he reconveyed the lands to Boyes, senior, under a deed, the term of entry in which drew back to Martinmas, 1785. Boyes took no infestment under this reconveyance, but in 1812, after his death, his son, the late John Boyes, junior, expedite a general service to him, and took infestment under the open precept in Buchanan's disposition. After

No. 219. the death of John Boyes, junior, Mrs Dykes and others, as his trust-disponees, took infestment in the subjects.

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In January, 1786, a brieve was taken out in name of Mrs Boyes and her husband for dividing the lands of Annsfield and others, left by Captain Gilchrist. The claim for Mrs Boyes stated that she had possessed the lands pro indiviso with her sister, and her sister's representatives, "Excepting all and whole the houses and offices of Annsfield, the court, and garden adjoining, with that small gushet of ground called Bryceon's Mailing, and the washing-green," &c., "all as particularly bounded and described in the decreet-arbitral after-mentioned. Which subjects were adjudged to the claimant, and declared to be her sole and exclusive property in full of her claim for a præcipuum," &c. She claimed the half of Annsfield, lying contiguous to her præcipuum. The agent for the children of Lady Dundonald, who was now deceased, took out this claim to see, and returned it, stating no objections, but agreeing to have it remitted to an inquest. The process fell asleep, however, and was not finally insisted in, until a wakening and transference of it was brought in 1828, by the trustees of John Boyes, junior. The claim now made set forth the præcipuum as before, and the authorized agent of Lord Cochrane acknowledged the accuracy of the claim, and concurred in craving to have it laid before an inquest. He also lodged a claim for his Lordship, who had expedie a general service as heir-portioner of Captain Gilchrist, and he excepted the præcipuum out of the subject of division. The lands of Annsfield were accordingly divided by the Sheriff and a jury, in 1830, setting aside the præcipuum as designated in the decreet-arbitral, and giving to Boyes' Trustees the half which was contiguous to it; the other lands of Captain Gilchrist were equally divided in all respects. His Lordship then obtained a precept of clare constat from the superior, and was infest under it.

Claims of accounting existed hinc inde, as Mr Boyes, senior, had not only always drawn the rents of that half of the lands belonging to Mr Boyes, and of the whole præcipuum lands after Mrs Gilchrist's death, but his management and intrusions had extended more or less to the whole lands. On the other hand, his trustees claimed a large balance for advances, &c.; and an agreement was now made by the parties, with a view to arranging their mutual claims. But the details of these proceedings, and of certain objections, of a special nature, to the regularity of the process of division, do not require to be stated.

In 1833, Lord Cochrane, now Earl of Dundonald, expedie a general service as heir-portioner of provision, under the settlement of Captain Gilchrist, in 1770; and, along with his mandatary and trustees, instituted a reduction, which concluded for setting aside—first, the submission of 1779 and decree-arbitral of 1780; and second, the decree of division 1830, with all that had followed thereon. The action also concluded for declarator that Mrs Boyes had no right to a præcipuum; that Lord Dundonald had right to one half of the heritage, which had been allotted to

her as a præcipuum; and that this was his right under Captain Gilchrist's settlement of 1770. There was a subordinate conclusion of count and reckoning for one half of the rents drawn from the præcipuum lands since 1803, when they had been disburdened of the liferent of Mrs Gilchrist. N
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In support of this action, the pursuers made allegations of fraud on the part of Mr Boyes, senior, as having led to the submission; but these allegations were not so qualified or instructed as to enter into the view taken by the Court.

Pleaded by the Defenders—

1. The settlement of Captain Gilchrist, if the matter was open for investigation, would be found to consist partly of the trust-disposition 1770, and partly of the disposition in the marriage-contract 1774, the compound effect of which was expressly to bestow a præcipuum on Mrs Boyes. But it was not competent to discuss this, as her right to a præcipuum was fortified both by the negative and the positive prescriptions.

(1.) By the submission to Mr Rolland, in 1779, the right of Mrs Boyes to a præcipuum was expressly admitted; and by his decree-arbitral in 1780, the precise extent of it was decided. If this decree could not be challenged, the pursuer was excluded from impeaching the right of Mrs Boyes to the præcipuum. But all right to challenge that decree was cut off by the negative prescription, as four years had run, after the decree, before the death of Lady Dundonald, and above thirty-seven years of the majority of the pursuer, Lord Dundonald, had run before the institution of this action. It was quite competent to the defenders to state this plea, whether they could also plead the positive prescription or not; because the effect of the plea, in this instance, was, to cut off the pursuer's right to attack their title.¹

(2.) But the positive prescription had also run in favour of the defenders. Mrs Boyes was infeft, as eldest heir-portioner, in 1778, and this infeftment was followed with more than forty years' possession.² As to the præcipuum lands, it was true that the natural possession of Mrs Boyes commenced as late as 1803, but that was because the liferentrix lived till then, and her possession was the possession of the fiar. The infeftment of Mrs Boyes, to its full legal extent, was therefore unchallengeable; and even if it were only in the pro indiviso half of the lands in general, it was necessarily an infeftment in the full right of the præcipuum lands, as they were an indivisible subject, to which a younger heir-portioner was legally a stranger. The right of Mrs Boyes in the præcipuum lands was

¹ 1469, c. 29; 1474, c. 54; 1617, c. 12; 2 Ersk. 12, 15; 3 Ersk. 7, 8; Kames' *Enc.* 242; Younger, June 20, 1665; (10924); Murray, March 18, 1707 (10721); *Feil.* Feb. 8, 1814 (F.C.)

² 3 Ersk., 8, 71, and 13.

No. 219. therefore complete, without any brieve of division, or conveyance
 y 12, 1836. the other heir-portioner; and if these were necessary, quoad ultra
 ri of defenders could compel the pursuers to concur in such measures, as
 undonald v. as not already carried through.
 kes.

2. If either of the preceding pleas was well-founded, it was unnecessary to insist on the homologation and rei interventus arising out of a recent decree of division, &c.

Pleaded by Pursuers—

1. Lord Dundonald now stood infeft as heir of provision under the settlement 1770, which cut off all right of præcipuum on the part of the Boyes; and, if not prevented by prescription, the pursuers would insist that that to be the only deed regulating Captain Gilchrist's settlement. Negative prescription did not apply. (1.) The negative prescription could not competently be pleaded by any party, whose title was not fortified by a positive.¹ And, farther, the negative prescription was not and could not be effectual to take away any right of property in the præcipuum which arose under the settlement 1770. (2.) The positive prescription did not apply. The infeftment of Mrs Boyes in 1778, was expressed to be limited to her "just and equal half" of the lands of Annsfield, with the mill &c., as well as of all the other lands. It did not refer to any præcipuum, and it was not repugnant to the settlement 1770, which also gave the same pro indiviso half of every heritable subject, including Annsfield. There was no other infeftment to which the positive prescription could be referred; and no length of possession, following on an infeftment, was thus limited, could enlarge the party's right beyond the pro indiviso half in any part or portion of the subjects. As to the possession of the præcipuum lands by Mrs Gilchrist, as liferenter under the bond and disposition of 1777, executed in her favour by Captain Gilchrist, it could not be imputed as the possession of any fiar, especially where the fiar was not made up conformably to Captain Gilchrist's settlement.

2. If the pursuers were permitted to challenge the decree of division and other recent procedure, they were ready to show it was reduced. The Lord Ordinary reported the cause on cases.

LORD BALGRAY.—I think the defence of prescription must be sustained.

LORD PRESIDENT.—I am of the same opinion. I think the plea of the defenders is good both on the positive and the negative prescriptions. The negative prescription is quite enough for their defence, and consistently with the case of Paul v. Brown, which received great consideration, I hold the defenders perfectly entitled to plead that plea, even if they could not also plead the positive prescription. It has frequently been said that no man can plead the negative prescription, as affecting a heritable right, who cannot also plead the positive. But this is too loose. The correct statement of the doctrine appears to be, that the negative prescription

¹ 3 Ersk. 7, 8, and 11; 3 Ersk. 7, 37; 2 St. 12, 27; Brown, Feb. 5, 1680 (L. R. 1680); Elliot, Feb. 18, 1724 (V. Brown's Supp. 854); Scott, Dec. 21, 1756 (ib.)

can be pleaded by any party to whom the positive prescription, if it had run, would have afforded a good title. Such a party, I conceive, may plead the negative prescription, whether the full term of the positive prescription has run in his favour or not.

LORD MACKENZIE.—I concur with your lordship in holding the defenders entitled to plead the negative prescription; and that plea is sufficient for their defence. Their argument on the submission and decree arbitral appears to me to be invincible. The terms of that submission distinctly implied an acknowledgment that Mrs Boyes had right to a præcipuum. They admit of no other construction. If the submission had been entered into yesterday, and was not impeachable on the ground of fraud, or any other relevant ground, there would be an end of the pursuer's case, in so far as that deed would import a distinct acknowledgment that Mrs Boyes had right to a præcipuum. The decree arbitral defined the extent of the præcipuum in 1780. Now, it appears to me that the decree has been fortified by the negative prescription, and that the right to challenge is cut off. According to the decision of *Paul v. Reid*, the negative prescription excludes reduction. But, without a reduction of the decree arbitral, the pursuer cannot effectually insist. And as this is not now competent to him, it appears to me that his case is at an end, in consequence of the application of the negative prescription in support of the defences.

It is unnecessary for me, therefore, to give judgment on the plea founded on the positive prescription. I am not prepared to say whether that plea is well-founded. I am not satisfied that the *jus crediti* under the disposition of Captain *Christ* would have been extinguished, but for the decree arbitral and the negative prescription. The service as heir-portioner, followed by the vague seisin, and by prescription, would probably have been a good title; but I do not see that possession here as would have supported the positive prescription; and, in particular, I am not prepared to assent to the plea that, in this case, the possession of the liferentrix was equal to the possession of the defenders' author. On the whole, I should not have been free from doubt had not the negative prescription applied; but that is decisive of itself.

LORD GILLIES.—I agree. The pursuers plead that Mrs Boyes made up her title to one-half of the lands, which was exactly what she would have taken if she had acted under the settlement 1770. But still she did make up her title exactly as eldest heir-portioner, and in that character alone. I think the defences should be sustained.

THE COURT sustained the plea of the negative prescription, and assoilzied with expenses.

THOMSON PAUL, W.S.—MACKENZIE and MACFARLANE, W.S.—Agents.

No. 220.

y 12, 1836.

rr v.
emner's
ustees.D DIVISION.
ord Jeffrey.

CHRISTOPHER KERR, Pursuer.—*D. F. Hope.*
BREMNER'S TRUSTEES, Defenders.—*Pyper.*

THIS was a question as to expenses in which the Court adhered to an interlocutor of the Lord Ordinary finding the defenders liable therein.

WILLIAM MURRAY, W. S.—GIBSON and HECTOR, W. S.—Agents.

No. 221.

wan v.
awford.

WILLIAM COWAN, Pursuer.—*Rutherford*—*G. G. Bell*—*Cowan.*
WILLIAM RONALD CRAWFORD and OTHERS, Defenders.—*Keay*—*Whigham.*

Trust.—In an accounting under a trust where the trustees were protected by a clause in the deed declaring them not liable for omissions, &c.—circumstances which held not to amount to such culpa lata as to infer personal liability against a trustee for losses sustained by the trust-estate in the course of his management.

ay 13, 1836.

2D DIVISION.
Lord Jeffrey.
M.

THE late William Crawford, by deed of settlement dated October 1799, conveyed his whole effects to certain parties in trust, and died November of that year. The trustees were empowered to sell and dispose of the trust-estate "either by public roup or private sale, as they shall think fit," and generally to do and execute whatever might be necessary for disposing of it or rendering it effectual. They were also empowered to "appoint factors, either of their own number, or other persons, for uplifting the rents of my lands and estate, and principal sums and annual rents of the debts hereby disposed, and whole other subjects of the said trust, and from time to time, to employ the same, and the prices and proceeds of the said trust-estate, upon such securities, either real or personal, as they shall think fit, until the same shall be applied in manner as herein after directed, and to give such salaries and gratifications to the said factor, or any others who shall be employed in the premises, as they shall think fit." The trustees were, inter alia, directed to pay certain provisions to the truster's daughter and her husband, George Reid, and the last of the trust purposes was expressed in the following terms:—"I appoint my said trustees to take the charge of William Crawford, my grandchild, eldest son of the said Peter Crawford and Janet Grey, his spouse, when he arrives at the age of seven years, and have the sole management and direction of him as to his maintenance, clothing, and education, in as liberal and proper a manner as his capacity will admit of, and have him bred up to such business as they shall judge most prudent for him to follow, and to be at the whole expense thereof and of the management of my affairs, until he attain to the age of twenty five years complete, unless my said trustees shall consider him entitled

d enabled to enter upon the management of his own affairs at the age No
 twenty-one. But at either of these periods, or in the interim, as they May 1
 all see fit, I ordain them to divest themselves of their whole trust now Cowan
 committed to them in his favours, and dispoise and convey to him, in a Crawf
 gal manner, the whole of the subjects, heritable and moveable, under
 eir management, and put him in actual possession of these whole sub-
 jects and sums, heritable and moveable, which may then remain in their
 hands, or under their management, after deduction of all expenses,
 according to an account to be settled between him and them, which re-
 sult I appoint them to assign and make over to him, the said William
 Crawford, his heirs and successors, absolutely without any other burden,"
 c. The deed farther contained a clause declaring that the trustees
 shall not be liable for omissions, or not doing diligence, but each for
 his own actual intromissions only, and not to be answerable to my said
 grandchild, or his foresaids, in any farther, or for one another."

Of the trustees named, three accepted, amongst whom was the pursuer
 Cowan, banker in Ayr, and two declined, of whom one was the truster's
 son-in-law Reid. In January, 1800, the accepting trustees granted a
 proxy in favour of Reid, who had for several years assisted his father-in-
 law in the management of his affairs, and in various factories held by him,
 conferring the usual powers in relation to the management and execution
 of the trust, and at the same time they took a bond of caution from him
 and a responsible cautioner named Logan. In virtue of this proxy Reid
 entered on the management of the trust affairs and intromitted with the
 funds. At this time he was indebted to the estate in a sum of £1300 in
 unsecured and past due bills, while he had a counter-claim against the
 estate for personal services to the deceased, on account of which claim,
 and while there was a balance of £260 against him on his factory
 accounts, the trustees made a payment to him of £265. Cowan occa-
 sionally received and made payments on account of the trust-estate, but
 the chief management of the funds devolved on Reid. Neither then nor
 afterwards was any sederunt-book kept or record made of the proceedings
 under the trust.

The widow and children of the truster being dissatisfied with their
 provisions under the deed, and having betaken themselves to their legal
 rights, the trustees, shortly after the testator's death, brought a process
 of multiplepoinding, in which, on statements produced by the trustees, as
 of their intromissions with the estate, a sum of £2343 was reported by an
 accountant (Mr Ferrier) as the balance "due by the trustees" to the
 estate in June, 1803. This report was acquiesced in, and the claims in
 question settled according to it.

The trust-estate consisted partly of money invested in bonds and
 government stock, partly of certain valuable lease-hold rights to the lands
 of Dalvenan and others belonging to Sir John Whiteford, subset by the
 original tenant to the truster, the principal lease being for fifty-eight

No. 221. years, and terminating in 1814. At the time of the truster's death the properties held in lease were partly in his own occupation and partly let to subtenants at a considerable advance of rent. The farm of Dalvenna, which had been in 1792 subset to his son Peter Crawford at a rent of £160, having become vacant, the trustees, about the commencement of the trust, granted a sublease of it for the remainder of the tack to the factor Reid, by private bargain, at a rent of £160 for the first three years, and £170 for the remaining years. Two years thereafter Reid subset the farm at a rent of £327 to one Dickie, who being unable to carry it on, gave up his sublease, at the same rent, in favour of one Orr, by whom it was possessed till the expiry of the original lease in 1814.

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Crawford.

Reid ceased to act as factor at Martinmas 1804, and soon afterwards became bankrupt. By this time the other trustees had become incapacitated, and in consequence, the management of the trust devolved entirely on Cowan, against whom, amongst with the other trustees and Reid, an action to reduce the sublease to Reid, and for an accounting, was, in 1804, raised by Peter Crawford, as administrator-in-law for his son William, the residuary legatee under the settlement. The Court, in 1808, decerned in the reduction, on the legal ground of the impropriety of a factor on a trust-estate acquiring such a right from and under trustees. After which the trustees entered into possession of the sub-rent payable by the sub-tenant Orr.

During the course of Reid's factory, and at its termination, he was indebted in a large balance to the trust-estate. No steps, however, were ever taken by the trustees to secure the estate against consequent loss, nor was any attempt made afterwards to recover this debt from the cautioner Logan. Orr likewise failed in payment of his rent, and at the close of his sublease in 1814, was indebted to the estate in a large sum of arrears and damages, which, in the course of legal proceedings, he was found to have incurred to the landlord. There were also certain other arrears of sub-rents due to the trust-estate at the termination of Cowan's management, which took place soon after the residuary legatee, Dr William Crawford, attained majority in 1815. No detailed statement of the trust accounts was rendered to Dr Crawford, but in his correspondence he evinced a knowledge of the general situation of the trust affairs and approbation of the trustee's management. Dr Crawford died in 1826 without any settlement of accounts having been made. During the period of his management Cowan's intromissions amounted to a sum of about £20,000, and during the latter part of it he occasionally made payments to Dr Crawford in advance.

In the process of accounting, which had been allowed to stand over from 1808, a submission was thereafter entered into between Dr Crawford's representatives and Cowan. The arbiter pronounced the following decree:—"I find that no evidence has been adduced, or offered, to shew that the said William Cowan, as one of the trustees foresaid,

act to the best of his judgment, and agreeably to what he believed
 in the interest of those who were beneficially interested in the said
 in authorizing and granting or concurring with the other trustees
 in authorizing and granting the sub-lease executed in favour of George
 in Blairston Mains, of the lands of Dalvenan; and I find and de-
 clare that no claim can be made against the said William Cowan for any
 rents higher than the rents contained in the said sub-lease,
 if it is alleged, might have been drawn from the said lands of Dal-
 venan had the said sub-lease not been granted; and I assoilzie the said
 William Cowan from the claim made against him for such alleged surplus
 and from the conclusions of said action or process, and repel the
 claim made by the said Charles Morland, as factor loco tutoris foresaid,
 the said Mrs Jane Ronald Angus or Crawford, for the same, and
 accordingly; further, I find and declare that the said William
 is not entitled on accounting with the said Charles Morland, as
 foresaid, or with the said Mrs Jane Angus or Crawford, to take
 for any expenses incurred by him, or his co-trustees, in defending
 the sub-lease granted to the said George Reid against the action of reduc-
 tion mentioned in the said deed of submission, and I decern and declare
 accordingly. But I find and declare that the said William Cowan, as
 sole trustee foresaid, must account to the said Charles Morland, as
 foresaid, and to the said Mrs Jane Ronald Angus or Crawford, for
 rents payable by the said George Reid, during his possession under
 the sub-tack, and by the other possessors of the said lands of Dal-
 venan during the continuance of the principal leases, and I decern and
 accordingly. And I find no expenses due to or by any of the
 parties in this submission to the other."

Under these circumstances, Cowan, as sole surviving accepting trustee
 under the deed of settlement, brought an action of declarator of exonera-
 tion and for payment against the representatives of Dr Crawford,
 his widow, his infant child, and the factor loco tutoris appointed for
 the child, in which, after reciting the late William Crawford's trust
 deed, and the proceedings of the trustees in fulfilment of the pur-
 pose of the trust, he set forth that the residue of the estate, for which he
 as trustee was responsible, was exhausted, and that a balance was owing
 on account of over-payments and advances to Dr Crawford, and
 prayed, 1st, To have it found and declared that the trust was at an
 end and that the pursuer should be exonerated and discharged thereof;
 2dly, For payment by the defenders of the balance which should be
 found to be due to him on an examination of the trust accounts.
 In defence it was maintained, without admitting or denying the cor-
 rectness of the proceedings under the trust, that, as a full statement of
 the accounts had not been exhibited, the pursuer was not entitled to
 payment, and generally, that no balance was due to the pursuer, but
 that the same was due to the defenders.

No. 227

May 13, 1831

Cowan v.

Crawford.

No. 221. The Lord Ordinary, before answer, remitted to an accountant (Mr D. Lindsay) to report, who, after examining the trust accounts and relative documents, reported a balance due to Cowan of £963, 4s. 11d. The accountant held Cowan only bound to account for the trust-funds according to their actual state while under his own management subsequent to 1804. The charge for the whole expenses of management amounted to £404, no charge being made for remuneration. Cowan was allowed credit for a factor fee to Reid.

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In the discussion which ensued on the report the chief question related to the responsibility of Cowan for the sums due to the estate by Reid, and for certain other sums of arrears and damages, for all which the accountant had considered him not liable.

The defenders maintained that Cowan's whole proceedings in reference to Reid's sub-lease, and to the affairs of the trust generally, showed at the least a culpable negligence and a total want of that diligence and care which a man in like circumstances would bestow on his own affairs, and that the protecting clause as to the trustees not being liable for omissions could be of no avail, the loss to the estate having been occasioned by act of the trustee as well as by omissions, and it having been pleaded without effect in cases where the circumstances were much more favourable to the trustees.¹

The pursuer answered, that the circumstances in regard to Reid's sub-lease, and especially the nature of the ground on which it was set aside, freed the trustees from all charge of culpa or tort in the transaction such as to fix on them personal responsibility, and that their freedom from this charge was *res judicata* in consequence of the findings in the decret arbitral;—that there being no culpa, the pursuer's personal liability for the sums lost through Reid and the tenant Orr came to rest exclusively on the ground of his neglect or omission of due diligence, which, in the case of a gratuitous trustee, and looking to the effect of the clause in the decret guarding against such liability, was in the circumstances untenable.²

The Lord Ordinary reported the cause on cases, and issued the note subjoined.*

¹ Gray v. Kennedy, Jan. 10, 1820 (unreported); Morrison v. Miller, Feb. 9, 1821 (ante, V. 322, new ed. 299); Kennedy v. Wightman, June 28, 1827 (ante, V. 322, new ed. 792); Thomson v. M'Lachlan, June 24, 1829 (ante, VII. 787); Sym v. Charles, May 13, 1830 (ante, VIII. 741); M'Nair v. Broomfield, June 24, 1830 (ante, VIII. 968); Anderson v. Small, Feb. 12, 1833 (ante, XI. 382); Moffat v. Robertson, Jan. 31, 1834 (ante, XII. 369); Ainslie v. Henderson's Trustees, Feb. 6, 1835 (ante, XIII. 417); Mayne v. M'Keand, June 4, 1835 (ante, XIII. 870); Grieve v. Anderson's Executors, June 24, 1835 (ante, XIII. 973).

² Sym v. Charles, *supra*; Children of Earl of Wemyss v. Charteris, July 24, 1835 (Elchies, voce Tutor); Dalrymple v. Murray, Aug. 4, 1784 (Mor. 3534); Ainslie v. Henderson's Trustees, *supra*; Jones on Bailments, 119.

* "The cases being already printed, the Lord Ordinary thinks it best to report

LORD JUSTICE-CLERK.—Before going to the particular items of this account-
 ag there are some general points to be settled. I think the Lord Ordinary and
 the accountant have done right in holding that Mr Cowan is only bound to

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them without a judgment, more especially as it will probably be necessary to re-
 mit anew to an accountant, after the decision of the Court upon the principal
 matters in dispute has been obtained. In this situation, he has not thought it in-
 incumbent on him to form a definitive opinion upon all the points that have been
 raised in the discussion, though it may be proper to mention generally what has
 occurred to him upon some of the most material.

“He still inclines to hold with the accountant (Mr Lindsay) that the pursuer
 is only bound to account for the trust funds according to what he can now show
 to have been their actual state and condition while under his management; and
 that he cannot, therefore, be made personally answerable for the whole sum of
 £2555, reported by Mr Ferrier to have been in the trustees’ hands in June, 1803,
 &c. in point of fact, he can show that £1700 of that sum was then truly in the
 hands of Reid the factor, and that part of it has been since lost, without any fault
 or culpable negligence of the pursuer. Mr Ferrier’s report was not at all intended
 to furnish data for any settlement between the trustees and their factor, but only
 to give such a view of the amount of the trust funds as might show to what
 extent the *jus relictæ* of the widow, and the legitim of the children, should extend.
 Whether the available amount was actually in the hands of the trustees them-
 selves, or of their factor, might well be thought a matter of indifference in such
 an inquiry; and while it is not even insinuated that the pursuer had any impro-
 per motive for acquiescing in this part of the report, there is not the slightest
 evidence that those who then acted for the defender were in any degree misled
 by it.

“In the next place, the Lord Ordinary has no notion that Mr More, by finding
 in his decret-arbitral, that the pursuer must account for the rents payable by
 Reid, and those who succeeded him, in the farm of Dalvenan, intended to fix upon
 him a direct personal responsibility for the full nominal amount of those rents, in
 so far as they may be still unpaid. The words, as well as the plain meaning of
 the whole finding, would seem to exclude so rigorous a construction. The mean-
 ing plainly is, that he shall account, at the very utmost, only as a factor would be
 bound to account; that is, either by reporting payment, or by showing that pay-
 ment could not, by ordinary diligence, be recovered. As a gratuitous trustee
 under such a deed as is here in question, he was probably bound to less exact
 diligence. But that belongs to another chapter.

“On the other hand, it is apprehended to be equally clear that there is nothing
 in this decret-arbitral that can prevent the defenders from fixing a personal
 responsibility on the pursuer by proof of malversation or gross negligence, and
 that the ratio decidendi, assigned by the arbiter for specific findings to a more
 limited effect, can never be founded on as an authoritative decision of that more
 general question.

“The chief difficulty of the case is as to the degree of negligence and irregu-
 larity with which the pursuer is truly chargeable, and the sufficiency of such ne-
 gligence (for there is no allegation of fraud) to deprive him of the immunity which
 seems held out to him by the terms of the trust-deed. The extent of that immu-
 nity has no doubt been jealously and wisely restrained by the course of recent
 decisions. But each case is a case of circumstances, and it would be difficult even
 now to lay down a rule of general application. The Lord Ordinary will not go
 into details, but he may observe that the two things that have weighed most with
 him against the pursuer, in so far as Reid’s balance is concerned, are, first, the
 omission to call on his solvent and responsible cautioner, Mr Logan, or to give
 him the least notice of the heavy balance which stood against Reid at the begin-
 ning of the intromissions as factor, and continued to accumulate till their close;
 and, second, the actual payment over to him of the sum of £365, in October, 1800,
 while he was confessedly indebted to the estate, on unsecured and past due bills,

No. 221. account on a view of the whole accounts as made up from the beginning trust, and according to the state and condition of the funds while in management. Then the question arises as to the personal liability of Reid on the grounds on which it is to be rested. This is a penal action, and he can be made liable for losses accruing to the trust-estate through the fact or otherwise, he must be found either to have acted fraudulently or shown that *crassa negligentia quæ æquiparatur dolo*. We must keep in provision of the trust-deed, that the trustees are not to be "liable for or not doing diligence, but each for his own actual intromissions only, and be answerable in any farther or for one another." These words are the guide and measure of our judgment as to this party's liability. Then the trustees have power to appoint a factor, and even from their own number—with respect to which part of the deed there is reason to believe that Reid was the person who had in contemplation. They deemed it requisite that Reid should give security, so they took a bond of caution from a cautioner, Mr Logan. The matter could be brought to this that the trustees took no steps whatever

to the extent of £1300, and on his factory accounts to the amount of at least more. His liability under both these heads is much enhanced by his very able omission to keep any sederunt-book, minutes, or record of any kind of trust affairs. There is not even a letter-book or state of correspondence, the pursuer is a man of business, and, from not residing on the spot, was called upon to preserve some record of the information he received or gave and the instructions he gave. The Lord Ordinary is also inclined to hold that the pursuer is not entitled to take credit for any allowance to Reid in the factor-fee. As that person was found liable to the estate for the surplus which he drew from Dickie and Orr (and which are still wholly unaccounted for) any claim he might have had for factor-fee should have been set off against the rents; the pursuer, though relieved by the decret-arbitral from any responsibility for these rents, having a plain duty to perform in making them regular. If the proper factorial accounts had been cleared by an exact equal charge and discharge, it is thought plain that the pursuer could not have paid a factor-fee to Reid, while he knew that he was largely indebted to the estate for the surplus rents in question; and if he could not have paid, in such circumstances it rather appears that he cannot be allowed to take credit for such a factor-fee. Things actually stand, to the effect of diminishing that part of Reid's debt to the estate, for which he may be more immediately answerable.

"As to Orr's arrears, and the damages and expenses in which the estate has been subjected by his neglect of the fences and miscropping of the farm, the Lord Ordinary is, on the whole, disposed to take a view more favourable for the pursuer. The whole arrear not recovered at the close of a twelve years' possession did not exceed one year's rent, and, considering the history of the possession, a want of any notice or complaint on the part of the landlord, it is conceivable that the mere omission of an active superintendence of the tenants' operations, not, in a case of this description, to subject the trustee personally for the consequences of his irregularity, especially considering that the question as to the liability for the fences and buildings was one of very considerable difficulty. That the damages for miscropping were awarded (though to no greater amount than £140 on the whole), not on account of any one flagrant transgression of the rules or the rules of good husbandry, but for a series of little irregularities which did not well come to the knowledge of the most vigilant trustees, and of which the landlord never complained while they were in progress.

"The history of the pendicle called Dallowie will require farther explanation. The other smaller articles seem well enough disposed of by the accountant, perhaps the item of £26 for property-tax, as to which the Lord Ordinary is disposed to adopt the views of the pursuer."

the balance due by Reid from himself or Logan, this might infer a liability on the part of Mr Cowan of which I do not think he could shake himself loose. But the difficulty is that it requires to be shown, that, when the factorial accounts came before the eyes of the trustees, they omitted to take any steps against Logan. Where is the evidence to show that there was a deficiency in the accounts rendered by the factor, and that the trustees neglected to take steps against the debtor? We are not entitled to mix up the questions as to the Dalvenan lease with the other matters. In regard to the factor's fee, we must have clear proof of misconduct before we can prevent it being put to the credit of the trustees. As to the demand on the part of the defenders for the arrears and damages due to the tenant Orr, there is no ground for subjecting the trustee therein. I have no doubts as to the large payment of £365.

LORD GLENLEE.—I agree with the chair; but have less difficulty as to the payment of the £365, for which I cannot hold Mr Cowan liable. This is not a question as to the rights of creditors, but a demand made by a residuary legatee, must be bound by the terms of the testator's trust-deed, relieving the trustee from omissions or neglect to do diligence. A testator has no right to give relief, in respect to the claim of a creditor, but with respect to his own heir or representative, he may say that his trustees shall not be liable for omissions,

Under omissions it would be rather strong to include things amounting to culpa lata which is equivalent to fraud, and so the real question is whether Mr Cowan has been guilty of such culpa lata. The payment of £365 was made in the first year of Reid's factory, and was the payment of a debt due by the testator.

It could not have been withheld on account of any supposed liabilities of Mr Cowan; and if they had attempted to retain it, I think the trustees would have been a bad figure at the time. At what time in the course of his management, can Mr Cowan turn round to Mr Cowan and say, you have been guilty of gross negligence? We see that a case inferring his liability might be supposed if it were proved that he had ever called on the cautioner to pay; but I see nothing which at any period rendered the impossibility of Reid making payment or the doubtfulness of the cautioner, Logan. On the whole, I can observe nothing in the conduct of Cowan so liable as to warrant the defenders in subjecting him to the liability proposed.

LORDS MEADOWBANK and MEDWYN having concurred,

THE COURT pronounced the following interlocutor:—"Find that the pursuer is not personally liable for the balance reported as due by the trustees in the former process of multiplepoinding, but that he is in this accounting entitled to have the accounts framed according to the true registers. Find that the defenders have not stated any grounds relevant or sufficient to subject the pursuer personally either in the balance due by George Reid, the former factor, the arrears of rent due by Robert Orr, or alleged claims of damages and expenses connected with his sub-lease referred to in the record, either on the ground of gross negligence, want of due diligence, or any of the other grounds maintained by the defenders, and with these findings remit to the Lord Ordinary to proceed in the cause quoad ultra, reserving all questions of expenses for the decision of his Lordship."

HUGH COWAN, W.S.—DONALDSON and CAMPBELL, W.S.—Agents.

No. 222.

May 14, 1836.
Howie v. Rust.WILLIAM HOWIE, Pursuer.—*C. Fergusson.*ALEXANDER RUST (Treasurer of Aberdeen Mason Lodge), Defe
H. J. Robertson.

Friendly Society.—In an action to set aside the expulsion of a member of a society, circumstances in which held, that the expulsion was not liable to be reduced, although there were certain informalities in the proceedings.

May 14, 1836.

2d DIVISION.
J. Cockburn.
T.

IN the town of Aberdeen there has been long established a Friendly Society, known by the title of the “Aberdeen Mason Lodge,” the object of which is to maintain a fund for the relief of decayed needy members and their widows and children.

By the 2d article of the laws of the society it is provided, that the election of office-bearers in the lodge should take place “at the meeting which is to be held for that purpose, upon the 27th of December yearly,” &c. The general meeting is to be convened “by advertisement in the Aberdeen Journal, at least eight days before the meeting, regard to the convening of meetings for other purposes than the election of office-bearers, it is provided by the 8th law of the society, “The master, or, in his absence, the depute-master or senior warden, shall have power to call general meetings of the lodge, for entering new members or otherways, as may be found necessary for the affairs of the society, the officers of the lodge, in the usual manner.”

By the 14th article of the regulations it is provided, “That in order to preserve the character of the society, it is ordained, that upon information or flagrant report of any misdemeanour, fraudulent bankruptcy, or like of any member, the master and other official managers for the time being do make strict inquiry thereanent; and, if it shall appear evident to the majority of the members present at any general meeting called for that purpose, that the report is well-founded, such offending member shall be expelled from the society, and forfeit for ever any interest therein.”

The 22d law provides as follows,—“That in case of any dispute between the society or the committee of managers, and any individual member of the society, the matter so in dispute shall and may be referred to such three arbitrators of character in the town of Aberdeen, as shall be named and elected by a majority of said committee of managers, and whatever award, order, or determination shall be made by said arbitrators or the major part of them, according to the true purport and meaning of these rules and regulations, shall be binding and conclusive on the parties.”

By section 16th of the 33d Geo. III., c. 54, commonly called the Friendly Society Act, it is enacted, “That if provision shall be made by one or more of the general rules or orders of any such society (as in question), and confirmed, as required by this act, for the reference

tration of any matter in dispute between any such society, or any per- No.
 or persons acting under them, and any individual members thereof, May 14
 matter so in dispute shall be referred to such arbitrators as shall be Howie
 ed and elected, in such manner as shall be prescribed by such gene-
 rules or orders."

The 8th section of the same act provides, that, in case of the neglect
 refusal of the treasurer or other officer of such society, to pay over and
 transfer the society funds which may be in his hands, in the manner en-
 ded in the act, "it shall and may be lawful to, and for every such society,
 the name of the treasurer or treasurers, trustee or trustees thereof, as
 case may be, to exhibit a petition in the High Court of Chancery, or
 Court of Exchequer in England, or the Court of Session in Scotland,
 the Courts of Great Sessions in Wales, respectively, who shall and
 proceed thereupon in a summary way."

In the year 1800, the pursuer, Howie, was admitted a member of the
 lodge. In 1813, he was elected treasurer, which was an office without
 salary, and he continued to act as such till 1820, intrusting during that
 time with the whole funds of the society. In June, 1820, Howie borrowed
 £100 from one Craighead, by bill due at twelve months, accepted by him
 in his character of treasurer, "for behoof of" the lodge. This sum was
 entered in the treasurer's accounts, nor in the books of the lodge, nor
 mentioned in the annual state of accounts laid before the society on St.
 Andrew's day, 1820. At the annual general meeting on the 27th Decem-

Howie, by a vote of the society, was deprived of his office. In June,
 1821, the transaction as to the bill transpired, in consequence of an indorse-
 ment standing payment from the society's new treasurer; which being re-
 ceived, the indorsee raised action against that officer before the sheriff of
 Aberdeen, and obtained decree. The lodge being thus obliged to retire
 from the bill, brought an action of relief against Howie before the same tribu-

Howie declined to avail himself of the society's law providing for a
 reference to arbitrators, in case of a dispute between the society and a
 member; but, in defence against the action, maintained, inter alia, that
 the sheriff had no jurisdiction, and that the 8th section of the Friendly
 Society act conferred an exclusive jurisdiction in the matter in question
 on the Court of Session.

In September, 1823, the sheriff pronounced decree against Howie, upon
 which letters of caption were raised; but, on his intimating a desire to
 make some proposal to the managers of the society, diligence was delayed
 till the annual meeting on the 27th December. The minutes of this
 meeting bear, that "the meeting took under consideration the case of
 William Howie, with regard to the debt due by him to the lodge, which
 was remitted by the managers at their last sederunt to this general meet-
 ing; and the said William Howie being present, stated, that he wished
 to extract from the sederunt-book of the lodge of the minutes of the meet-
 ing held on the 18th of June 1817, and also of the minutes of the annual

No. 221. general meeting of the lodge, held on the 27th December, 1820, relative to his accounts, as he was to submit them to his friends, for the purpose of getting them to come forward as security to the lodge for payment of the debt; and requested the lodge to have the goodness to delay the execution of the diligence against him for the space of three months from this date, within which time he would report to the managers what he could do towards the liquidation of the debt; which having been considered by the lodge, they agree to grant the request of the said William Howie, and authorize the clerk to furnish him with the extracts wanted."

May 14, 1836.

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Another meeting was held on the 19th April, 1824, the minutes of which bear, "that the meeting resumed consideration of the case of William Howie, late treasurer, regarding the debt due by him to the lodge; and resolved, that the clerk enforce the caption against him; but in the event of Howie's requesting any further indulgence, they instructed the clerk to allow him a month longer, but to inform him that beyond that time he need expect no farther indulgence."

On the 25th July thereafter, Howie addressed the following letter to Mr Duthie, the master of the lodge:—"Respected Sir,—I am very sorry that I have detained you so long in giving you my answer, as was agreed upon on the 27th December, on the footing of giving me an extract of minutes. I have not got them, but I am ready to settle in presence of a general meeting, if it is called by the officer according to the rules page 7, and rule 8; and if not done in that manner I will not attend; but I am very sensible of the honour you did me, in appointing me your instructor when you became a member of the Aberdeen Lodge, and I trust that on account of what I have experienced of your respectability, that you will not dissemble from the printed rules; in doing this I shall perform my promise, that is to do for the Lodge all that is in my power. I am, &c."

No settlement of the debt having taken place, Howie was incarcerated in August, 1824. He presented a petition for aliment, and on the 18th September was subjected to a judicial examination, in which, with respect to the bill transaction, he declared, "that he borrowed £100 from John Craighead in Mindurno, for which he granted him his bill as treasurer for the lodge, without informing the managers, or getting their consent to it; and, thinking that he would be retained in office the following year, he did not enter the sum of £100 sterling, so borrowed from Mr Craighead, in his accounts as treasurer, at St John's day, 1820, intending to pay the interest of the money himself." He further declares, "that at St John's day, 1820, he made up, as usual, an account of his intromissions with and expenditure of the funds of the lodge, which account did not include either the said sum of £100, nor the interest charged by the committee on his former accounts, nor the declarant's charge for trouble and expenses allowed by the committee: Declares that, with the except of said interest, and his own charge for trouble and expenses, allowed

committee, and the not crediting the said £100, all the other articles No. charge and discharge in said account, now shown to him and marked May 1 him of this date, as relative thereto, are all, as far as he knows, cor- Howie it."

On the 14th September, another meeting took place, at which "the treasurer reported to the meeting, that, in consequence of the instructions given to the clerk at the meeting held on the 19th of April last, to execute the caption against William Howie, in case he should not come forward as therein mentioned, and no offer of a settlement having been made, he had directed the clerk to carry the caption into execution, which had been done; and the said William Howie thereupon applied for aliment to the magistrates, and served an application against the treasurer for that purpose, to which he had given in answers; and the same, with the proceedings had in the case, were laid before the meeting. The meeting having deliberated thereon, instructed the clerk to state to the magistrates, that from the fraudulent conduct of the said William Howie, in regard to the money for which he is incarcerated, they hope the lowest settlement will be granted to him that the act authorizes to be given; and, when the same is modified, empower the treasurer to lodge aliment for him to the extent of £5 sterling, and to continue the same till farther orders from the managers or the lodge.

"The farther consideration of the conduct of the said William Howie is postponed until the general meeting of the lodge, on St John's day next; and in the meantime the clerk was directed to give notice in the Aberdeen Journal, previous to the said meeting, that the subject will be then considered, and a motion made for the expulsion of the said William Howie from being a member of the lodge, in terms of the 14th article of the rules and regulations, in case no satisfactory arrangement is made of the debt due by him to the lodge before that time."

In terms of these directions, an advertisement of the annual meeting on the 27th December, with an intimation subjoined to it that "a motion would then be made for the expulsion of William Howie from being a member of the lodge, in terms of article 14th of the regulations," was inserted in the Aberdeen Journal of the 15th and 22d December. At the general meeting on the 27th, Howie was expelled. The procedure, as given in the minutes, was as follows:—

"There was laid before the meeting a petition from William Howie, praying his liberation from jail, in which brother John Chalmers moved, that the advertisement in the Aberdeen Journal, that a motion was to be made at the present meeting for the expulsion of the said William Howie from being a member of this lodge be read, which was done accordingly, along with the 14th article of the regulations, and also the declaration of the said William Howie, in the process of aliment at his instance against the treasurer of the lodge, before the Magistrates of Aberdeen, in which he admitted that he had borrowed the sum of £100 from John Craighead

No. 221. in Mindurno, and had not entered it in his account with the lodge at St John's day, 1820, nor accounted for it in any way to them, but had applied it in payment of his own private debt; when the said John Chalmers further moved, that the said William Howie should be expelled from being a member of this lodge, which was seconded by brother Patrick Still; and the vote having been put, the following brethren (28) voted for his expulsion. * * * And the meeting, accordingly, do hereby declare the said William Howie to be expelled from this lodge, as a member thereof, accordingly, in terms of the foresaid 14th article of the regulations."

May 14, 1836.
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One member voted against the expulsion, while three declined to vote. The petition above referred to was in the following terms:—"To the Right Worshipful Master, and all the office bearers and members of St John's Lodge, Aberdeen: I have to express to you my deep regret, that I should in any shape have abused the trust which you were pleased to commit to my charge, and I beg leave to declare to you my firm determination to repair the injury which the lodge has sustained, as far as my future abilities will admit. In my present circumstances, however, I am altogether destitute and helpless. I am severely afflicted, as many of you are aware, with rheumatisms, and have a wife and family dependent on me, to a considerable extent. On these grounds, I humbly entreat that you will liberate me from my present confinement, which is the hope of an afflicted brother. (Signed) Wm. Howie."

The lodge acceded to the request of this petition, and authorized Howie to be liberated.

Nearly six years after the date of his expulsion, Howie raised two actions, which were subsequently conjoined, against the defender, Rust, as treasurer of the Aberdeen Mason Lodge. In the one, he founded on services said to have been rendered to the lodge as treasurer, and in the capacity of architect and mason, and alleged incompetency on the part of the sheriff to entertain the action of relief brought by the lodge, on the separate grounds that by 33d Geo. III, c. 54, § 8, the claim should have been made in the Court of Session, and that, according to the 22d law of the society, it should have been referred to arbitrators, and concluded 1st, To have it declared that he was entitled to an adequate remuneration; and 2dly, That the decree of the sheriff should be reduced and set aside. In the other action, founding on certain irregularities in the proceedings connected with his expulsion from the lodge, he concluded to have the resolution of expulsion rescinded.

In defence against the first action, the lodge maintained, that as the services of the treasurer were gratuitous, according to immemorial custom, and as the pursuer's professional claim as an architect and mason was unfounded, his demand for remuneration on either ground was inadmissible, that the sheriff's jurisdiction in the proceedings in question was not ex-

cluded by the section of the Friendly Society Act referred to; that the rules of the society did not render a reference to arbitrators imperative, and at all events, the defender ought to have proposed such a reference ^{May} ^{How} in limine of the action before the sheriff, and was now barred from founding on the provision as to arbitration, to the effect of invalidating the sheriff's decree. Against the second action it was pleaded, that the expulsion of Howie was gone about with sufficient attention to form, and at all events according to the substantial justice of the case: That the expulsion of a member might take place at a general meeting, provided it was called for that as well as for the general purposes; and accordingly, in both the advertisements of the meeting of 27th December, 1824, special intimation was given of the intended motion to expel Howie, which was sufficient notice to all concerned: That, although no regular charge was brought against Howie, he had upon the whole justly subjected himself to the punishment of expulsion, and there was evidence to show that he himself was perfectly aware of the nature of his offence.

On the point of the regularity of the expulsion, which was the chief matter in discussion, it was contended by the pursuer in reply, That his expulsion from the lodge was illegal and unjust, and the proceedings in relation thereto irregular, as the meeting at which he was expelled was not called by competent authority, and the members were not personally summoned by the proper officer, and as no formal or satisfactory notice was given him of the intended procedure, while by the conduct of the society persisting in his incarceration, he was precluded from being present; that no specific charge was ever made against him; that the lodge were not entitled to put forward the bill transaction in question as a ground for the pursuer's expulsion, having waived the objections which might have been taken to it, and having, when in the knowledge of the facts, not only permitted him to remain a member for several years, but also, during that time, received and appropriated his contributions to the society funds; and that, as the lodge expressly made the pursuer's expulsion contingent on his failing to satisfy their pecuniary claims against him, they had no right now to allege that the cause of his expulsion was a circumstance of a totally different description.

The Lord Ordinary pronounced the following interlocutor, adding the words subjoined:—* “ Finds (under the action for setting aside the decree

* “ The judgment of the sheriff is not challenged on its merits, but only on the (inconsistent) grounds, 1. That by the 33 Geo. III., cap. 54, sec. 8, the demand by the Society should have been made in the Court of Session; 2. That, by the 22d regulation of the lodge, it ought to have been settled by arbitration. The Lord Ordinary does not think that the statute touches this question. It applies only to the case in which an officer of the society refuses or fails to deliver or pay, or to render his account of monies or books, &c., in his hands, belonging to the society. The pursuer here was not charged with retaining any of the society's moneys, but only with being indebted to it otherwise. As to the 22d regulation, if

No. 221. of the sheriff), 1mo, That the defenders were not bound, by the 33 Geo. III., cap. 54, sec. 8, to have made their demand against the pursuer in the Court of Session ; 2do, That the pursuer, never having claimed the benefit of the 22d article of the regulations of the lodge in the inferior court, cannot object now to the jurisdiction of the sheriff, on the ground that the case could only be settled by arbitration ; and therefore sustains the defences to this action, assoilzies the defenders, and decerns : Finds the pursuer liable in expenses ; appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same and report : Finds (under the action for setting aside the expulsion from the lodge), That the proceedings were irregular, in respect that no specific charge was made against the pursuer ; therefore, reduces the said sentence of expulsion of the 27th December, 1824, and decerns in terms of the declaratory conclusions of this action."

The lodge reclaimed.

LORD JUSTICE-CLERK.—On considering this case I had and still have great doubts as to the validity of the pursuer's expulsion. We are not called upon to give an opinion as to Howie's conduct. Had I been a member of the society, and the question been brought forward whether he should continue to be a member,

the pursuer had founded on it in the court below, he might have been entitled to have the claim adjusted by arbitrators (Cooper, 11th March, 1826). But he not only did not plead this, but maintained the very reverse ; for he maintained, that it could only be determined in the Court of Session. Having stated no objection at the time on this ground, he is barred from stating it now. He argued, that the 33d Geo. III., cap. 54, sec. 16, makes the enforcement of this regulation so imperative, as to exclude all other jurisdiction. But it only compels the parties to 'such arbitrators as shall be named and selected,' and he prevented the society from naming any body.

"The expulsion is challenged partly on the ground that it did not take place as required by the 14th regulation, at a meeting 'called for the purpose.' This point is not free from doubt, but the Lord Ordinary has not thought it necessary to dispose of it, because he holds it to be clear, that the conviction was irregular in another respect.

"The regulation allows the society to expel a member who has been guilty of 'any misdemeanour, fraudulent bankruptcy, or such like.' This implies that he can only be expelled for a crime, and consequently that before he can be convicted, he must be duly tried ; not certainly with all the formalities of an ordinary trial before a Court, but still with a fair regard to the substance of justice. Now, there never was any specific charge preferred against him ; nor is the exact offence for which he was expelled even yet to be gathered from the proceedings. It would seem from the notice given of the intended motion, that it was meant to exclude him, because he had not paid his debt ; at other times it seems to have been for official malversation ; elsewhere for breach of trust, &c. &c. ; and he is nowhere told exactly what to defend himself from. Certain facts, or alleged facts, are set forth, and on considering these, his brethren, upon the whole, expel him.

"In this situation it is needless to dispose of his plea, that he was convicted without evidence, because the evidence cannot be judged of without knowing the charge. All that the Lord Ordinary can say is, that though he plainly deserved to be dismissed from the treasurership, the proof of criminal guilt, so as to warrant his expulsion, is not quite satisfactory."

I should not have voted for his continuing. But the question is, did the society, on the 27th December, 1824, regularly expel him? It is to be remembered that this is a charitable society, and on its funds Howie, if a member, has a claim. None of the persons enrolled as members can be deprived of their rights without a due course of proceeding. Now, by the 14th regulation, a certain procedure is prescribed (his lordship read the regulation referred to); and it is impossible by any equipollents to supply the want of the requisite procedure. Then there were certain days appointed for particular business, and it is clear that, according to the regulations, if the expulsion of a member was to be a matter taken up on the day of the general meeting, the meeting must have been called for that special purpose, as well as for the general purpose. It is likewise provided that the meeting is to be summoned by an officer, and no advertisement in a newspaper can stand instead of this form. At the very time when those proceedings took place, the pursuer was in Aberdeen jail, and not in a situation in which he had an opportunity of reading newspapers. He should have been formally apprized, by notice regularly served on him, that a motion was to be made at the general meeting for his expulsion. There ought also to have been a special summons served on all the members of the society, intimating a special meeting for a particular purpose. In regard to the proceedings at the meeting, there is no evidence that the society, in expelling him, were actuated merely by a wish to punish misconduct. If he had paid the £100 which he was due the society, it is more than probable his expulsion would not have taken place. His letter asking liberation from jail shows that he did not know that at this meeting there was an intention to expel him. I concur, then, in the Lord Ordinary's interlocutor, in the first place, because the meeting was not called in the terms of the regulations, and, in the next place, because the pursuer never got that notice of the proceedings to be adopted to which, on plain principles of justice, he was entitled.

LORD GLENLEE.—I cannot say that I concur. The chief objection stated is that the meeting in question was not called for the special purpose of expelling the pursuer. Now, I rather think that there was no impossibility in the general meeting being used for this purpose—that it was not impossible so to contrive matters as that the meeting for the one purpose might regularly take place at the same time as the meeting for the other. I see nothing requiring you to give separate citations for the separate pieces of business then to be taken up. But certainly the notice must be given in such a way as to preclude the possibility of the ignorance of the parties concerned. I think, looking to the evidence before us, we cannot proceed upon the supposition that Howie was ignorant of the meeting. And then the matter is reduced to this, was the notice in the newspapers a due way of intimating it? Now, if it was competent at this meeting to proceed to the business of expulsion, I cannot see that more was necessary in the way of intimation than the advertisement which was published. If I could see any thing like an apology for his conduct in the whole matter, I might perhaps think otherwise as to the expulsion.

LORD MEADOWBANK.—I am for adhering. This is a case of importance in point of precedent, as the rule here adopted must operate in reviewing the proceedings of all other Friendly Societies, and in regulating the effect which is to be given to the rules for the expulsion of members. Looking to the practice of those societies, we cannot but observe that when individual members become bur-

No. 221. Secondly, I am of opinion that the meeting of the 27th December, 18
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 of the 27th of November, or the next lawful day thereafter, is to be held
 the purpose of electing officers," &c., notice of the hour being given
 Aberdeen journal. By the 14th Article, expulsion can only be pronounced
 "the majority of the members present at any general meeting called for
 purpose."

Article 8th provides, "that general meetings for entering new members
 otherwise, as may be found necessary for the affairs of the Society," shall
 place by the authority of the master, &c., and be called by the "officer of the
 Lodge in the usual manner." By the combined operation, then, of those
 8 and 14, it appears to me, that the competent form of summoning a
 meeting, for the purpose of expelling members, was by "the officer of the
 Lodge;"—a mode of citation implying a personal notice, or something
 equivalent, to all the members of the Lodge, and of course to the party accused
 within the reach of such notice. And I do not think that this form, required
 by Articles 8 and 14, could be supplied by the intimation in the newspaper
 intimation much less certain and direct, and in the present case merely substituted
 to the notice of a general meeting, intended, agreeably to the 2d Article, for
 purposes distinct from the expulsion of members.

Addition by Lord Moncreiff:—

I concur in the Lord President's opinion, principally on this ground, that
 though there was clearly no obligation on the society to institute any trial,
 a regular trial, they were bound to give the party full and fair notice of the
 precise nature of the charge made, and of what was intended against him, and
 give it in such circumstances that he might have it in his power to attend the
 meeting, or in some manner to state whatever he might choose to say in
 the proposed resolution to expel him; and that, while the defenders were
 keeping him in jail, the advertisement, with reference to the annual meeting,
 the terms of that advertisement, cannot be considered as such fair notice.

If the pursuer had not been in jail, and if the advertisement had stated
 distinctly the charge intended to be brought forward, and an unconditional
 proposal to propose that he should be expelled from the society, I should not have
 prepared to say, that, under the regulations as I understand them, it would
 have been incompetent to proceed in the matter at that meeting. But, in the
 circumstances, I think that the notice was insufficient, and the proceedings
 incompetent, as well as contrary to the essential principles of justice.

LORDS BALGRAY, GILLIES, MACKENZIE, COREHOUSE, and JEFFREY
 rather think that the interlocutor of the Lord Ordinary should be altered so
 that the defenders be assoilzied.

There seems no room for doubt at all, that the expulsion of the pursuer
 from the Lodge, was in itself a measure perfectly just and proper; for it appears
 from his own confession, that he had committed an act of breach of trust
 and embezzlement, for which he might justly and legally have been so

a sentence of at least imprisonment, for a term of no short duration, in the Bridewell of Aberdeen. And that act, too, was committed against the Lodge itself, whose confidential officer he had been, which had thereby suffered a considerable loss. In these circumstances, his expulsion from the Society was a measure of the most obvious and undoubted justice and propriety. N
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But it is said that, however just, it was not competently effected, from the want of due form.

In the first place, it seems to be contended, that the form necessary was something approaching at least, or resembling in certain respects, a legal trial before the Lodge, for the misdemeanour, on account of which he was expelled. We cannot adopt that view. The Lodge had neither jurisdiction nor skill suited to legal, or any thing like legal, trials of their members for delinquencies. It was, a reason, proper and necessary, that they should have a power of expulsion, upon inquiries wholly untrammelled by any legal formalities of that kind. In general, there would be no room for any such trial, in cases the most fit for expulsion. Take, for instance, the obvious cases of a member who had notoriously defamed the country, after committing a crime, or been convicted of a crime by a criminal court, and transported or sent to Bridewell; it is plain, that, in such cases, there could be nothing at all like a trial for the crime before the Lodge itself, previous to the expulsion of such member. As little could there be any occasion for any thing like a criminal trial before the Lodge, when a member did not attempt to deny, but, under his own hand, confessed, a disgraceful delinquency. Accordingly, the power of expulsion is expressly provided in the regulations, quite free from any such unnecessary, and, indeed, impracticable restriction; the clause is in these words:—"That, for preserving the character of the Society, it is ordered, that, upon information, or flagrant report of any misdemeanour, fraudulent bankruptcy, or such like, of any member, the master and other official managers for the time, do make strict enquiry thereanent, and if it shall appear evident to a majority of the members present at any general meeting, called for that purpose, that the report is well founded, such offending member shall be expelled from the Society, and forfeit for ever any interest therein." The import of this regulation, we think, is, that the inquiry or exhibition of evidence, respecting the fact of misdemeanour, may be of any form or nature that affords a rational ground of certainty to a general meeting called for the purpose of considering it, however different it may be from any thing admissible in legal procedure for crimes. If, before such a meeting, there were such grounds of certainty, we do not think that any member expelled by such meeting could pretend to have it rescinded, merely on the ground that it followed on an investigation not similar in all respects, or in any respect, to a judicial trial for crime.

The less strict and formal was the proof of the misdemeanour on which the expulsion proceeded, the more it might be open to the member expelled, to maintain that it was erroneous, that he was innocent, and still to offer evidence establishing his innocence. But where the actual fact of the misdemeanour, and the justice of the expulsion was undeniable, we cannot see that the mere want of a sort of formality, certainly not required by the regulations, could afford any ground for reducing a well-founded act of the society.

But it is farther said, that the meeting was not a general meeting called for the purpose, in terms of the regulations. We think that this objection is not

No. 221. Secondly, I am of opinion that the meeting of the 27th December, 1824, was not summoned according to the form prescribed by the rules, in regard to the expulsion of members. By the 2d Article of those rules, the general meeting of the 27th of November, or the next lawful day thereafter, is to be held "for the purpose of electing officers," &c., notice of the hour being given in the Aberdeen journal. By the 14th Article, expulsion can only be pronounced by "the majority of the members present at any general meeting called for that purpose."

May 14, 1836.
Howie v. Rust.

Article 8th provides, "that general meetings for entering new members, or otherwise, as may be found necessary for the affairs of the Society," shall take place by the authority of the master, &c., and be called by the "officer of the Lodge in the usual manner." By the combined operation, then, of those articles 8 and 14, it appears to me, that the competent form of summoning a general meeting, for the purpose of expelling members, was by "the officer of the Lodge;"—a mode of citation implying a personal notice, or something equivalent, to all the members of the Lodge, and of course to the party accused, if within the reach of such notice. And I do not think that this form, required by Articles 8 and 14, could be supplied by the intimation in the newspaper;—an intimation much less certain and direct, and in the present case merely subjected to the notice of a general meeting, intended, agreeably to the 2d Article, for purposes distinct from the expulsion of members.

Addition by Lord Moncreiff:—

I concur in the Lord President's opinion, principally on this ground, that though there was clearly no obligation on the society to institute any thing like a regular trial, they were bound to give the party full and fair notice of the precise nature of the charge made, and of what was intended against him, and to give it in such circumstances that he might have it in his power to attend the meeting, or in some manner to state whatever he might choose to say against the proposed resolution to expel him; and that, while the defenders were detaining him in jail, the advertisement, with reference to the annual meeting, and the terms of that advertisement, cannot be considered as such fair and full notice.

If the pursuer had not been in jail, and if the advertisement had stated distinctly the charge intended to be brought forward, and an unconditional purpose to propose that he should be expelled from the society, I should not have been prepared to say, that, under the regulations as I understand them, it would have been incompetent to proceed in the matter at that meeting. But, in the actual circumstances, I think that the notice was insufficient, and the proceedings incompetent, as well as contrary to the essential principles of justice.

LORDS BALGRAY, GILLIES, MACKENZIE, COREHOUSE, and JEFFREY.—We rather think that the interlocutor of the Lord Ordinary should be altered, and the defenders assoilzied.

There seems no room for doubt at all, that the expulsion of the pursuer from the Lodge, was in itself a measure perfectly just and proper; for it appeared, from his own confession, that he had committed an act of breach of trust, fraud, and embezzlement, for which he might justly and legally have been subjected

a sentence of at least imprisonment, for a term of no short duration, in the Bridewell of Aberdeen. And that act, too, was committed against the Lodge self, whose confidential officer he had been, which had thereby suffered a considerable loss. In these circumstances, his expulsion from the Society was a measure of the most obvious and undoubted justice and propriety. N
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But it is said that, however just, it was not competently effected, from the want of due form.

In the first place, it seems to be contended, that the form necessary was something approaching at least, or resembling in certain respects, a legal trial before the Lodge, for the misdemeanour, on account of which he was expelled. We cannot adopt that view. The Lodge had neither jurisdiction nor skill suited to legal, or any thing like legal, trials of their members for delinquencies. It was, on reason, proper and necessary, that they should have a power of expulsion, upon inquiries wholly untrammelled by any legal formalities of that kind. In general, there would be no room for any such trial, in cases the most fit for expulsion. Take, for instance, the obvious cases of a member who had notoriously led the country, after committing a crime, or been convicted of a crime by a criminal court, and transported or sent to Bridewell; it is plain, that, in such cases, there could be nothing at all like a trial for the crime before the Lodge itself, previous to the expulsion of such member. As little could there be any occasion for any thing like a criminal trial before the Lodge, when a member did not attempt to deny, but, under his own hand, confessed, a disgraceful delinquency. Accordingly, the power of expulsion is expressly provided in the regulations, quite free from any such unnecessary, and, indeed, impracticable restriction; the clause is in these words:—"That, for preserving the character of the Society, it is ordered, that, upon information, or flagrant report of any misdemeanour, fraudulent bankruptcy, or such like, of any member, the master and other official managers for the time, do make strict enquiry thereanent, and if it shall appear evident to a majority of the members present at any general meeting, called for that purpose, that the report is well founded, such offending member shall be expelled from the Society, and forfeit for ever any interest therein." The import of this regulation, we think, is, that the inquiry or exhibition of evidence, respecting the fact of misdemeanour, may be of any form or nature that affords a rational ground of certainty to a general meeting called for the purpose of considering it, however different it may be from any thing admissible in legal procedure for crimes. If, before such a meeting, there were such grounds of certainty, we do not think that any member expelled by such meeting could pretend to have it rescinded, merely on the ground that it followed on an investigation not similar in all respects, or in any respect, to a judicial trial for crime.

The less strict and formal was the proof of the misdemeanour on which the expulsion proceeded, the more it might be open to the member expelled, to maintain that it was erroneous, that he was innocent, and still to offer evidence establishing his innocence. But where the actual fact of the misdemeanour, and the justice of the expulsion was undeniable, we cannot see that the mere want of a sort of formality, certainly not required by the regulations, could afford any ground for reducing a well-founded act of the society.

But it is farther said, that the meeting was not a general meeting called for the purpose, in terms of the regulations. We think that this objection is not

No. 221. sufficient. The meeting was the annual meeting, competent generally for the discussion of any business. But besides that, notice had been specially given by 14, 1836. the public newspapers, that the subject of the pursuer's expulsion would be considered at this meeting. We think, therefore, that this was truly a general meeting called for this purpose. It had also other purposes; but that did not exclude this particular purpose, of which notice had been given, and which, of course, the meeting were called to consider.

No form of trial being necessary, and the meeting being sufficient, we think then that, by the pursuer's own confession in writing, it did most reasonably appear evident to a majority of that meeting, that the pursuer had been guilty of a misdemeanour, for which it was proper to expel him. He was expelled accordingly, and we can see no good grounds why this act of unquestionable justice and propriety should be rescinded.

We must farther observe, that we think it very doubtful whether the pursuer ought to be allowed to bring forward a formal objection of this kind, *post tantum temporis*. If he had insisted upon it at the time of his expulsion, it is very probable that evidence could then have been produced of communications between the Lodge and him, such as to afford a complete answer to it, which evidence may no longer exist. And it seems clear, that, if at that time there had been felt to exist any doubt in the case, there was an immediate remedy, by expelling the pursuer anew, in a form not subject to the objection; whereas, if the objection were to be sustained now, he must be held to have continued a member five years after he was certainly expellable, and fully understood to have been expelled. It does not therefore seem consistent with equity to allow the pursuer, by lying by so long a time, to gain the advantages of insisting on a formal objection of this kind, in circumstances, and to an effect, different from what existed at the proper time for insisting on the objection.

LORD COCKBURN.—I am still of opinion that the expulsion of the pursuer cannot be maintained in law.

In saying so, I refer to the record as it is, and do not speak of the case in any new character which it may be made to assume by the addition of new pleas. It is competent for the Court to suggest an additional plea; but both parties are entitled to be heard, first, before it be admitted, and again upon its effect. In the meanwhile, the case must be disposed of on the existing record; with reference to which alone this consultation has been held.

The Mason Lodge was not bound to proceed with any thing approaching to the regularity of a Court. But it was bound to proceed according to the plain, obvious, and indispensable rules of common fairness; and, if they did not do so, the greatness, or the clearness, of the guilt of the pursuer, is perfectly immaterial. Such societies, if not duly checked, are extremely apt to convert their exemption from form into an exemption from the necessity of being just; and to imagine that their confidence in the guilt of a brother (whose expulsion may be convenient), is a sufficient reason for dispensing with his defence.

Now, though the interlocutor decides the case on only one point, because this was thought enough, I am of opinion that the proceedings were vitiated by two fatal flaws:—

1. It is not proved that any notice of the intention to try was given to the accused; and so far as can be inferred from the statements of the defenders on the record, there is sufficient *prima facie* evidence that no such notice was given.

only intimation which they allege, was by advertisement, twice in a single No. newspaper, in December, 1824, which advertisement was not confined to this particular subject, but had the summoning of an annual meeting for its principal object (Statements, 49, 50). But the pursuer avers (Condescendence, 16), that he never saw this advertisement; and this is rendered probable by the fact, that he was in jail from the 27th of August till after he was expelled, on the 14th of December. It is said by the defenders, in their Case (page 14), that at that point of fact he was aware of the intended motion. But there is no such statement in the record. It is said, that he does not deny his knowledge in the record. I rather think he does indirectly; for the end of the 16th article of his Condescendence scarcely admits of any other construction. Accordingly, he presented a petition to the meeting at which the expulsion took place, praying to be released from jail; in which petition there is not even an allusion to any design of extrusion—a fact which is irreconcilable with the idea, that he was aware of such heavier calamity than a little longer incarceration being impending over him. But let it be assumed that he not only knew what awaited him, but that he knew it from reading the advertisement; I do not think this was enough. He was entitled to remain passive, till he was put into the position of an accused man, by being warned, by a direct personal intimation, to prepare for his defence on a particular day.

2. No specific charge was given notice of in the advertisement, or was made at the meeting, or is specified even yet in the record. That he had applied 100 of the funds to his own purposes, which he had been incapable of repaying, is clear; and it may even be admitted, that out of these facts a criminal charge, warranting expulsion, might have been made. But his accusers were bound to state what the charge was. Not certainly with technical accuracy. They were not bound to distinguish embezzlement from theft, or breach of trust from either. But he had a right to know, no matter in what language, the practical import of the moral delinquency meant to be charged. The proceedings show that his misconduct was sometimes considered to have consisted in a criminal appropriation of the money to himself, intended and devised from the very first; at other times it is stated as a piece of mere official rashness or malversation, in the treasurer using the Society's funds at all, however honestly in the original design. Then it is treated as lying in his official concealment of the truth from his constituents in his accounts. And often, and chiefly, is his guilt said to consist in his inability to repay. If their true feeling can be gathered from their proceedings, it is clear that it was on this last score that the expulsion took place. The minutes of the meeting on the 14th of September, 1824, bear that the clerk was ordered to advertise the motion for expulsion on the 27th of December, "in case no satisfactory arrangement is made of the debt due by him to the Lodge before that day." If he had paid the debt, we have their own authority for holding that any delinquency, through which it was incurred, would have been overlooked. Since his conduct admitted of these various aspects, he was well entitled to be informed explicitly which view of it was meant to be taken; and the Society would not have been the worse of having the exercise of its penal jurisdiction assisted by what the accused man might possibly say, either in defence or in extenuation, for justice or for mercy. No doubt the 14th article gives the Society power to expel, "if it shall appear evident to a major-

No. 221. rity of the members present," that there has been due delinquency ; but this certainly does not make any thing resolve into the mere caprice of the meeting. They had no right to say that a brother's guilt appeared evident, until they gave him an opportunity of explaining his conduct ;—which he could not do until he was told exactly what the substance of his alleged criminality was. He was never told to prepare himself against any particular charge.

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The spirit with which the whole proceeding was conducted, may be appreciated from three facts. 1st, Instead of casting him off as a criminal, they were willing to keep him if he would only pay his debt ; that is, the expulsion was resorted to for the attainment of a personal object of their own. 2d, His petition for liberation from jail, which, though it had only been for an hour, was absolutely necessary to enable him to make his defence, was rejected by the meeting, which, in his absence, thus created by them, proceeded to expel. 3d, Then, having deprived him of the right to come among them as a member, they instantly grant the prayer of his petition ; proving that the prevention of his defence had been their only object in refusing it before.

I cannot think that a Court of justice can sanction such proceedings.

The cause having been this day put out for advising,

THE COURT, in respect of the opinion of the majority of the consulted Judges, altered the interlocutor of the Lord Ordinary, and assoilzied.

ROBERT M'FARLANE, W.S.—WALTER DUTHIE, W.S.—Agents.

No. 222.

JAMES THOMAS MURRAY, W.S., Pursuer.—*Marshall*.
JOHN MONCUR and OTHERS, Defenders.—*Hamilton*.

Process—Expenses.—In a case in which the Court had pronounced specially as to certain points, superseding consideration of any other points in the cause, and remitting the cause to the Lord Ordinary,—Held, That it was not incompetent for the Lord Ordinary, the remit having taken place, to award to one of the parties the expenses incurred in the previous litigation.

ay 14, 1836.

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2D DIVISION.
Lord Jeffrey.
F.

In this case, after some litigation, the Court, on 3d February, 1836, pronounced a special interlocutor as to certain points, "superseding *locu statu* consideration of any other points in the cause, and remitting the cause to the Lord Ordinary." After this remit a motion was made by the pursuer, before the Lord Ordinary, for the expenses incurred by him in the previous litigation, which was opposed by the defender on the ground of incompetency. The Lord Ordinary, "in respect of the remit from the Court to the Lord Ordinary," found that it was "not incompetent to award said expenses to the pursuer."

The defender reclaimed, but

THE COURT adhered.

THOMAS RANKEN, S.S.C.—JOHN GARDINER, S.S.C.—Agents.

CARRICK BROWN and Co. Pursuers.—*D. F. Hope—More.*
 CHARLES M'KINLEY and OTHERS, Defenders.—*M'Neill—J. Anderson.*

Cautions—Confirmation.—Circumstances in which held, That, although certain persons confirmed themselves as next of kin to a deceased, and gave up a sum of money due to him on a bank deposit-receipt, and uplifted that sum as executors, their cautioners in the confirmation were not liable in repetition to the bank, although the money had never been due to the deceased.

On June 9th, 1830, Robert Duncan, shoemaker, Rothesay, paid £40 to Carrick Brown and Co., bankers, Glasgow, and obtained a deposit-receipt. He left a specimen of his subscription with the bank, as usual, for the purpose of comparison with any subsequent draft by him. On May 21, 1831, he uplifted the contents of this receipt, with interest, and paid the sum, with an addition amounting to £90, for which he obtained a deposit-receipt as before, in the name of "Robert Duncan, Rothesay." On May 10, 1833, Duncan again paid £60 to the bank, and took another deposit-receipt.

In the end of 1831, Robert Duncan, master of the brig Eagle, was drowned near Port Rush in Ireland, and his brothers and sisters, who resided in Rothesay, having heard of a sum of £90, deposited in name of Robert Duncan, Rothesay, called at the bank in 1833, stating the money had belonged to the defunct, and claiming it as his next of kin. They could not produce any deposit-receipt, and were directed to produce a confirmation of the sum claimed.

On 11th October, 1833, they obtained a confirmation of a testamentary inventory, which stated, in gremio, that the deceased Robert Duncan died near Port Rush, in Ireland, in December, 1831, or January, 1832. The inventory given up was in these terms:—

"The said umquhill Robert Duncan had pertaining and belonging, debted, resting-owing to him, at the time of his decease foresaid, the sum of £90 sterling, contained in bank-check, deposit-receipt, or promissory-note by the Ship Bank, Glasgow, dated the 29th day of July, 1831 years. Item, The sum of £1, 2s. 9d. sterling of interest due thereon, tending said two sums herein given up in hail to the sum of £91, 2s. 9d. sterling.

"Summa of the inventory, £91, 2s. 9d."

The Commissaries decerned them executors dative qua nearest in kin, "in and to the debts and sums of money before written, herein given up and confirmed allenarly; with full power to them to uplift and receive the same, grant discharges thereof, if needful, to pursue thereon, and generally every other thing thereanent to do that to the office of executors dative qua nearest in kin is known to belong; providing al-

No. 223.
 May 17, 1836.
 Carrick v.
 M'Kinley.

ways they render just count and reckoning of their intromissions with, when and where the same shall be legally required. Where and that the debts and sums of money before written shall be made and forthcoming to all parties having interest therein as law will, C M'Kinley, merchant, Broomielaw, Glasgow, and Robert Goodwin, Glasgow, became cautioners, as an act made thereanent bears."

The executors produced this confirmation to the bank, along with a discharge, in these terms:—"We, executors dative, &c., acknowledge to have received £90, being the principal sum contained in a deposit receipt, or bank-check, subscribed by Michael Rowland (cashier), in favour of the said banking company, dated 29th July, 1831 years, in favour of the said defunct; but which has been lost or mislaid, at least it cannot be found presently; together with the sum of £5 sterling, being the interest due thereon." They accordingly discharged the bank, and the bank delivered up the foresaid testament dative, to be kept and used by the bank as their own writ and document in all time coming, and we, the executors, and oblige ourselves, jointly and severally, to deliver up to them the said lost receipt, when found by us or either of us." This discharge was prepared by Robert Goodwin, who was cautioner in the confirmation. During this transaction it did not appear that the bank ever referred to the payment of £60, which had been made by Robert Carrick, shoemaker, in May 1833.

Soon afterwards, this Robert Duncan called with the deposit-receipt for £90; and, after the bank had satisfied themselves of his identity by examining his subscription and otherwise, they paid him the contents of his receipt. They then demanded repetition from the executors of the deceased Robert Duncan, who admitted their liability, and stated that they had committed a bona fide mistake, believing that the deposit receipt had been lost in the vessel with their brother. They offered to pay £37, 10s., but being unable to pay back the balance, the bank brought an action against them, and against M'Kinley and Goodwin, the cautioners on the confirmation. Decree passed against the principal executors; but the cautioners, who were not alleged to have acted in bad faith, pleaded in defence, that their liability extended only to the deposit of the defunct which should come into the hands of executors, and not to the effects of third parties uplifted by them. The bank were negligent in granting a deposit-receipt without taking a fuller designation than "Robert Duncan, Rothesay." In so populous a district they should have added the designation of the party's trade; and they should have made more enquiry before they paid a sum for which no receipt was produced. But especially they were guilty of laches in not advertent to the deposit of £60, made as late as May, 1833, by the same Robert Duncan who had deposited the £90 in question: whereas the testament founded on by the executors, stated their Robert Duncan to have died in 1831. But for this gross negligence, the payment would never have

made; and the defenders would not have been allowed to fall into the belief that the sum claimed by the executors really belonged to a man who died in 1831, and of whom the bank had subsequently heard nothing. N
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The bank answered, that the sum claimed had been uplifted by the executors in that special character. A confirmation was required as the proper title to uplift part of a defunct's estate, and the caution expressly extended to that sum or to nothing, for that sum was the whole inventory. But, farther, by signing as cautioners, the defenders concurred with the executors in positively representing the sum to have been due to the defunct; and, though acting in bona fide, yet, as they misled the bank, and caused the money to be paid away on the faith of a false representation so made, they were liable in repetition, and were personally barred from objecting any laches to the bank, who had merely acted on the faith that the statement so vouched by them was true.¹ The bank pleaded separately that the cautioners were liable, and that the executors' title was good for any debt uplifted by them as executors.

The Lord Ordinary "sustained the defences for the defenders; assoilied them from the conclusions of the libel, and decerned: and found the pursuers liable in expenses."

The bank reclaimed. The Court, without calling on the defenders' counsel, unanimously adhered.

LORD BALGRAY,—I do not hold the cautioners to warrant the right of the defunct. On that ground I am for adhering.

LORD GILLIES,—I am of the same opinion. Besides, on looking to the confirmed testament, I find that the cautioners' obligation had special reference to a bank-receipt therein described. If the bank had refused to pay till that receipt was produced to them, or until due inquiry was made, and satisfactory evidence produced as to the disappearance of the receipt, it might have been argued that the cautioners' obligation applied. But the bank did not do so. They paid without the receipt, and without sufficient evidence as to what had become of it. That was the act of the bank and not of the cautioners, and if a loss must now fall on the one party or the other, I think it ought not to fall on the cautioners.

LORD PRESIDENT,—I am of the same opinion. The case of Carnegie referred by the pursuers, was a different case from theirs.

LORD MACKENZIE concurred.

W. and D. ALLESTER, W.S.—C. FISHER, S.S.C.—Agents.

¹ Scott, Dec. 6, 1749 (2080).

No. 224.

May 17, 1836.

Campbell's
Trustees v.
Campbell.CAMPBELL'S TRUSTEES, Raisers.—*Sol.- Gen. Cunningham.*JAMES ARCHIBALD CAMPBELL, Claimant.—*M^cNeill.*ALEXANDER CAMPBELL, Claimant.—*D. F. Hope—More.*

Entail—Clause.—A party having by a holograph deed conveyed to trustees his whole heritable and moveable property “belonging to him at the time of his decease,” with directions, after payment of debts and legacies, to “pay over the whole free residue to his son, “hereby declaring his will to be” that the trustees should entail the whole amount on the heirs-male of his son, whom failing certain other substitute heirs; and the party having thereafter died—(1.) He was declarator at the instance of the trustees, and it was evidently the party's intention that an effectual entail should be executed. The trustees were bound, after purchasing lands, to settle them by strict entail to apply the fetters thereof to the son as institute, as well as to the substitute heirs. (2.) Opinion intimated that the sum to be invested in lands was the free residue of the estate as at the date of the testator's death without any accumulated interest.

May 17, 1836.

2^D DIVISION.
Lord Jeffrey.
R.

By a holograph deed of settlement, dated 9th December, 1811, the late Archibald Campbell conveyed to trustees his whole heritable and moveable property, consisting of certain lands in the counties of Argyll, and Renfrew, “and generally all my other lands and heritages wherever situated, and of whatever description, and all debts, heritable and moveable, that shall belong to me at the time of my death; and my whole moveable means and estate, of whatever kind or denomination, and heirship moveables included, that shall belong to me at the time of my decease.”

The purposes of the trust were, 1st, Payment of the truster's debts; 2dly, Payment of certain legacies; and the deed provided, “That my said trustees shall pay over the whole free residue and remainder of my means and estate, above disposed, to Alexander Campbell, my son, and his heirs, executors, and successors, hereby declaring my will, that my said trustees shall entail the whole amount on the heirs-male of the said Alexander Campbell; whom failing, on the heirs-male of my late brother Duncan Campbell; whom failing, on the heirs-male of my late sister Jean; whom failing, on the heirs-male of my niece Mary, Mrs Paterson; and I do hereby direct, and give full power to my said trustees and survivors, or survivor of them, as soon after my death as they may judge proper and expedient, and for the interest of all concerned, to sell and dispone of my whole lands and estate, heritable and moveable, above conveyed to them, and that either by public roup or private bargain, as my said trustees shall think best, in order that the same may be converted into money, for answering the several purposes of the trust, and converting the free residue, after paying the legacies mentioned in this will, and any future memorandum, into lands, to be entailed on

ed." In one of the codicils to the deed, dated February, 1819, No. 224
 ograph of Campbell, was the following clause:—"It is my wish, May 17, 18
 y boy may be liberally educated, to fit him for any profession he
 int at; and in purchasing lands for him to be entailed, I wish a
 ce to be given to the old family estate of Inveraw, if it can be
 Campbell's
 Trustees v.
 Campbell.

ibald Campbell died in May, 1825, leaving property to the
 of upwards of £127,000, his natural son, Alexander Camp-
 e residuary legatee under the settlement, being at the time ten
 f age. The trustees having accepted proceeded to carry the trust
 ecution. They realized the property, paid the debts and legacies,
 chased the estate of Oakfield at a price of £70,000. The whole
 rice and other outlay on this estate was paid out of the trust-funds,
 e exception of £5000, which remained unpaid. Property of the
 f about £23,000 remained at the disposal of the trustees, there be-
 onsiderable sum of increase on the capital by accumulation of
 . No entail had yet been executed as directed by the trust-

ese circumstances, the trustees brought a process of multiple-
 g, declarator, and exoneration, in which, setting forth the provi-
 the settlement, and their proceedings under it, and stating cer-
 ficulties which occurred to them, they concluded to have it found
 lared, that the free balance of the trust-funds, as it stood at the
 f Archibald Campbell, fell to be invested in the purchase of lands
 tailed on Alexander Campbell, and the series of substitute heirs
 in the trust-settlement; or otherwise, that both the principal sums
 umulations of interest betwixt the truster's death and the majority
 ander Campbell, fell to be so invested; and farther, that it should
 d and declared, that the trustees were entitled and bound to exe-
 strict entail of the lands acquired and to be acquired, in favour of
 der Campbell and of the substitute heirs set forth in the settle-
 nd that the fetters of the entail should apply both to him and to
 airs; and, lastly, that the trustees should be exonerated and dis-
 of their intromissions.

ander Campbell claimed—

hat the whole proceeds of the estate and the accumulations which
 subsequent to the death of the testator, should be paid over to
 terms of the trust-deed; and

hat the lands already purchased should be conveyed to him, free
 e fetters of any entail, to be executed by the trustees.

s Archibald Campbell, nephew of the testator, and first substitute
 ned in the settlement, claimed that the lands purchased and to be
 ed, in implement of the trust, should be settled under a deed of
 ntail, the fetters of which should be applicable to Alexander
 ill, as well as to those called to the succession after him.

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y 17, 1836.

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In regard to the principal question arising out of these claims, viz. whether the fetters of the entail were to be applied to Alexander Campbell, the institute,

It was pleaded for James Archibald Campbell—

That the intention of the testator must be the rule in construing the settlement; and that he evidently meant that the lands were to be secured by entail on a certain series of heirs, which implied that the entail must be an effectual entail; for otherwise, Alexander Campbell would have the power of defeating the order of succession pointed out by the testator's will.

To this it was answered—

That the direction to entail the lands on certain heirs did not include the residuary legatee; that the first direction to “pay over” to him the remainder of the funds, must, on sound principles, be taken as the primary, and the second direction in regard to entailing, as the subordinate portion of the clause, according to which view, the two must be reconciled; and that as the words of the first part of the clause were clear and absolute, and the subsequent direction expressed no limitation of Alexander Campbell's right, the fetters of the entail ought not to be applied to him.

The Lord Ordinary (February 18, 1836,) pronounced upon this point the following interlocutor, adding the subjoined note: *—

* “ The only question hitherto discussed is, whether the entail, which all parties are agreed the trustees must execute, before divesting themselves of the property, shall be so conceived as to impose the fetters on Alexander Campbell, the institute, as well as on the succeeding heirs, or shall vest him with an unlimited fee, and impose limitations only on those whose hope of succession he may not choose to disappoint. When it is conceded, that there must be an entail, under which, and not otherwise, Alexander Campbell must take the lands, it does not appear to the Lord Ordinary that there can be much difficulty in this question. When a man orders his trustees only to denude of his property in the shape of an entail, it is scarcely possibly to doubt, that his object is to secure, by that mode of settlement, the succession of all the persons whom he there names as the objects of his favour; indeed it is believed that there is no instance where it has failed out otherwise, except through the blunder or unskilfulness of the conveyancer, who has not employed proper expressions to carry that object into effect. It is altogether impossible, therefore, to argue, from the strict legal construction which is applied to imperfect entails, to a case in which the only question is, what is the true meaning of instructions given by an absolute proprietor, to make an entail, which, whatever its character may be in other respects, certainly could not have been meant to have been blundered, or to fail of its intended effect, by defective or imperfect expression.

“ Though a mere intention to secure the succession of all the substitutes may not therefore be sufficient to bring the institute under the fetters necessary for that purpose, if they are not expressly laid on him, such an intention will be completely binding on trustees appointed for carrying it into effect, and will make it their duty to lay the fetters on the institute, in order that it may not be defeated.

“ The settlement, it must be admitted, is expressed with singular infelicity, and is manifestly inconsistent in its two leading directions, as to the residue now in question. It first positively directs the trustees to pay over the whole of it to

The Lord Ordinary having resumed consideration of the debate, No. 22
the closed record, and whole process: Finds, that, according to

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under Campbell, his heirs, executors, and successors,' which would clearly carried it to his heirs, male or female, and to his executors nominate, or assignerous or voluntary. But, in the very next line, it is stated, that the trust all 'entail the whole amount,' not on Alexander Campbell himself, but 'on his heirs-male of Alexander; whom failing, on the heirs-male of Duncan Campbell a deceased brother of the testator), and a variety of other substitutes; and to take away all doubt as to this entail being intended to include the whole of his property, after paying debts and legacies, he proceeds to direct them his whole estate into money, and, after paying debts and special legacies, vest the whole in land, to be entailed as above-mentioned.' And in a codicil the year following, he directs, in reference to Alexander Campbell, that the testator, 'in purchasing lands for him to be entailed, shall give a preference to his family estate of Inveraw, if it can be got.'

The first instruction to pay over the whole residue to Alexander Campbell and his heirs and executors whatsoever, being totally superseded by the posterior reconcilable instruction to entail the very same subject on his heirs-male only, the Lord Ordinary, but for the expression now cited from the codicil, have had considerable doubt whether Alexander Campbell himself could hold any place in the proposed entail, or could have taken any thing under the entail; for in its ruling and only operative part, the lands are directed to be entailed, not to him at all, but to his heirs-male (which, being illegitimate, could be heirs-male of his body only), and he would therefore appear to be named as the stirps from which the institute was to spring, and as a part of the designation of that institute only. With reference to the first (though inconsistent) direction, and to the relationship of the parties, such a purpose must be admitted to be very improbable; and more weight is, on this account, given to the terms of the subsequent codicil, in which the purpose of giving Alexander Campbell a leading interest in the entailed lands is plainly enough expressed: and therefore, because none of the other parties have raised any question as to his exclusion, the Lord Ordinary has not scrupled to give him such a place on the entail as seems best to meet the double purpose of the testator, at once to give to his natural son, and to secure the succession of his property in the male line to his kindred, to a remote generation.

Alexander Campbell made a bold attempt at the debate, to reconcile the first and second instructions to the trustees already referred to; and contended, that, the direction actually to pay over the residue to himself, or heirs-general, would be controlled by the subsequent direction to entail the whole on his heirs-male only, to the utter and final exclusion of his heirs-general, executors, or assigners, till the practical result might be nearly the same, if the fetters of the entail were laid upon him as institute; as he might, in that case, ultimately transmit the estate, by deed, to his heirs-female, or sell it, and leave the price to his executors or assignees. It seems only necessary, however, to suggest, in answer to this construction, 1st, That the terms of the first direction are plainly calculated to secure the succession, independent of any future deed or settlement by Alexander Campbell, and would, if not superseded by what follows, clearly vest the estate in his heirs-general or executors, as conditional institutes, in the event of his predeceasing; with all the rights provided to himself personally, in the event of his surviving; and, 2d. That whatever may have been the favour which the testator intended for Alexander Campbell himself, it is utterly inconceivable (and therefore inadmissible in a *questio voluntatis*), that he should ever have intended to give his estate, or executors, whom he had altogether excluded even from a limited interest in the estate, such an unlimited and absolute property in it, as to make the succession of his own legitimate relations entirely dependent on those (improbable) preferences of them to all the rest of the world.

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the best and most probable construction of the trust-settlement of the late Archibald Campbell, and the codicil of February, 1819, thereto annexed, in so far as the said settlement and codicil relate to the free residue of the truster's whole property, after payment of debts and specific legacies, it must be held to have been the meaning of the said truster that the said residue should be vested in lands to be purchased by his trustees, or allowed to remain vested in lands belonging to him at his death, and which could not be sold to advantage; and that the said lands should be settled by them on Alexander Campbell (the truster's natural son), and the heirs-male of his body, whom failing, the other near relations of the truster himself, mentioned in the said deed of settlement; but only in the form of a strict entail, according to the law of Scotland; the whole fetters and limitations of which must be laid on the said Alexander Campbell himself, as well as on the substitutes appointed to succeed to him, so as to secure the succession of the said several substitutes in their order: And Finds, that it is the right and duty of the said trustees to execute such an entail accordingly: And, before answer as to the other points of the cause, directs it to be enrolled, that parties may be further heard."

On the other point, whether the money to be invested in lands should consist of the free capital sum, as at the testator's death, or also of accumulations of interest, subsequent to his death, the Lord Ordinary (February 24) pronounced the following interlocutor and note: *—

" It may also be remarked, that the direction, 'to entail the lands on the heirs-male of Alexander,' does not necessarily, or even primarily signify, to put their right to the property, for the first time, under limitations. The more ordinary and natural sense of the direction, would seem rather to be, to secure their succession to the lands by an entail; the limitations of which must of course have been laid on some antecedent person. This is undoubtedly the meaning most usually intended, when we speak in common parlance, of lands being entailed on such or such persons; the ordinary implication of the phrase being, that they are irrevocably secured in the succession by an entail; not that their right is burdened by limitations; and, looking to the whole scope and object of this settlement, the Lord Ordinary is of opinion that it was in this sense that the phrase was used by the testator. The case of *M'Allister*, 29th June, 1827 (5 Shaw, 864), presenting a singular coincidence with some of the most extraordinary features of the present, and its decision affords a precedent for the interlocutor now pronounced, which was scarcely to have been expected."

* " This seems to follow, from the last judgment of the House of Lords, in the case of *Lord Stair*;¹ the character and structure of the trust-deed being, in the present case, even more favourable for that interpretation, than in the former; and there is here no instruction (similar to what there occurred) to invest not only the residue, but the interest and proceeds in lands to be purchased; while the direction is to pay the debts as soon as convenient, and the legacies, if possible, within six months after the death of the testator. The only ground of doubt might be, that as the residue is here assigned to a boy, for whose maintenance

¹ W. and S. II. 614.

“ The Lord Ordinary having heard the counsel for the parties on the remaining points of the cause, and made avizandum with the trust-deed and whole process: Finds, that the free annual profits and proceeds of the trust-estate, from and after one year subsequent to the death of the truster, and till the actual investment of the free capital or residue in lands to be entailed as directed by the said trust-deed, must be accounted for to, and be at the disposal of Alexander Campbell, the proposed institute, individually, and that, in the event of his death before the final investment of such capital, the free annual proceeds of any part of the said capital that may remain so uninvested, must, in like manner, be accounted for, and be at the disposal of the heir next appointed to succeed to the said lands or residue. No part of the said free annual profits or proceeds accruing subsequent to one year after the death of the truster, being to be accumulated or added to the capital in the hands of the said trustees, for the purpose of being vested in lands to be entailed: Finds also, that the whole expenses hitherto incurred are to be defrayed out of the trust-funds.”

Alexander Campbell reclaimed.

LORD JUSTICE-CLERK.—I am for adhering to the interlocutor of the 18th February. I have no doubt as to what was the true intention of the maker of the deed, which bears to have been written by himself, without professional assistance; and I think we are bound to give effect to his will. The testator wished to benefit his son, and create an entailed estate, and he had also an avowed intention that certain other parties were to be benefited. We must read the whole of the will, and also the codicil. The trustees are to pay over the residue of the trust-estate for the purpose of the whole amount thereof being entailed on the testator's son, and the other persons mentioned in the deed; and is the entail here contemplated to be an ineffectual entail? It was the *enixa voluntas* of the testator, that there should be an effectual entail, and unless we give authority for

education the trustees are directed to provide, and who could not, during his minority, have any personal or uncontrolled enjoyment of the property, so it might be inferred, that it was the intention of the testator that the surplus annual profits, beyond his actual wants, should rather be entailed along with the capital, than accumulated merely for the purpose of paying them over to him on his majority, as his individual and absolute property. But as the majority or minority of the person first succeeding, was a casualty, depending entirely upon the period for which the life of the testator might be prolonged, and on the survivance or predecease of those named to succeed him, and as the deed contains no special provision for the event of the testator being succeeded by a minor, it would be unwarrantable to give a different construction or effect to it, in one case, from what it could receive in another. Besides, holding the decision in Lord Stair's case, as intended to fix a general rule, where no specific direction or declaration to the contrary is made in the settlement, it does not appear to the Lord Ordinary that the accidental majority or minority (any more than the sanity or insanity) of the heir first called, can be allowed to interfere with its application. If the benefit of such a rule legally belongs to the party to whom the residue is effectually devised, a Court of law is not less bound to secure him in that benefit, though he is a minor entitled to its protection.”

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such an entail, we do not give effect to his will. If you leave the institute free, he may alter the destination pointed out in the deed.

LORD GLENLEE.—I agree with the chair. The argument against the interlocutor rests on an obvious fallacy, as the real object of the testator is plain, there being no separate provision to dispoise the subjects to the young man. The words "hereby declaring" qualify the whole contents of the clause, and must subject both Alexander Campbell and those called after him to the fetters of the entail. Alexander Campbell was to get the subjects, but in such a way as that the entail should be effectual to the substitutes called. The testator acted without professional assistance, but in using the word "entail," he clearly meant an effectual and valid entail, according to the law of Scotland. As to the point in the interlocutor of 24th February, the whole accrescence of the fortune of the deceased goes to the young man, and I think the trustees are not entitled to accumulate it.

LORD MEADOWBANK.—I have no doubt in this case, taking the whole deed as you have it, that the trustees are bound to make a strict entail. This is altogether a question of intention.

LORD MEDWYN.—I agree. All we have to do is to find out this party's intention; and, for this purpose, the whole clause must be read together. He could not mean to have an entail executed, which his heirs might defeat. The primary object of the deed is to entail an estate on certain parties, not to pay out the money to Alexander Campbell. As to the other point, I have doubts as to any accumulation being intended, and I do not think the case of Lord Stair applies.

THE COURT adhered to the interlocutor of 18th February, and recalled the interlocutor of 24th February, remitting to the Lord Ordinary with instructions to hear parties farther thereanent, and to proceed as he shall see cause.

JOHN BLAIR, W.S.—CAMPBELL and TRAILL, W.S.—WILLIAM YOUNG, W.S.—Agents.

No. 225. GEORGE YOUNG and ATTORNEY, and JAMES MORTON, Advocators—
Maitland—Cowan.

MRS BRYAN and OTHERS, Respondents.—*J. Anderson.*

Cessio—Arrestment—Competition.—A party having, in a process of cessio, conveyed his whole property to two trustees, who, for more than twelve years never took up or acted on the disposition, and the trustees having, after the date of the conveyance, used arrestment in the hands of the truster's debtor: Held, in a competition with a third party founding on arrestments used in the hands of the same debtor, both prior and subsequent to the date of the trust conveyance, that the trustees had no preferable right, and were barred from founding on the disposition in support of their claim to a preference.

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2D DIVISION.

Lord Jeffrey.

IN August, 1820, Mrs Bryan used arrestment in the hands of Robert Wilson, as indebted to one Wilson, her debtor. In 1821, Wilson said

and granted a disposition omnium bonorum to the advocates, and Morton, in trust for his creditors. This disposition was not d nor extracted. In 1823 and 1825, Morton also used arrest- n the hands of Robertson, having, more than five years prior to the these dates, used arrestments in the hands of the same person, were now prescribed. In May, 1825, Mrs Bryan followed up her e by an action of furthcoming, and in July following renewed her ent. Thereafter, the representatives of Robertson, who had died, process of multiplepoinding, which was subsequently conjoined s furthcoming, to try who had right to the debt alleged to be due ion.

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on had raised action against these parties for payment of the sums aim by Robertson ; and, during the dependence of the processes mentioned, they called upon the trustees under the disposition to their concurrence to Wilson's instance. Morton granted his con- e accordingly, though he had never acted under the disposition, having previously gone to America. This action, after being ad- , was brought to a successful termination, and the fund in medio . Morton's claim for the expenses incurred by his appearance allowed by the Court.

eafter a supplementary summons of multiplepoinding was raised the Sheriff of Ayr, in which Young and Morton, on the one nd Mrs Bryan and certain cautioners, amongst with another party, nterest was the same as hers, on the other, appeared as claimants. mer claimed, 1st, the expenses incurred by their appearance in on at Wilson's instance ; and, 2dly, the remainder of the fund e, if the Court should find it to have been carried by the disposi- their favour. Mrs Bryan, founding on the arrestments in 1820 25, as entitling her to a preference, claimed the whole fund in

In the pleadings it was admitted by Young and Morton, that, ees, they could not compete for the fund, unless it should be at the arrestments founded on by the other competitors were The Sheriff found, that Young and Morton, as trustees under the ondrum, had no preferable claim for the expenses disallowed them Court of Session, and, in virtue of the arrestment, preferred Mrs und the other arrester to the sum in medio.

g and Morton brought an advocacy, in which they maintained, us grounds of law, that the arrestment by Mrs Bryan, in 1820, pt ; that the whole property of the common debtor, Wilson, had eveyed to and vested in them at the date of the trust-disposition, to the validity of which no objection could be pleaded on the of mora, inasmuch as it was founded on by the trustees, so soon ne necessary to do so for the interest of the creditors ; and that entors' claim of preference ought at all events to be sustained to art of the expenses incurred in sisting themselves as parties to the

* " The Lord Ordinary has not the least doubt of the subtilty of this judgment, and is not aware of any authority upon which it can be impeached. He is inclined to think, though there seems to be no authority on the point, that a disposition *omnium bonorum* in a cessio, if not acted on by the trustees for twelve or twenty years, will not tie the individual creditors (whether cited in the cessio or not) from attacking in the uncontrolled administration of which the common debtor was trustee for the full period of forty years after the granting of this *cessio*. But he humbly conceives it to be clear, that the trustees not only judicially admit their deliberate neglect and this conveyance (no one creditor appearing to complain of such a conveyance) individually use separate diligence against the funds of the common debtor, claim any right founded upon such conveyance in a competition founded upon such separate diligence, they can never be allowed, in such competition, to recur, at the distance of fifteen or sixteen years, to the conveyance, as a title upon which they can evacuate decrees of preference in favour of other parties in such competitions, and in processes in which they themselves were parties, and in which they had judicially admitted no claim on that title, unless all the grounds on which the other parties which certain of them had been ultimately preferred, were found to be unavailing.

" But if this be true generally, the circumstances of this case make the principle applicable, a fortiori, to the claims of the present Morton, the only trustee who could have been expected to act upon the disposition *omnium bonorum*, was himself the agent of Wilson, in the year after its date, in his (Wilson's) own name, against Robertson; proof of his utter rejection of that disposition, Morton used the same as which he mainly relied in the competition, in the hands of Robertson's debtor, in 1823, two years after the date of that disposition in 1821 when compelled, in 1830, to grant his concurrence as trustee to the present Morton's instance, he expressly states, that the trustees had themselves acted in that character, and accordingly advisedly withheld their inste

tted and set forth, in the process of multiplepointing before the She- No.
 5, now advocated, and especially in their replies in that process, that May 1
 e disposition omnium bonorum granted to them, as trustees for his cre- Young
 tors, in the cession of James Wilson, and on which they now found as Bryan
 air only title, had been allowed to lie untouched (and unextracted) for
 elve years after it was granted; and that, when called upon for their
 ncurrence in 1830, in the action at the instance of the said James
 Wilson against James Robertson and his representatives, they had mere-
 granted their concurrence, as such trustees, to obviate objections to
 e title to pursue of the said James Wilson, as an individual, and not at
 l as claiming the sums due by Robertson for behoof of the creditors of
 e said James Wilson: And farther, in respect that it was then judici-
 ly admitted by the said advocates that they had no claim, and could
 t compete for the fund in medio as such trustees, unless it should be
 and that all the arrestments founded on by the other competitors were
 id, and that they accordingly made no appearance in the original advo-
 cation, as to the preferences of the said arresters inter se; remits the
 me to the Sheriff simpliciter, in so far as his judgment totally excludes
 e claims of the present advocates to the fund in medio, and decerns:
 inds the claimant, Mrs Bryan, entitled to her expenses in this last
 lvocation."

The advocates reclaimed.

LORD GLENLEE.—The Lord Ordinary, in his interlocutor, has gone upon
 and reasons in law, and it would be contra bonos mores to alter his finding,

ntee was himself then founding on an arrestment in 1823, and that the party
 timately prevailing had relied mainly on another in 1825, it is manifestly impos-
 ble to listen to such a pretext.

"Whether, or to what extent, the advocates may be liable to Wilson's creditors,
 r not objecting tempestive to these subsequent arrestments, is not hujus loci.
 ut having not only totally neglected the interest of those creditors for twelve or
 anty years, but judicially admitted that the arrestments of the other claimants
 re preferable to their disposition, and stood by and allowed these subsequent
 esters to incur great expenses in disputing their mutual preferences on the faith
 hat admission, the Lord Ordinary thinks it clear, that they are barred and pre-
 led from now putting forward any claims of preference, which were thus deli-
 ately renounced in initio litis; and being farther of opinion, that, in respect of
 ir long previous neglect and mora, these preferences were legally annulled and
 nguished, he has no difficulty in dismissing this tardy and most suspicious in-
 erence, with full expenses.

It is very material, with a view to this last question, to observe, 1st, That no
 creditor of Wilson has come forward or been referred to in this process, as
 ing an interest in this antiquated claim of the trustees; and, 2d, That Morton,
 the claim as an individual was finally rejected in the former advocacy, has been
 years the only trustee in this country,—Young, whose name is borrowed to
 in his present compearance, having been confessedly for a long time in South
 Africa. It is not very uncharitable, therefore, to surmise, that this claim in
 off of the long neglected creditors of Wilson, is truly for the exclusive benefit
 said Morton himself."

No. 225. that the advocates, qua trustees under the disposition omnium bonor now barred from interfering with the fund in medio. It is perfect that a trustee under a cessio must have accepted before he can do any. Though there have been delay, there is certainly nothing to prevent him ing, unless something occur to bar his doing so; but this was the ca Morton having already used two arrestments. When a party who is ma a trustee has previously secured a preference, then his preference, as that other creditor, will be good, but I deny his right, as a trustee, to use a gence whereby to make himself preferable. As to Robertson's represe taking advantage of the advocates' concurrence in Wilson's action, thei tion was not to ask any thing for themselves, but merely to have Wilson sustained.

The other Judges having concurred,

THE COURT adhered.

DONALDSON and CAMPBELL, W.S.—M'INTOSH and GEMMELL, S.S.C.—Agents

No. 226. MRS HOME, or PAUL, and HUSBAND, Pursuers.—*M'Neill—M. SIR WILLIAM BAILLIE and OTHERS (Clyne's Trustees), Defen Sol.-Gen. Cuninghame—Boswell.*

May 18, 1836. *Accounting.*—Special case of accounting, in which the Lord Or approved of an accountant's report, and repelled the defenders' obj thereto, in respect they were either expressly repelled by, or fell the principle of a previous interlocutor, to which the Court had ad To this judgment the Court adhered, and awarded additional expe

DAVIDSONS and SYME, W.S.—D. MANSON, S.S.C.—Agents.

No. 227. JAMES WALKER, Advocate.—*D. F. Hope—Cheape. WILLIAM DRUMMOND, Respondent.—Robertson—Deas.*

Accounting—Contract—Rei Interventus.—A party had a cash-credit with and took receipts from the bank for all sums paid in by him, but gave bac receipts at the annual settlement of his accounts, which took place on an c tion of vouchers and of the bank ledger, after which a balance was struck an by the bank and himself, which was carried to a new account: This annui ment was repeated for seven successive years, when the party paid up th balance due by him, and retired his cash-credit bond: Party held entitled, in against a subsequent action by the bank, to object to go into a question of a ing, in respect of an error calculi, which the bank alleged appeared in their books prior to all these settlements, and consisting of an entry of £191 to hi without any such sum having ever been paid by him.

May 18, 1836.

1st DIVISION.
Ld. Corehouse.
B.

JAMES WALKER, farmer, had a cash-account with the Fife B Company. He kept a memorandum book, containing entries of h

n, &c. When he paid money in, he obtained a receipt from the bank No. 1
voucher, and on 2d August of each year, he balanced accounts with May 18
bank, at which period a docquet was signed by the bank and him, or Walker
his son acting for him, in these terms :—" The above account settled, Drum
chers exchanged, interest debited, and the balance carried to Mr
ker's debit in a new account." This adjustment and docqueting of
unts and surrender of vouchers took place, successively, on the 2d
ust, 1818, 1819, 1820, 1821, 1822, and 1823, when the first Fife
king Company's contract terminated. The balance then due by
lker was transferred to an account opened in the books of the second
Banking Company, who succeeded to the first, and the account of
lker in their books was adjusted and docqueted as before, on 2d
ust, 1824 and 1825. The bank stopped payment in November, 1825,
the parties appointed to wind up its affairs, examined Walker's ac-
it, and struck a balance as due by him, which he paid on 11th May,
6, and took up the bond, which he and his cautioners had granted to
bank.

1831, William Drummond, cashier for the Fife Banking Company,
entitled to sue on its behalf, presented a petition to the Sheriff of
stating that, by a recent examination of the bank books and accounts,
ad been discovered that, on the 23d July, 1819, the bank had erro-
rily given credit to Walker for a sum of £191; and that all the sub-
sequent settlements of accounts were made up on the footing of this er-
rourous entry. He therefore claimed payment of the sum and interest
to Walker.

In support of this claim, the following statement and explanation were
given by Drummond :—He alleged that the bank recorded their busi-
ness transaction in three books; 1st, the teller's book, in which the teller
recorded, at the moment, every sum paid or received by him; 2d, the
bank or state cash-book, which was a private book of the banker, made
from the teller's book, but classifying the various transactions of that
book under distinct heads, such as "Cash-Accounts," "Deposit-Accounts,"
"Bills Discounted," &c.; and 3d, the ledger, in which all operations on
debit or credit accounts were posted from the teller's book and entered
under the names of the parties. At settling a party's annual account, no
examination of any book, except the ledger, ordinarily took place. In
the teller's book, kept by Ebenezer Anderson, there was an entry under
August, 1818, "Paid James Walker £191;" and in the state cash-
book, an entry was made of the same date, "James Walker (*this sum
received*), £191." These words in italics were in Anderson's handwriting.
In the ledger, this sum was not entered on either side of Walker's
account. The effect of this was to give Anderson credit in his teller's
book for £191, which was not debited to Walker in the ledger. About a
year afterwards, on July 23, 1819, the same teller made this entry in the
teller's book :—

“ 1819. July 23. To cash, Ja. Walker. Er.	£191 . 0 0
Pro. and loss, Int. on this sum, it should not have been entered to Mr Walker's debit,”	- - 8 10 0”

" 1819. July 23. James Walker. Er. - £191 0 0"

From this entry in the teller's book, another clerk of the bank making up the ledger, had, by inadvertency, carried this sum of £1 into the ledger, in favour of Walker, though Walker had made no responding payment. The account was balanced as usual on 2d Aug 1819, with reference to the ledger, which thus gave the erroneous

£191; and the balance being then struck, the grounds on which it No
 stated were never again examined into at the subsequent balances, until May
 recently before the institution of this action. Walker
 Drum

Such was the tenor of Drummond's explanation of the error calculi.

Walker was examined as a haver. He did not produce any bank pass-
 book for 1819, but he produced the only memorandum book which he had
 relative to his bank transactions. In the month of July, 1819, it con-
 tained four entries of sums paid to the bank amounting in all to £505; the
 bank ledger contained four corresponding entries, besides a fifth entry of
 £191 on 23d July, 1819, as taken from the teller's book already quoted,
 but without any addition of the word "error" or other mark to distinguish
 it in the ledger entry, from any other ordinary entry. But the memo-
 randum book of Walker had been irregularly kept, and frequently
 omitted sums which the bank books showed to have been paid in by Wal-
 ker, or stated such sums at an amount different from what appeared in
 the bank books. This memorandum book had been kept by Walker's
 sons, as he was himself advanced in years.

Against the explanatory statement of the defenders, Walker pleaded
 a defence, that, as regular settlements of accounts took place annually,
 each of which he had surrendered to the bank every voucher for money
 paid into it, and got, in return, the docketed account striking a precise
 balance, he could not now be required to enter upon an accounting with
 the bank as to his transactions in 1819. At settling his account, in that
 year, he was satisfied that all the entries to his credit, including the
 £191, were accurate. The whole evidence of the bank consisted in a
 reference to their private books, which, on their own showing, were
 blundered: and whether the alleged blunder arose from accident or de-
 sign, it would be equally unsafe to allow the bank now to make up a new
 ledger from such books. But, besides the evidence afforded by the en-
 tries in these books, it was necessary for the bank to offer a great deal of
 supplementary and hypothetical explanation which was quite inadmissible.
 One single settlement, accompanied by the surrender of vouchers,
 would have been enough to foreclose the bank: but much more was this
 done by the succession of annual settlements and the lapse of years. The
 defender did not retain any personal recollection of paying in the £191,
 but he could not recollect bank transactions at such a distance of time,
 especially as his sons chiefly managed these. And though his memoran-
 dum book did not contain an entry of this payment, it had been too
 irregularly kept to render this omission of any importance.

The sheriff decerned in terms of the libel, and Walker brought an ad-
 vocation. The Lord Ordinary found "that the advocator, James Wal-
 ker, kept a cash-account with the Fife Banking Company for some time
 previous to 1819, and subsequently till the dissolution of that company
 in August, 1823, and that he kept a similar account with the second Fife
 Banking Company, to which the business of the first was transferred, till

it had stopped payment: And on the last mentioned occasion balance appearing due by the advocator was paid by him, by himself and his cautioners delivered up to him: That a consecutive settlements and exchanges of vouchers, it is not tent to found upon an error, alleged to have occurred in July appearing on the face of the accounts as entered in the which, it is admitted, all the settlements took place, but said detected by an examination of the teller's book and clean private books of the bank—to which the advocator had not which it is not averred he ever examined before his final set the creditors of the Banking Company in 1826, for the purpose aside all those settlements, and of establishing a claim against the lapse of so many years: That no presumption arises against the advocator from his not now being able to produce his pass-book 1819, or from there being no entry to his credit in a privy book, which he has produced under the diligence, is proved by the bank books to have been carelessly and irregularly nor from his declining to state at this distance of time that he of having paid in a sum to the credit of his account on the 1819: Therefore, advocated the cause, recalled the interloper sheriff; absolved the advocator from the conclusions of the inferior court, and found the respondent liable in expenses in the inferior court."

The bank reclaimed. The Court, without hearing Walk, unanimously adhered, and awarded additional expenses.

LORD PRESIDENT.—The accounts were not only settled among

o them ; and he gave up these vouchers to the bank upon seeing, at the annual settlement of accounts, that he got credit for all the sums for which he held vouchers. It would be a serious matter to admit the bank's claim now, and I should be very sorry to see this judgment altered.

LORD MACKENZIE concurred.

KER and DICKSON, W.S.—W. ALEXANDER, W.S.—Agents.

MISS MARY JANE LOCKHART M'DONALD, and OTHERS, Pursuers.

—H. J. Robertson.

SIR N. M'DONALD LOCKHART, Defender.—D. F. Hope—Neaves.

Entail—Clause—Provisions to Wives and Children.—1. Terms of a marriage contract, exercising reserved powers under an entail, by which it was held, that a provision granted to younger children, and consisting of three years' rents, so far as the land was "free and unaffected, at the time, with liferents,"—entitled the succeeding heir to deduct the liferent locality of the granter's widow from the rental, before computing the children's provisions. 2. Formula for computing the amount provided respectively to a widow and children, where, on the one hand, the widow's provision is first to be deducted, before the free rental is ascertained, as the basis for computing the children's provision ; and, on the other hand, the amount of the widow's provision is to be a proportional part of the rental, after deducting the interest of the children's provision. 3. Succeeding heir not entitled, in the question of the children's provision, to deduct a sum, allotted by him, under 10 Geo. III. c. 51, to pay the burdens for improvement-expenditure imposed by his predecessor, under said statute.

THE late Sir Charles M'Donald Lockhart possessed the estates of Mary Carnwath and Dryden, under two deeds of entail, executed respectively in 1721 and 1787. By the former entail, power was reserved to the heirs "to grant liferent infeftments to their ladys and husbands, by way of locality allenary, in lieu of their terce or courtesie, from which they are hereby excluded, not exceeding a fourth part of the said lands and estate, in so far as the samen is free and unaffected for the time with former liferents, and after deduction of the annualrents of the provisions" which they might grant to their younger children ; as to whom, power was reserved to provide them to any sum "not exceeding three years' free rent of the said lands and estate, so far as the same is free and unaffected at the time with liferents, and after deduction of the annualrents of former provisions granted by any prior heirs to their younger children when resting unpaid."

The entail of 1787 included certain additional lands, and narrated the granter's purpose "to renew and confirm the former entail" in all respects as to the old lands, but to add certain other conditions as to the new. In this entail, the power reserved to provide spouses, referring to the whole lands, old and new, was thus expressed, reserving power "to grant liferent infeftments to their wives and husbands by way of locality only, in

No. 228. place of their terce and courtesy, from which they are hereby excluded not exceeding a fourth part of the lands and others above-written, in far as the same are free and unaffected for the time with former liferents and, after deduction of the interest of the provisions after-mentioned. The power to provide younger children applied to any sum "not exceeding three years' free rent thereof, as far as the same are free and unaffected at the time with former liferents, and after deduction of the interest of former provisions granted by prior heirs, to their children, then resting unpaid." In this last instance, the clause varied in expression from the corresponding clause in the first entail, by the insertion of the words "former" before "liferents."

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In 1820, Sir Charles, being heir of entail in possession, entered in an antenuptial contract of marriage, which, after narrating the two deeds of entail, and his infeftment under the entail 1787, which included the lands, bound himself "to infeft his spouse, in liferent, during all the days of her life after his decease, in case she shall happen to survive him (in certain lands), which lands do not exceed a fourth part of the said taillied lands and estates, in manner after-mentioned; but providing always, as it is by the said two deeds of entail, and by these presents, expressly provided and declared, that the said locality lands are hereby limited to, and shall not exceed a fourth part of the said taillied lands and estate, in so far as the same are free and unaffected for the time with former liferents, and after deduction of the interest of the provisions allowed by the said two taillies to be settled by the heirs and members taillie on their younger children." This provision was granted "under the whole conditions, &c., contained in the two entails," &c.

Sir Charles farther bound himself in virtue of the powers conferred by the said two deeds of entail, to make payment to the younger children "of a sum of money amounting to, and not exceeding three years' free rent of the said taillied lands and estates, so far as the same are free and unaffected at the time with liferents, and after deduction of the annual rents of former provisions, granted by any prior heirs to their children, then resting unpaid." It was provided that this sum of money should be payable "at the first term of Whitsunday, &c. after the death of Sir Charles, and the legal interest of the said provision from and after the death of Sir Charles, to the term above-mentioned, and thereon during the not-payment." This provision was also granted "under the whole conditions of the said two entails." The provisions in favour of the wife and children were declared to be respectively in full of all terce &c. and legitim, &c.

Lady Lockhart was infeft, under the marriage contract, in 1822. Sir Charles died in 1832, leaving Miss Mary Jane Lockhart, and other daughters, but no sons. He was succeeded in the entailed estates by his brother, Sir Norman M'Donald Lockhart, between whom and the daughters of Sir Charles a question occurred as to the amount of their provision.

The Misses Lockhart therefore raised an action against him, in which two questions arose as to the right of Sir Norman to make deduction from the entail, by which the pursuers' provisions were to be computed. The first was as to a sum, which, in virtue of the option conferred by 10 Geo. III., cap. 51, Sir Norman had allotted to pay the improvement-expenditure of his predecessor, under that statute. The second claim of deduction was the liferent-locality of Lady Lockhart, the mother of the pursuers.

The Lord Ordinary found "that in estimating the amount of the provisions of the pursuers, agreeably to the powers in the entails of Dryden and Carnwath, and the exercise of those powers in the marriage-contract of their late father, Sir Charles Lockhart, the defender, the present heir of entail, is not entitled to deduct either the liferent created in favour of Lady Lockhart, or the sum which, in virtue of the option conferred on him by the 10 Geo. III., cap. 51, he has allotted to the payment of sums expended on improvements under that statute by his said predecessor: Therefore, to that extent, repelled the defences, and decerned."

The defender reclaimed, and the Court ordered minutes of debate. These were confined to the right of deducting Lady Lockhart's liferent, the defender not insisting seriously against the other finding.

Pleaded by the Pursuers—

Under the entail 1721, the power to provide younger children, extended to "three years' free rent of the lands, as far as the same are free and unaffected with liferents," and "after deduction of the interest of former provisions" to children, by prior heirs. The co-relative power to provide a surviving wife with a liferent, directed the interest of the children's provisions, computed as above, to be first deducted, and then the liferent of the wife, not to exceed one-fourth of what remained. The necessary effect of this was to postpone altogether the consideration of the widow's liferent, until after the children's provisions were computed. So much so, that the setting aside of the children's provisions, formed a necessary preliminary element, in calculating the widow's liferent. And it involved a practical absurdity to hold, that, in order to compute the children's provision, the widow's must first be deducted, while, at the same time, the children's was expressly to be first deducted, before computing the amount of the widow's. Accordingly, the entail 1787 expressly introduced the word "former" before "liferents," in the understanding that this was consistent with the entail 1721. And, as the interest of the pursuer's provisions was to run from the moment of Sir Charles's death, it was impossible to class Lady Lockhart's as a "former" liferent, requiring to be deducted. Sir Charles made up his right in reference to both entails; and the contract of marriage clearly indicated his intention to grant the largest provision which was competent. The words of the marriage contract, three years' rent, "so far as the lands are unaffected, at the time, with liferents," &c., probably referred to the period when the obligation was entered into; but even if it referred to the time of the death of Sir Charles, his intention clearly

o. 228. was, consistently with his powers under the entail, to compute
 r 18, 1836. provision, under deduction of "former" liferents only, which could
 Donald v. include that arising under the same contract to his widow.
 khart.

Pleaded by the Defender—

The entail 1721 was the original and regulating deed. The entail of 1787 was not meant to vary from it; and, at all events, the words of the former entail had been copied into the marriage-contract, which was the governing deed in this question, so far as not exceeding the entails. Under that contract, the rental was to be computed, "so far as the lands were free and unaffected, at the time, with liferents." The time here meant was the death of Sir Charles, as it was then that the provision was to be ascertained, and, with reference to that event, that it was granted. At that time, the lands were affected with the liferent of Lady Lockhart, she being infert, stante matrimonio, in a liferent right, which commenced instantly on the decease of Sir Charles. The children's provision was not payable till the first term after Sir Charles's death; but her lady's liferent-right affected the lands at the instant of his death. And there was no practical difficulty in computing, simultaneously, the interests of the widow and children, though the amount of each was dependent on the amount of the other, as appeared from the fact that such a calculation had been actually made, by an accountant, and was now submitted to the Court.*

* Opinion and calculations of the accountant (Mr John M'Kean, W.S.) relative to this question:—

"The question proposed may be solved by a simple algebraical equation which will be found annexed hereto, and wrought out for the sake of distinctness perhaps at unnecessary length. I have applied it to a rental of £10,000 per annum, and also to £12,000 per annum, and of course it can be readily applied to any other amount of rental.

"It may be proper briefly to show, by calculation, that the results obtained under these equations meet the conditions of the question,—or that, in the facts of the case, they bring out 'sums for the amount of the widow's liferent and children's provisions, which stand to each other in the mutual relation contemplated in the entail and contract of marriage, viz. the provisions of the children are to amount to three years' rent of the estate, after deducting the widow's liferent, while the widow's liferent is not to cover above a fourth part of the rental of the estate, after deducting the interest or annual rent of the children's provisions.'

"I. Take rental at £10,000.

"The equation, No. 1, shows, that, in this case, the amount of the widow's liferent, in conformity to the conditions of the question, is £2,207.792.

"Gross rental,	£10,000.
"Deduct widow's liferent,	2,207.792

"Remains for rental,	£7,792.208
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"Which, multiplied by	3
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"Gives amount of children's provisions,	£23,376.624
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LORD PRESIDENT.—This is a case attended with very considerable doubt. But it rather appears to me that Sir Norman is entitled to deduct the liferent of Lady Lockhart from the rental, before computing the pursuer's provisions. From

Brought forward,	£23,376.624
" The interest or annualrent whereof is, .	£1,168.831
" Which deducted from gross rental as before,	10,000.
	<hr/>
" Leaves,	£8,831.169
" One fourth part whereof is equal to the amount of the widow's liferent already stated, or,	£2,207.792
" (Thus proving the correctness of the operation)."	
 " II. Take rental at £12,000.	
" The equation, No. 2, shows, that, in this case, the amount of the widow's liferent, in conformity to the conditions of the question, is £2,649.351.	
" Gross rental,	£12,000.
" Deduct widow's liferent,	2,649.351
	<hr/>
" Remains,	£9,350.649
" Which, multiplied by	3
	<hr/>
" Gives amount of children's provisions, .	£28,051.947
" The interest or annualrent whereof is, .	£1,402.597
" Which, deducted from gross rental as before,	12,000.
	<hr/>
" Leaves,	£10,597.403
" One fourth part whereof is equal to the amount of the widow's liferent already stated, or,	£2,649.351
" (Thus proving the correctness of the operation)."	

“ APPENDIX TO OPINION AND REPORT.

“ Equation No. 1.

Suppose free rental = £10,000,
And let x = widow's free liferent annuity,
Then $10,000 - \frac{\{(10,000 - x) 3\}}{4} \div 20 = x$

$$\begin{aligned} 10,000 - \frac{\{(10,000 - x) 3\}}{4} \div 20 &= 4x \\ 200,000 - 30,000 + 3x &= 80x \\ 170,000 &= 80x - 3x = 77x \\ \therefore x &= \frac{170,000}{77} = £2207.792 \end{aligned}$$

Substitute this known quantity instead of the symbolic quantity x on the left side of the equation, and the same value of x is obtained:—Thus,

$$\begin{aligned} 10,000 - \frac{\{(10,000 - 2207.792) 3\}}{4} \div 20 &= x \\ 10,000 - \frac{\{(10,000 - 2207.792) 3\}}{4} \div 20 &= 4x \\ 200,000 - 30,000 + 6623.376 &= 80x \\ 176,623.376 &= 80x \\ \therefore x &= \frac{176,623.376}{80} = £2207.792 \end{aligned}$$

lo. 228. the moment of Lady Lockhart's infestment, her liferent right affected the and it did not require even the death of Sir Charles to occur, as an even sary to call it into operation. Suppose, for example, that Sir Charles committed adultery, and she had found it necessary to divorce him, she would instantly entered on the possession of her liferent, notwithstanding his continuing And I apprehend there are other imaginable contingencies which might have led to the same result, such, for instance, as his transportation for account of any felony. I refer to these possibilities merely to show the principle that the liferent of Lady Lockhart was an existing right affecting the from the moment of her infestment. And when Sir Charles died, I am opinion that Sir Norman was entitled to deduct her liferent right before computing the pursuer's provisions on the free rental.

LORD BALGRAY.—The provisions are limited to three years' free rental estate, "so far as the same is free and unaffected, at the time, with liferent." The question is, what is the precise period intended by the words "at the time." Now I have always understood that in provisions, of a testamentary nature, these, the rule applies tempus mortis respiciendum est. I recollect this rule being applied in more cases than one, which were analogous to the present, particularly in that of Douglas of Mains. The rental was taken as at the death of the party, and the provisions were calculated on that rental. Holding that to be the rule, the question is whether Lady Lockhart's liferent was an existing liferent at the death of Sir Charles. If it was a burden affecting the estate at that moment, Sir Norman is entitled to deduct it, just as he would have been if there had been any permanent burden, such as an augmentation of stipend, for example, at that moment affecting his estate. In short, whatever is a burden at the death of the party is a diminution of the interest of the heir; and I cannot understand that the pursuers can insist upon a certain given sum, as being the free rental, when the estate is actually affected with a liferent right which carries away a fourth, or any other proportion of it. I look upon this locality in the same

"Equation No. 2.

Suppose free rental = £12,000

And let x = widow's free liferent annuity,

Then
$$\frac{12,000 - \{(12,000 - x) 3\} \div 20}{4} = x$$

$12,000 - \{(12,000 - x) 3\} \div 20 = 4x$

$240,000 - 36,000 + 3x = 80x$

$204,000 = 80x - 3x = 77x$

$\therefore x = \frac{204,000}{77} = £2649.351$

Substitute this known quantity instead of the symbolic quantity x on the left-hand side of the equation, and the same value of x is obtained:—Thus,

$$\frac{12,000 - \{(12,000 - 2649.351) 3\} \div 20}{4} = x$$

$12,000 - \{(12,000 - 2649.351) 3\} \div 20 = 4x$

$240,000 - 36,000 + 7948.053 = 80x$

$211,948.053 = 80x$

$\therefore x = \frac{211,948.053}{80} = \underline{\underline{£2649.351}}$

as if it had been an actual terce. The entail took away the right of granting a terce, and gave power to grant this liferent locality in lieu of terce. I view it, therefore, precisely as the surrogate of the terce, and I consider the next heir to be as well entitled to have it deducted, as if the estate had been affected with a terce in favour of Lady Lockhart.

LORD GILLIES.—I concur with your Lordships in the opinion that the defender, Sir Norman Lockhart, is entitled to deduct the liferent locality of Lady Lockhart before computing the pursuer's provisions on the free rental of the estate. The words of the marriage contract provide the pursuers in "a sum of money amounting to, and not exceeding three years free rent of the said taillied lands and estates, in so far as the same are free and unaffected at the time with liferents." The time here referred to, is, I conceive, the time of Sir Charles's death. The pursuers have contended that it meant the time when the marriage contract was entered into; that it was only the liferents then existing which were to be deducted; and that in so far as the rental was then free, it was to be the basis of computation of their provisions. I cannot adopt this construction. Had it been the intention of the parties to make a provision of this sort, nothing could have been more easy, or more necessary, than to say this expressly. But in place of this, the contract, in providing for the succession to be taken up at the death of the father, declares, in general terms, that it is to be three years' free rent "at the time," and that I think regards the time of the father's death, and no other period.

LORD MACKENZIE was understood to express the following opinion:—I consider this to be a very embarrassing question. But the most satisfactory view which I am able to take is this. I feel that there is great difficulty in holding that the liferent locality of Lady Lockhart, which was constituted in the lifetime of Sir Charles, did not form one of the liferents to be deducted before computing the free rental. Still I do hold that it was not to be deducted. Up to the last moment at which Sir Charles had the power of executing a provision for his children—up to the last moment of life—the rental of the estate was undiminished by any right in Lady Lockhart. Had she possessed, not a liferent locality, but a right of terce, which only came into operation after the death of Sir Charles, I think such burden could not have been deducted before estimating the free rental for the purpose of computing these provisions. And, for a similar reason, though certainly not without great difficulty, I hold that the liferent locality ought not to form a deduction either. The rents of the estate were not, at any period of the life of Sir Charles, diminished by the liferent locality any more than they would have been by a terce. And at any time of his making the provision, even at the last moment of life, the rental was free of all deduction on that account. I am aware that there are difficulties which may be opposed to this construction; but less, I think, than to the opposite. And it is easy to conceive that much unexpected hardship might be the result of adopting the defender's construction. The surviving widow may be far advanced in years, and yet if she survives at all, this circumstance is to have the effect of materially and permanently diminishing the provision to the family, on account of a brief and temporary burden on the heir. Nay the case may be harder still. For the entail allows a limited liferent right, in lieu of courtesy, and it might have allowed the courtesy itself to take effect, or an equally extensive liferent in lieu of it. But in such a case, if a husband survived the heiress of entail, his right would have

No. 228. the effect of permanently cutting off the whole provision of the younger children, because it would reduce the free rental, at the time of the death of the heiress, to nothing. I think had the question presented itself in this shape, there is nothing in the words of the marriage contract or the entails to compel the Court to adopt so harsh a construction. And viewing the question which does arise here, to be of similar import, and involving the same principles of construction, I incline, though not without much difficulty and hesitation, to dissent from the opinions expressed by your Lordships, and to adhere to the interlocutor under review.

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y 19, 1836.
lston v.
ninghame.

THE COURT, by a majority, altered, and found that the liferent provision of Lady Lockhart was to be deducted before fixing the free rental on which the pursuers' provisions were to be computed, and quoad ultra adhered.

A. STORIE, W.S.—CUNINGHAMES and BELL, W.S.—Agents.

No. 229. MISSES AGNES and ANN RALSTON, Pursuers.—*Maitland—Paterson*.
JOHN CUNINGHAME and OTHERS (Ralston's Trustees), Defenders.—*M'Neill—Mackenzie*.

Expenses.—Circumstances in which pursuers were subjected in the expenses of an action, which they had raised prematurely, and carried on nimiously, after the only cause of action was removed by the defenders timefully granting the disposition concluded for.

lay 19, 1836.
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1ST DIVISION.
d. Fullerton.
S.

MISSES AGNES and ANN RALSTON were beneficiaries under the trust settlement of the late William Henry Ralston of Warwickhill, who died in July, 1833. In April, 1834, they raised an action against the trustees, to denude of certain heritage in their favour. The trustees had reasonable and sufficient grounds for delaying to do this, partly because the general affairs of the trust were not sufficiently wound up, and partly because the heritage in question was affected with a large heritable burden, which a third party was primarily bound to remove, and the trustees could not, with safety to themselves, grant a disposition in the terms required by Misses Ralston. After some delay and correspondence the action was called in Court, and the defenders were compelled to lodge defences, though they intimated, before doing so, that the heritable burden was now discharged, and they were ready to dispose the subjects to the pursuers, on receiving an obligation from the pursuers to bear a proportional share of any deficiency which might arise in satisfying the trust purposes: and also that they were willing to refer the question of the expenses already incurred. Soon after defences were lodged, such a disposition and counter-obligation were respectively granted and accepted, reserving all questions of expenses. To determine this point, a rescript was made up, notwithstanding certain communings as to a reference.

question of expenses, in regard to which the defenders apparently **No**
 ed with a more sincere desire to enter into a reference than the pur- **May**
 rs did. A record being closed, the Lord Ordinary “found that at an **Ralst**
 ly stage of the proceedings the only cause of action was removed by **Cunl**
 e defenders granting, and the pursuers accepting, the disposition con-
 ded for; and therefore, that there is now no room for a judgment on
 e merits; but found the pursuers liable in expenses.” *

The pursuers reclaimed.

THE COURT without calling on the defenders’ counsel, unanimously
 adhered, and subjected the pursuers in additional expenses.

J. CULLEN, W.S.—W. B. CAMPBELL, W.S.—Agents.

* **NOTE.**—This is one of a class of cases unfortunately not of very rare occurrence, which, after the only substantial ground of action is removed by payment or performance, the procedure is urged on in the same form, and at the same expense if the merits remained undecided, for the absurd purpose of determining who is to pay the trifling costs originally incurred.

* It is needless to observe that in such a case the party to whom this is owing must bear the expenses. Now the Lord Ordinary has no doubt that the blame lies with the pursuers. In the first place, as the truster died in July, 1833, the raising of the action in April, 1834, was in itself precipitate, more particularly when the premises directed by the settlement to be conveyed to the pursuers were affected by an heritable security which another party was bound to remove, and while the pursuers themselves refused to accept the disposition, unless fortified by an obligation in regard to that security on the part of the defenders, which they were not bound to grant. 2dly, The delay of obtaining the removal of the heritable security was not imputable to the defenders, the trustees, and when it was removed, which was not until the 10th December, 1834, the defenders were ready to grant the disposition, under a condition to which the pursuers ultimately acceded, and which indeed only expressed a liability on the part of the pursuers, which, by implication of law, would have attached to them. 3dly, And above all, after the letter of the defenders’ agent of the 7th of January, 1835, written before defences were lodged, binding the trustees to grant the disposition within fourteen days, and offering the expenses then incurred to any person to be mutually chosen, there really remained nothing to dispute,—certainly nothing to justify the continuance of the process. Shortly afterwards the disposition was actually executed by the defenders, and accepted by the pursuers. Remonstrances were made by the defenders’ agent against the continuance of the procedure, and met by answers, which, as it appears to the Lord Ordinary, clearly evince a determination to persist at all hazards in the litigation. Thus the action was forced on through all its forms, and the result is, a record extending to about ninety pages, accompanied by a copy of correspondence of nearly seventy more. The Lord Ordinary thinks it clear that the expense of this must fall on the pursuers.”

No. 230.

y 19, 1836.

ung v.
atson.JOHN YOUNG, Pursuer.—*D. F. Hope.*ALEXANDER WATSON, Defender.—*Robertson.*

Title to Pursue—Expenses—Bankrupt.—Circumstances in which the Court found that an undischarged bankrupt was entitled to insist in an action of damages, without finding caution for the expenses of process.

y 19, 1836.

RT DIVISION.

l. Corehouse.

S.

JOHN YOUNG, S.S.C., raised an action of damages against Alexander Watson, merchant in Leith, on account of the irregular execution of personal diligence. Watson pleaded that Young was an undischarged bankrupt, and must find caution for the expenses of process before being allowed to insist. The following circumstances were founded on, hinc inde in reference to this plea:—In 1819, the estates of John Young and Co. were sequestrated, John Young, S.S.C., being the surviving partner of that company. On his application, the creditors allowed him “to carry on his professional business as a writer, and such mercantile and shipping agency business as he may be able to obtain, until it can be ascertained whether he can procure a settlement and discharge in one way or other under the statute.” This was done on condition that no allowance should be claimed by him for aliment to himself and family. Alexander White was elected trustee. In August, 1826, a final division of the funds of the estate, according to a scheme prepared by White, was made. He applied to the Court for his discharge, as trustee, and obtained it in November, 1827, and the extract of the decree bore, “that, with a view to conclude the sequestration and obtain his discharge, he, in terms of the statute, prepared a final state of his accounts, and of the situation of the estate, and gave intimation to the whole creditors who had produced claims and proved their debts, by advertisement, &c., that a general meeting would be held, &c., on Wednesday the 28th day of March last (1827), to consider the said state, and to give directions for winding up and concluding the sequestration.” That the general meeting approved of the state, and directed him to “report to the Court the amount of certain dividends unclaimed, and to take measures for obtaining his exoneration. The dividends still unclaimed amount to £45, 9s. 6½d. of a penny sterling, and are placed to the credit of the estate in an account kept by the petitioners for the creditors with the Commercial Bank of Scotland:” and that the Court had, on White’s application, discharged him of his intromissions and his trust. During all this time, Young carried on business as a partner, agent, and he continued to do so until the institution of the action of damages, without any of the creditors in the sequestration having taken any step whatever, after the final dividend and the exoneration of the trustee. But Young did not obtain any discharge.

In answer to the dilatory plea of Watson, Young contended that the sequestration was wound up, to all intents, by the final scheme app-

by the creditors, and the division in 1826, followed by the trustee's exoneration and discharge in 1827. The sequestration was no longer a pending process; all his acquisitions subsequent to the period of the dividend were his own, free from the diligence of the creditors; and the understanding of all parties as to this, was evinced by the fact of no subsequent steps of any sort having been taken against him by the creditors. He was therefore entitled to insist in this action, without finding caution for expenses, especially as it was for damages on account of enormous personal diligence.

Watson answered that the exoneration and discharge of a trustee, or a number of successive trustees, did not extinguish a process of sequestration; and that there was one set of provisions in the Bankrupt Act (§ 74), for the trustee's discharge, and a different set of provisions (§ 75 & 76), for winding up the sequestration and bringing it to a close. Besides these, there were other provisions still, for the bankrupt's discharge, which, for important reasons of public policy, required the concurrence of a certain proportion of the creditors, and did not admit of any equipollent. Whenever all the residue of the funds realized was to be divided, such a dividend and scheme must necessarily be described as final; but it was not equivalent to a bankrupt's discharge, otherwise a fraudulent bankrupt would, ipso facto, be discharged, as soon as his estate was divided, and the trustee exonerated of his intromissions. On the contrary, the whole debts of the bankrupt remained in force against him; and he could be subjected to incarceration for payment; and if he realized, or succeeded to any property, it might be attached by a supplementary sequestration. He was therefore precisely in that situation in which a defender was entitled to insist on caution for expenses being found, before he was forced into a trial with the bankrupt.

The Lord Ordinary found "that the pursuer is not entitled to insist in this action without finding caution for expenses of process, and allowed him fourteen days for that purpose." *

* "NOTE.—The question whether a pursuer who has been insolvent is bound to find caution for expenses in initio litis, often depends upon the circumstances of the case. If a sequestration has been entirely abandoned, the trustee exonerated, and the bankrupt restored to the full management of his estate, the circumstance of the bankrupt having, per incuriam, or from some other cause, neglected to obtain a discharge, may not of itself impose upon him the necessity of finding caution. It appears in this case, that after the discharge of the trustee, there was a written agreement between the pursuer and his creditors, that he should be allowed, on the one hand, to carry on certain business for his own behoof, and on the other that he should not demand any aliment from his creditors on consideration of this licence. There is no express condition that he should not apply for a discharge, but virtually it makes part of the transaction. He is, in fact, carrying on business on behalf of the creditors, for whatever gains he may realize, or property which they acquire, after deduction of what is stipulated as an aliment, remain exposed to their diligence, and there is not, and cannot be any evidence that he is restored to a state of solvency. Proceeding on the principle which has regulated similar

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Young reclaimed; and explained to the Court that the extract of the trustee's discharge had not been before the Lord Ordinary, and that his Lordship had thus been led into a material mistake in point of fact, as the agreement with the creditors, allowing him to carry on business for his own behoof, was many years prior to the trustee's discharge, in place of being subsequent thereto. He contended, therefore, that the actual facts of the case were very analogous to those to which the Lord Ordinary had referred in his note, as entitling a pursuer, though undischarged in point of form, to insist without finding caution.

LORD BALGRAY.—There appears to have been a final scheme of division, regularly made out and approved of, and a distribution in terms of it, for the purpose of winding up the affairs of the sequestration. This is quite satisfactory to my mind, as to the pursuer's right now to insist without caution. I think him entitled to do so.

LORD PRESIDENT.—I am of the same opinion. Even if the pursuer's creditors attempted to attach any of his funds for his old debts, they would not make this attempt, I apprehend, under the old sequestration as a subsisting and depending process, but under a supplementary sequestration. As to the effect of such supplementary sequestration, if attempted, it is not *hujus loci*, to decide.

LORD MACKENZIE.—The exoneration of a trustee under a sequestration is a very different thing, in itself, from bringing a sequestration to an end. But here there was also a final scheme of division. And when I add to this the long lapse of time since that scheme was approved of, at a meeting which was expressly called for the purpose of winding up and concluding the sequestration, and that Young has since continued to carry on business without the least step being taken against him by any of the creditors, I have no idea that the creditors could now come forward and say that all Young's interim acquisitions must be viewed as having been made for their behoof, and being vested in them. I think that the interlocutor reclaimed against should be altered.

LORD GILLIES intimated that he also was of opinion that the interlocutor should be altered.

LORD PRESIDENT.—The interlocutors of the Court ought expressly to state that it is in the special circumstances of this case that we alter the Lord Ordinary's judgment.

THE COURT accordingly altered the judgment of the Lord Ordinary, and found that in the special circumstances of the case, the pursuer was entitled to insist without finding caution for expenses.

J. CULLEN, W.S.—T. RANKEN, S.S.C.—Agents.

cases, the defence has been sustained. If such actions were suffered to go on, creditors might set up an undischarged bankrupt to try questions in his own name, but in effect for their own behoof: for they would derive the advantage if he succeeded, while they were not liable in costs if he failed. As soon as the pursuer obtains his discharge, he will be entitled to insist without caution."

ALEXANDER PIRIE HENDERSON, Petitioner.—*Sol.-Gen. Cuninghame*
—*J. Anderson.*

May 11
Hender
Robb.

WILLIAM ROBB and OTHERS, Respondents.—*Maitland.*

WILLIAM WOTHERSPOON, Respondent.—*M'Neill—Russell.*

Process—Bankruptcy.—A resolution of the creditors in a sequestration was complained of as having improperly awarded an allowance to the bankrupt: the trustee was not originally called, and the complaint was not served on him until more than thirty days had elapsed after the date of the resolution: Held that he ought to have been made a party to the complaint, from the first, as he was officially bound to obey the resolution of the creditors, until legally interpellated; and petition dismissed with expenses, in respect he had not been duly called.

ALEXANDER PIRIE HENDERSON, writer in Edinburgh, presented a petition and complaint, stating that William Robb, writer in Glasgow, William Wotherspoon, S.S.C., and Others, creditors of Michael Gilfillan, writer in Glasgow, had voted at a meeting of creditors in Gilfillan's sequestration, for a motion to make an allowance of £30, to the bankrupt, and had protested that the motion was carried by a legal majority; but that the bankrupt's misconduct had forfeited all claim on his part to any allowance, or at least that such allowance was premature; that a counter motion and counter protest had been made at the meeting; and thereupon craving the Court "to recall the resolution now complained of, and to declare the same null and void." The complaint was directed solely against those creditors, who, by themselves or their mandataries had voted for the allowance. It was not directed against, or served upon the trustee or the bankrupt. Answers were lodged by Robb and Others, pleading, that, in point of fact, the resolution complained of had not been carried by a legal majority of the creditors, and did not require to be complained against; but that the petition was incompetent in respect of its not being directed against the trustee,¹ who was officially charged with the execution of the resolution of the creditors, and as more than thirty days had elapsed, the defect could not now be cured, and the petition must be dismissed. The respondents also objected that the petition ought to have been served on the commissioners; and especially on the bankrupt himself, both because his conduct was impeached, and because he had an interest in defending any allowance made to him by the creditors. The Court ordained intimation to be made to the trustee, and also directed him to report whether the resolution had been carried by the legal majority. But eventually the petition was dismissed, on the single ground that the trustee had not been duly called.

LORD BALGRAY.—The trustee should have been called. He not only repre-

¹ Fergusson, &c., Dec. 23, 1825 (ante, IV. 349; or 354, new Ed.)

No. 231. sends the bankrupt estate, and should be called particularly for the sake of absent creditors; but he also should have been called on account of the bankrupt himself. The trustee would have been entitled to defend the allowance of the allowance if he saw cause, and felt it his duty to do so. In all similar cases, the trustee should be a party.

LORD PRESIDENT.—We granted warrant to serve this petition on him, and he is certiorated of the procedure, as we called on him to report on the majority of the creditors.

Dean of Faculty for respondents. But the petition was not served on the trustee till after the lapse of the thirty days. If it was an incomplete and defective petition at that date, the defect was incurable, since it was avowedly against a resolution of the creditors.

LORD GILLIES.—The trustee ought to have been made a party from the first. Suppose the allegations in the petition to be well-founded, and that a resolution of the creditors to pay this allowance to the bankrupt, had been passed, but that it was to be rescinded. If the trustee is not served with the petition and does not know anything, legally speaking, of the procedure in this Court. He is not bound to obey it, unless it be set aside. But if he is not made a party to the cause, he will naturally go on and fulfil the resolution of the creditors, by paying the allowance, and this may happen at the same moment, perhaps, that the creditors are rescinding the resolution, and declaring it null and void. It is clear that the trustee ought to have been made a party from the first, and I think the petition should be dismissed, in respect he was not duly made a party.

LORD PRESIDENT.—Our interlocutor should expressly bear that the petition is dismissed in respect the trustee had not been duly called.

LORDS BALGRAY and MEADOWBANK concurred.

THE COURT dismissed the petition with expenses, in respect the trustee had not been duly called.

C. F. DAVIDSON, W. S.—J. CULLEN, W. S.—W. WOTHERSPON, S. S. C.—AG.

No. 232. **JOHN CAMPBELL, Pursuer and Advocator.**—*D. F. Hope—Maitland*—**DUKE OF ARGYLE and TRUSTEE, Defenders and Respondents.**—*A. Dunlop.*

Property—Acquiescence—Servitude—Precarious Possession.—The tenant of a coal-work having been allowed to form a canal to a neighbouring seaport, passing through the lands, not only of his own landlord, but of an intervening proprietor, without obtaining any written title to the ground occupied by the canal, and being thereafter possessed by him, and subsequently by his landlord and his tenants in the coal-work, for upwards of forty years, paying yearly to the intervening proprietor a certain sum, fixed originally by a valuator, as damages in an action by the intervening proprietor (no prescription having taken place on account of his minority), that the owner of the coal-work had no right of action so as to retain the use of the solum for the purpose of a canal, but was a precarious possessor, without title, whom the intervening proprietor might at any time move.

Process—A.S. 1756.—An act of removing, under the Act of Sederunt, 1756, not a competent form of proceeding for removing such a possessor.

THE late Charles M'Dowall, of Crichen, held a lease from the Duke of Argyle, commencing in 1772, of the coal-works of West Drumlemble, about four miles distant from Campbeltown, with power of making roads, canals, &c., to and from the coalworks, so far as the Duke had power in himself. The country lying between Drumlemble and Campbeltown longed partly to the Duke of Argyle, partly to other proprietors. Campbell of Glencarradale was proprietor of the lands of Moy and Drummoir, holding of the Duke as superior, which formed part of this district, and were let in two divisions, by leases dated in 1777. At the commencement of these leases, M'Dowall was contemplating the formation of a canal, from his coal-works to Campbeltown, which, it was anticipated, would be a work of general advantage to the district. With reference to this scheme, the tenants of Moy and Drummoir were taken bound in Glencarradale in their leases, "that if the canal proposed to be carried from Drumlemble coal-works to Campbeltown, shall be at any time hereafter made or executed," they shall not be at liberty to give any obstruction thereto, they being always "entitled to any reasonable damages they might sustain thereby, as the same shall be ascertained by skilful men, chosen for that purpose."

In 1786, M'Dowall addressed the following letter to certain parties possessing moss-rooms in the line of the intended canal:—"Whereas, I now understand that the line of my intended coal canal passes through several moss-rooms possessed by different people, and as the public utility of it is evident, I find and hope that no opposition will be made to the carrying it into execution; and I hereby promise to pay annually whatever damage shall be done to the whole or to any particular person's moss-rooms, and this I shall do as the same shall be ascertained by two neutral men mutually chosen by you and me."

To this letter the parties addressed returned an answer in the following terms:—"We are favoured with your letter of this date, proposing that you should pay us annually whatever damage shall be done to any moss-rooms belonging to us, or either of us, through which your coal canal is to run, and the same will be ascertained by two men mutually chosen. We think that you, that the intended canal will be a work of great public utility, and so far as we are interested, we will heartily give you all the encouragement in our power, consistent with our private interests; and we are only to observe, that, suppose you were to die during the currency of your lease of said coal-work, or when your tack thereof expires, your heirs, or the next lessee, are not bound to pay us any compensation or damages for the injury done to our mosses. Therefore, we will agree to your proposal only on the terms that his Grace the Duke of Argyle (of

May
Camp
Duke
2d
Lord

No. 232. whom we hold), oblige himself (to be signified by his chamberlain your heirs and assignees, or the next lessee of said coal-work at Drumlemble, will be bound to pay the annual damage you now engage us, or we will accept of immediate payment of the total damage done to our mosses respectively, or an equivalent in moss-room same shall be comprised by neutral men to be mutually chosen in case of variance between them, by one of them and an overseer chosen by them, such moss-room to be adjacent, or as near as convenient to the moss through which your canal passes. We hope these offers show our sincere wishes to give no interruption to your proposals but to give every aid to it in our power, so far as we are not parties sufferers."

Thereafter, the canal was commenced, and completed about the year 1791, M'Dowall defraying the expenses of the work. No written instrument was entered into, defining the nature of the right or title which M'Dowall carried the canal through the lands in question, and across its solum and banks. In 1791, a surveyor was employed to report what payments should be made by M'Dowall to the several tenants, proprietors, in the line of the canal, in consideration of the canal being through their lands. For Moy and Drummoir the sums were estimated about £4, 10s. per annum, and were stated in the report as the "damages which the farms sustained by the canal." At the termination of M'Dowall's lease, in 1797, his representatives were allowed by the Duke, to whom the matter was referred, the sum of £1615, to be paid by the Duke, as the value of the canal. After this period, the Duke's tenants in the Drumlemble coal-works, continued to possess and use the canal, in the same manner as M'Dowall had done; his Grace made yearly payments therefor to the tenants of Moy and Drummoir, and at the expiry of their leases, in 1806 and 1812 respectively, to the proprietors, and also to the other parties through whose property the line of the canal lay. These receipts generally bore to be for payments on account of "damage occasioned by the coal canal," sometimes on account of "rent or damage for ground occupied by the coal canal;" and, lastly, for "the rent of the ground" so occupied.

Campbell of Glencarradale, in 1793, sold the lands of Moy and Drummoir, to Campbell of Glensaddell, whose son, the present proprietor, was born in 1797, a year before his father's death, and was in minority in 1818.

In this state of matters, Campbell of Glensaddell, as proprietor of these lands, in December, 1833, brought an action of removing the Act of Sederunt, 1756, before the Sheriff of Argyleshire, against the Duke of Argyle, and Mr Selkirk, his trustee, as pretended tenants and possessors of that part of the lands of Moy, &c., occupied by the canal, concluding that the defenders should be decreed to remove at Winton, on the 1st day of May, 1834.



The defence was, that the Duke possessed the canal and its solum by No. right of property, or at least of servitude, and not of tenancy.

The Sheriff, without closing the record, dismissed the action as incompetent. May 19
Campbell
Duke of

Campbell advocated the process, and, at the same time, raised an action declarator and violent profits against the Duke and Selkirk, with which the advocacy was subsequently conjoined, setting forth that he was heritable proprietor of the lands of Moy and Drumoir, and that the Duke was tenant of the solum of the part of the canal in question, which he possessed by tacit relocation, for payment of a yearly sum as rent, without a written lease or other written title, and that a process of removing had been instituted as above-mentioned, and concluding that it should be found and declared that the portion of the lands in question so possessed by the Duke, was a part of, and comprehended within the lands belonging in property to the pursuer, and that the defenders should be ordered to cede possession, and make payment of a sum of £50 of violent profits, for their possession after Whitsunday, 1834.

In defence against this action it was pleaded, *inter alia* :—

The action is rested on the assumption that the defenders are tenants of the subject in question; but the evidence furnished by the leases of the tenants of Moy and Drumoir, and by the letter of M'Dowall and the definitive answer in 1786, and especially by the receipts granted for the annual payments made on account of the canal, disproves the allegation of tenancy; that it was not to be presumed that a mere tenant on a verbal lease would engage in so great and expensive an operation as the widening of the canal; but that M'Dowall's right, to which the defenders succeeded, must have been a right of a permanent character, and that although not reduced to writing, the pursuer was barred by acquiescence in questioning it.¹

The pursuer answered :—

The defenders can show no title to the ground occupied as a canal, and they have only been allowed to use it on the footing of their paying yearly damages occasioned by such use, or the yearly rent of the land so used, and have thereby acknowledged that they were possessors precariously, or latterly, as yearly tenants, their pretensions to a permanent right, whether of property or servitude, to continue to use the subject in question are groundless; whatever right M'Dowall may have acquired in consequence of any alleged transaction can be of no avail to the defenders, as such right would fall when M'Dowall ceased to be tenant; the consent to the making of the canal granted by the proprietors through

¹ Lord Melville v. Douglas's Trustees, May 29, 1830, ante, VIII. 841 (Lord President's Opinion).

No. 232. whose lands it was carried, demonstrated that the right to its solum and banks was in these parties; the present case is not to be assimilated to Lord Melville's, where the excambion, though verbal, was admitted, and the only question was as to the extent of the ground excambied, while here there is no admission of any transaction which could be the subject of acquiescence.

May 19, 1836.
Campbell v.
Duke of Argyle.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : *—“ In the advocacy, advocates the cause, alters the interlocutors of the Sheriff complained of, and decerns in the removing in terms of the original action : in the declarator and violent profits, decerns in the declarator and removing (de novo) in terms of the conclusion of the libel : But before answer as to the claim for violent profits, appoint the cause to be enrolled that parties may be heard thereon.”

The defenders reclaimed.

LORD GENLEE.—The declarator does not proceed exactly on the same ground

* “ The annual payments which the defender (or his tenants) has uniformly made, very plainly for the use of the ground occupied by the canal, for upwards of fifty years, are inconsistent with his right to the possession being any other than the right of a tenant. Such a payment for the use of a servitude right is without precedent, and might often turn what the law holds to be the servient, into the truly dominant tenement; and as to its being considered as a feu-duty, or ground annual, it is enough to say, that those are payments only incident to proper feudal rights; for the constitution of which, in the absence of all written title or right by prescription, there are here no elements. It was strongly argued, that it was absurd to suppose that any man would lay out a large sum in constructing a canal upon so precarious a right, as a verbal, and consequently annual, lease of the ground which it occupied. But really it is not much less absurd, that such a work should have been carried through a neighbour's property, without a scrap of writing to settle the terms of occupancy, and where neighbours are on good terms, and there is both a desire to oblige, and a common interest to keep the work going, instances are to be met with of a rash and exuberant reliance on the result. Accordingly, the defender has actually had the undisturbed use of this ground, on very favourable terms, for upwards of fifty years, though it is apparent that for the latter half of that period, the pursuer at least and his agents were fully aware of the true state of the right. The Lord Ordinary does not think it doubtful that the annual payments were, from the very first, in great part for the use of the ground taken up by the canal, and not for damage done to adjoining ground. If this were not the case, then the land must have been given gratuitously, a thing never to be presumed, and which is distinctly contradicted by the whole circumstances of the case, which demonstrate that the transaction was strictly onerous, and exclusive of all notion of donation. It was not immaterial, perhaps, for the tenants, who probably had no power of subsetting, to call the payments made for the land taken off their possessions damage, rather than rent; but as soon as their leases were up, and the proprietor comes to draw those payments for himself, they take the proper name of rent; and it is very remarkable, that, when (probably from copy in the old form) the word damages had been first written, it appears that the word rent is anxiously added and interlined before the receipt is given up to the defender.

“ The parties (when this interlocutor is final) will of course settle for a new permanent lease at a new rent; and it will probably be thought right to adjust the claim for violent profits at such settlement, without farther litigation.”

the summons before the sheriff, which is referred to only narrative in the declarator. I think the sheriff's interlocutor was right, and that his decerniture in the process of removing should have been adhered to. As to the merits of the declarator I have no doubt whatever of the property being in the pursuer, and that no right was ever constituted in the Duke of Argyle. The present has no resemblance to Lord Melville's case, for it is not alleged that any transaction was entered into; and it struck me as an extraordinary argument that we must presume an agreement because it was absurd to have proceeded without one. M'Dowall having applied for leave to make the canal secured nothing for the Duke, for we cannot infer that his Grace must necessarily succeed to M'Dowall's right. No writing having intervened no perpetual burden could be created. The tenants of Moy and Drumoir being satisfied with surface-damages was not to conclude the proprietor. I think it of no consequence that the payments are stated in the receipts to be for damages;—there is no evidence of a lease, but they were certainly annual payments on account of ground taken up by the canal. Had the proprietor for forty years taken these payments, I will not say that a servitude could not have been constituted, but the forty years of prescription exclusive of minority are wanting.

LORD JUSTICE-CLERK.—I agree entirely with Lord Glenlee. This is just a case of property occupied and held without a proper title.

LORD MEDWYN.—I am also of the same opinion. In regard to the advocacy, I think the sheriff did right. But the decree of the Lord Ordinary in the declarator is well founded. There is no room for the prescription of a servitude, as the possession had was only twenty-nine years exclusive of the pursuer's minority. The party to the original transaction was not the Duke of Argyle, but his agent, M'Dowall. It is immaterial whether the payments are styled damage rent—they ascertain what value was taken for the ground occupied by the canal. This case stands quite clear of that of Lord Melville.

THE COURT recalled the first part of the interlocutor, and remitted simpliciter to the sheriff, and adhered quoad ultra, reserving all questions of expenses.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—**TOD and ROMANES, W.S.**—Agents.

ARTHUR KENNEY and MANDATARY, Pursuers.—*M'Neill—R. Robertson.* No.

SIR PATRICK WALKER, Defender.—*D. F. Hope—Anderson.*

Proof—Partnership.—Held that a partner must be presumed cognizant of the contents of the books of the company; and that, where a sum of money was consignedly advanced to retire a bill due by the company, and a question afterwards as to whether the money was lent by A (a stranger) or B (a partner), it was sufficiently proved against another partner of the company, to be the money of A, by a balance in the company's books, made to that effect, at the time; and letters of a contemporaneous company's cashier and book-keeper of a similar import.

SIR PATRICK WALKER of Coates, and **Alexander Robertson, W.S.**, 1st Div. F. are partners in the concern of the Observer newspaper. Robertson had

No. 233. a client, Arthur Kenney, residing abroad, who placed money in his requesting him to invest it for his behoof. In May, 1829, it was sary to retire a bill for £2649, 11s. 6d., due by the Observer news and Robertson applied £2650 of the money of his client Kenney so. He did this by paying over the sum to Scott, the cashier and keeper of the Observer, who retired the bill. Scott, of the same made this entry in the cash-book of the Observer:—

May 20, 1836.
Kenney v.
Walker.

“ 1829. May 18.—To cash in loan from Arthur Kenney, Esq.
the hands of Mr Robertson, £2650
By retired bill of 16th February last for 2649 1

The following entry was also made by him in the ledger of the Observer:—

“ Arthur Kenney, Esq., 1829, May 18th.—By sum in loan from per Mr Robertson, £2650.”

On the day of the loan, Scott addressed a letter to Kenney, acknowledging the loan, and promising a bill by the proprietors of the Observer when required; and he inclosed this in another letter addressed to Robertson, as Kenney's agent. Robertson wrote on the back of the letters, a description of them as documents relative to the loan by Kenney to the Observer, and placed them among Kenney's other paper securities. Robertson also intimated the loan to Kenney, and the intimation was acknowledged in his correspondence with Kenney. A short period, Robertson was in advance for the Observer. Robertson was employed largely in providing funds for the Observer, which were raised by bonds, bills, and cash-credits, in which both Sir Patrick and Robertson were obligants. Robertson himself kept an account of these transactions, and, from 11th November, 1829, to 15th May, 1833, he regularly debited the Observer, in account, with the interest due on the loan to Kenney. On 2d August, 1833, Robertson, by minute of agreement with Sir Patrick, conveyed to him the whole of his interest in the Observer; and the minute bore “the debts due by the proprietors at that date, appear, by a state furnished by Mr Robertson, to amount to £11,000 or thereby, conform to state signed by the parties relative to this agreement, whereof about £2800 consist of advances made by Mr Robertson himself, and £4150 of money borrowed from clients of Mr Robertson and applied in payment of debts of the concern.” The following statement of debts was appended, as relative to the minute:—

“ Royal Bank,	.	.	.	.	£2346 2
Bank of Scotland,	.	.	.	.	2534 17
Cunningham's trustees,	.	.	.	.	2200 0
Mr A. Kenney,	.	.	.	.	2650 0

The minute contained a reservation of Sir Patrick's right to object to the state of debts due by the Observer, if it was erroneously made up. Robertson was afterwards sequestrated, and when Kenney and his man- May Ken Wall
tary raised action to recover payment from Sir Patrick Walker, Kenney was met by the defence that he had lent his money to Robertson alone, and must look to Robertson as his sole debtor; that this appeared from the circumstance that Sir Patrick Walker had never signed any obligation for the sum, as was usual in regard to other loans to the Observer; and that he (Sir Patrick) did not personally know the entries in the books of the Observer, or in any way recognise the loan as being from Kenney; that Scott, the book-keeper, had no power to bind the partners, by promising an obligation to Kenney; and that between Robertson and Sir Patrick, there existed claims at Sir Patrick's instance, sufficient to extinguish the loan by compensation.

Kenney answered, that the sum of £2650 being confessedly applied on 18th May, 1829, to retire a bill due by the Observer, the only question was, whether this sum was advanced by a loan from him, or from Robertson. The books of the concern (which every partner was bound to know), and the relative letters of the book-keeper (which were good evidence to the effect of showing the money to be Kenney's and not Robertson's), were abundantly sufficient to prove the money to be the pursuer's. Besides which there was not only the payment of interest to him, which Robertson always entered in the account he kept with the Observer, but the acknowledgment of the debt, as the pursuer's, in the minute of agreement signed by both parties in August, 1833.

The Lord Ordinary "repelled the defences, and decerned against the defenders in terms of the conclusions of the libel; and found them also liable in expenses." *

* "NOTE.—This seems a very clear case. 1st, Though not expressly admitted by the defenders on the record, it was admitted at the debate, that, in the year 1829, Alexander Robertson, then a partner of the other defender in the concern of the Observer newspaper, and also agent for the pursuer, had, in this latter character, a considerable sum of money belonging to the pursuer. 2dly, It is admitted by the defender that, on the 18th of May, 1829, a sum to the amount libelled 'was paid into the hands of the cashier' of the company by Mr Robertson, for the purpose of retiring a bill for that sum, then due by the company, and that it was so applied. 3dly, It is admitted on the record, that the money so paid by Robertson to the cashier was not any part of the company funds in the hands of Robertson. Indeed, that is sufficiently clear from Robertson's account with the company, which shows that he was then largely in advance for the company. But it is enough to state, that the fact is admitted by the defender, both in the defence and the record, that the money so paid by Robertson to the cashier, 'was advanced by Robertson to the concern on his own account,' no doubt under the explanation, that though 'he might have made the advance from his client's money in his hands,' he, and not the client, became the creditor of the company by the transaction. 4thly, But this qualification is disproved by the books of the company, both the cash-book and ledger bearing, that the money so advanced was the

No. 233. The defender reclaimed.

May 20, 1836.
Gibson v.
Stewart.

LORD PRESIDENT.—The defender was a partner in the concern of the Observer newspaper. The entries regularly made in the books of that company, and by their own book-keeper, state the loan, at the time of the transaction, as a loan from the pursuer. It is no answer to this, when the defender alleges that he did not know the entries in his own books; for the books of the company were his, and the partners must be presumed cognizant of their contents. A partner cannot escape from the evidence afforded against him by his own books, by merely alleging that he never looked into them. And I certainly will not take the allegation off the defender's hands, that he never looked into the books of this concern from 1829 till the separation of the partners in 1833. The interlocutor is clearly right.

LORD BALGRAY.—I am of the same opinion. I never, in any case, saw stronger or more conclusive evidence that the company borrowed, and the pursuer lent, the sum in question.

LORDS GILLIES and MACKENZIE concurred.

THE COURT adhered, and awarded additional expenses against the defender.

J. BENNETT, W.S.—A. GOLDIE, W.S.—Agents.

No. 234. WILLIAM GIBSON and MANDATARY, Pursuers.—*Miller*.
DUNCAN STEWART, Defender.—*Sol.-Gen. Cunningham—Marshall*.

May 20, 1836. *Expenses*.—Sequel of the case reported ante, VI. 733; IX. 525; and
1st DIVISION. XII. 683, which see. After the last remit from the Court, the Lord Ordinary, "in conformity with the special findings contained in the inter-

money of the pursuer, borrowed of him, and advanced to the company through the hands of Mr Robertson. 5thly, This is confirmed, if any confirmation was necessary, by the letters of the cashier, quoted in the 5th article of the concordance, which letters, though of course not forming an obligation (which the cashier had no power to contract for the company), are good articles of evidence to show from what quarter the advance to the company actually came, and was understood to come; and it is also confirmed by Robertson's account with the company, which does not contain this advance as an article to his credit with the company. 6thly, In the settlement which took place between Robertson and the other defender in 1833, the minute signed by the parties distinguishes the debt due by the company to the partners from those due to third parties; and while the debt due to Robertson is set down at about £2800, there is also stated the debt libelled as due to Mr A. Kennedy, being confessedly a mere error in writing the name of the pursuer.

"In these circumstances, the Lord Ordinary must hold the evidence and admissions as quite sufficient to disprove the defence, that the money was advanced to the company, not by the pursuer but by Robertson, a pretence evidently resorted to in the face of the company books, for the purpose of enabling the defender to plead compensation against Robertson in the transactions remaining unsettled between them."

itor of the Court, of date the 6th of June, 1834," decerned against the No
 offender for various specific sums, and certain interest, and granted war- May
 ant for interim-extract: his Lordship at the same time found Stewart Scott
 able to the pursuer in the expenses of discussing two of the conclusions of Mo
 f the libel, but subject to such modifications as might seem just. Stew-
 rt reclaimed generally against the interlocutor, but explained at the ad-
 ming, that though this was done, in point of form, with a view to an
 appeal, it was only the question of expenses which he was substantially
 to discuss. Parties being heard on this question,

THE COURT adhered, and awarded additional expenses.

J. MACKENZIE—J. T. MURRAY, W.S.—Agents.

DAVID SCOTT, W.S. Pursuer.—*D. F. Hope—Wilson—Craufurd.* No
 EARL OF MORAY, Defender.—*Walker.*

Process—Reduction—Contract.—A party agreed to feu from a superior a certain
 lot of ground, with reference to a plan, on which he subsequently erected buildings;
 and thereafter entered into a feu-contract, whereby it was provided that no claim
 should lie at the instance of either party against the other on account of any variation
 which might appear between the actual measurements and the measures as de-
 cerned on the plan; some years afterwards, the feuar brought an action of damages
 against the superior, alleging that the latter, in marking off the boundaries, had
 deviated from the original plan, and averring that he had been led to enter into the
 contract through the superior's mala fide concealment of certain variations made
 from the true line of the plan in staking off the ground;—held, that, although such
 argument might be a relevant reason of reduction, it could not in this action of
 damages be taken as a ground for setting aside the contract per exceptionem,
 without a reduction in proper form, and that the grounds of the action were excluded
 by the contract, so long as it stood unreduced.

In the year 1822, the Earl of Moray and the pursuer Scott, W.S., May 2
 entered into an agreement whereby the latter became bound to feu from 2d D
 his lordship a certain piece of ground for building, as exhibited on a plan Lord
 referred to on the occasion. The boundaries of the area and the build-
 ing stances were marked off in terms of the agreement by professional
 persons employed by the Earl, and Scott thereafter erected houses there-
 on. In 1824, the parties entered into a regular feu-contract, which con-
 tained, inter alia, the following provision:—"Declaring always, as it is
 hereby provided and declared, that as the measurements of the said
 several areas or lots of the plot or piece of ground hereby feued out and
 opened to the said David Scott, as marked on the said plan, are ascer-
 tained with as much exactness as can at present be done, no claim shall
 lie at the instance of the one party against the other, of abatement from
 the feu-duties after-mentioned, nor any other claim what-

No. 235. soever, for or on account of any variation that may appear from these measures, after the different houses shall be erected on the said plot or piece of ground, and more accurate measurements made thereof.”
 May 20, 1836.
 Scott v. Earl of Moray.

Some years after the date of the feu-contract, Scott raised action against the Earl of Moray, alleging that, in marking off the boundaries of the building stances, there had been a deviation from the original ground-plan, in consequence of which he had sustained injury and damage in his building operations, and concluding that the Earl should be ordained either to pay him a certain sum as the price of the houses which had been built, on receipt of which the houses were to be made over to his lordship, or to pay a sum of £12,000, more or less, in reparation of the loss and damage he had sustained in consequence of the deviation from the plan.

The Earl, while he denied the fact of the deviation, pleaded in defence that the provision in the feu-contract of 1824, above quoted, excluded the claims of the pursuer.

Scott averred on the record that he was led to enter into the feu-contract containing the provision in question through the Earl's improper and mala fide concealment of certain deviations from the true line of the plan and certain consequent encroachments on the plot of ground fenced to him, clandestinely made by his lordship's architect in staking off the ground, and pleaded that the defence founded on the feu-contract should be repelled, and the cause remitted for trial by jury.

The Earl, on the other hand, contended that the feu-contract of 1824 must be held to embody the deliberate and final agreement of the parties respecting the subject in question, and that the pursuer, while not venturing to bring a reduction of the contract, could not shake himself loose from its provisions, and there was no room, therefore, for the remit.

The Lord Ordinary pronounced a special interlocutor,* in which he found, that, although the pursuer's averments above mentioned “might be relevant to infer the reduction of the said feu-contract in toto, or of the particular declaration and provision in question, they cannot be taken as grounds for setting aside the said contract, or declaration and provision, per exceptionem, and without a reduction in proper form: That so long as the said feu-contract, and provision and declaration therein contained, stand unreduced, they afford a complete defence against all the conclusions of this action, and totally exclude all the grounds thereof.”

* With reference to a proposal made by Scott that the process should be aided till a reduction of the feu-contract and provision in question should be brought and conjoined with it, the Lord Ordinary observed in the note to his interlocutor:—“The pursuer at one time proposed that this process should be aided till a reduction of the feu-contract and declaration should be brought and conjoined with it. But as this would obviously have required a new record, and as that record would be equally open to the pursuer after the present action was disposed of, the Lord Ordinary could not refuse to take it up on the record, which had been—

his Lordship therefore, “on the whole matter, sustained the defence No. 1. and on the feu-contract and the above recited declaration and provi- May 2
in therein, and assoilzied the defender from the conclusions of the Reid v
tion.”

Scott reclaimed.

THE COURT being of opinion that under the contract as it stood the pursuer's claim of damages was groundless, and that it was incompetent to attempt to reduce the contract indirectly without bringing a regular action of reduction, adhered.

DAVID SCOTT, W.S.—WALKER, RICHARDSON, & MELVILLE, W.S.—Agents.

JOHN REID, Petitioner.—*D. F. Hope—Paterson.*

GEORGE BERRY, Petitioner.—*Robertson—Penney.*

Competing.

Bankruptcy—Trustee.—Circumstances in which the personal disqualification of diverse interest was found not to be, hoc statu, sufficiently established against a candidate for the office of trustee on a bankrupt estate.

WILLIAM STRATHENRY, flaxdealer, carried on business both in Edin- May 2
burgh and Kirkaldy. His estates being sequestrated, John Reid, agent 1st
of the Commercial Bank at Kirkaldy, was elected interim-factor. His 1st
vote was on a sum of £3617, 3s. 5d. Of this sum, £1572, 9s. 4d. Bill-C
was composed of bills in which Strathenry was not acceptor, and in all
which the acceptor's security was valued, at a nominal amount, of about
halfpenny or a farthing per pound. At the election of a trustee, Reid
was a candidate, and, in support of himself, voted on a sum of £3044,
11d. which was due to him as bank-agent. The difference between this
sum and the former was, in part, occasioned by the obligants on some of
the bills, whose security had been nominally valued, having retired these
bills when they fell due. George Berry, merchant in Leith, was also a
candidate for the office of trustee, and a petition for confirmation was
presented in his name, and another in name of Reid. There was a third
candidate, named Stoddart, who presented no petition, but who address-
ed letters to Reid's agent and to the clerk to the process, intimating that

heavily closed, and on which parties were ready to debate. The case was heard
standingly at great length,—the pursuer strenuously contending that the clause
of the contract did not bear the construction alleged by the defender, and that it
was not necessary either to bring a reduction, or to offer to prove mala fides. The
Lord Ordinary was farther induced to refuse the motion for sisting from foreseeing
the great difficulty that would come, in practically disposing of the case, even if
a reduction were obtained—our law generally rejecting the principle of the
quantum minoris in such cases—and an actual restitutio in integrum being
impossible in the circumstances.”

No. 236. he meant to insist on his having been duly elected, in case Reid was not confirmed.

May 21, 1836.
Reid v. Berry.

Berry had stated personal objections to the eligibility of Reid, at the meeting for choosing the trustee ; and he now insisted in them, as prejudicial to any enquiry into the legal majority of votes. These were,

1st, That Reid resided at Kirkaldy, which was not the seat of the bankrupt's trade.

2d, That he had acted mala fide, in putting a false and nominal value on all the securities for bills, while he knew the security, in many instances, to be good for the full amount ; and that he had collusively kept some bills ex facie unretired, to serve the purpose of a vote, though funds had been placed in his hands, by the debtor, to retire them ; and,

3d, That he had an interest adverse to the creditors.

Reid, answered—

1st, That the bankrupt carried on business at Kirkaldy, as well as Edinburgh ; and farther, that, even if he had traded only at Edinburgh, it was still the majority of the creditors who could best dispose of any objection founded on the residence of the trustee.

2d, That he had acted bona fide in valuing the securities as he did ; that he had not collusively kept any bills unretired, after receiving funds to retire them ; and that such inquiries were out of place, at this stage, as they might affect the validity of his vote, but were by no means of such a nature as to disqualify him for the office of trustee, if, in the ensuing investigation, he retained the legal majority of votes ; and,

3d, That he had no interest adverse to the general body of the creditors, except such as was common to all creditors whatever, where there was a fund inadequate for full payment, and where every creditor had an interest to cut down the claim of another creditor as far as possible. But if this was a ground of exclusion, no creditor of a bankrupt could ever be elected trustee.

The Lord Ordinary, “ in respect that it appears to him that, from the nature of the claims made against the estate of the bankrupt by the said John Reid for himself, or as agent for the Commercial Bank, he has or may have an adverse interest to that of the other creditors on the estate, and that questions in the ranking are likely to arise, in which he cannot give an impartial judgment, found that he is ineligible to the office of trustee on the estate, and refused the desire of his petition for confirmation : Found the said John Reid liable in the expenses of this competition, appointed an account thereof to be put in, and remitted to the auditor to tax the same, and to report : And in respect that full notice of the above objection to the said John Reid was given at the meeting for the election of trustee, and that the only other petition for confirmation now before the Lord Ordinary is that for George Berry, confirming the nomination of the said George Berry as trustee on the sequestrated estate within mentioned : Ordained the bankrupt, within three u

from this date, to execute and deliver a disposition, or other deed or deeds of conveyance, in terms of the prayer of the petition; and adjudged, decreed, and declared in terms thereof, and of the statute; but super-added extract until the first box-day," &c. *

Reid reclaimed, and contended that he had no adverse interest to the other creditors, except that of being a large creditor upon an inadequate fund, the bankrupt estate.

Berry, without insisting on adverse interest, went into the alleged irregularity of putting a mala fide and nominal value on the securities.

LORD GILLIES.—All that does not go to support the interlocutor of the Lord

* "NOTE.—The Lord Ordinary is not of opinion that the objection to Mr Reid on the ground of his residence at Kirkaldy is a good objection; because it is distinctly stated in Mr Berry's condescendence, Article 3d, that the bankrupt transacted business both in Edinburgh and at Kirkaldy. Neither does he think that there is any evidence of such proceedings for obtaining votes as would disqualify Mr Reid from being trustee. But the way in which his claim is made up, is very particular. The Lord Ordinary understands well enough that, to a large extent, that is, in all the bills in which the bankrupt was the principal obligant, Mr Reid had no occasion to value the securities of the other obligants. But, in the other cases where he was bound to value them, he has done so in a manner which must necessarily create an embarrassment, if he were called upon to judge of these claims in the ranking. The Lord Ordinary does not think that there is anything in the nature of these claims which would entitle him to reject Mr Reid's vote upon them, and he seems to have a clear majority of value independent of them. But there is a serious ranking to follow, and he can easily conceive that very important questions may arise out of the nature of these claims, and the deductions to be made from them, which renders it not expedient that Mr Reid should be the person who shall be called upon to judge of them.

"It is clear law that a man being a creditor is no objection to that man being trustee. But the Lord Ordinary understands the Court to have uniformly held that, if there be any probability, from the nature of his claims, or from his situation in regard to the bankrupt estate, that he may have an adverse interest to that of the creditors in general, that is a sufficient ground for refusing to confirm him as trustee. And the objection is particularly strong in this case; because Mr Reid is in reality elected by means of his own vote, each of the other candidates having had a majority of votes against him, independent of it.

"The Lord Ordinary has been in some difficulty as to the effect of finding Mr Reid ineligible, from the circumstance that Mr Berry had not a majority of votes, supposing Reid to be out of the question, the majority in that case being for a different person, Mr George Stoddart, and that, though Mr Stoddart has put in no petition, he had sent a letter to the clerk of the process, stating that he did not mean to give up his claim in case one or both of the other competitors should be found ineligible. But on consideration, he is of opinion that he cannot attend to any thing but the petition before him, and that, as Mr Stoddart has put in no petition for confirmation, and cannot now do so, it must be held that he abandoned the competition; and, therefore, that Mr Berry being now the only party demanding confirmation, is entitled to obtain it. He was referred to a case of Hutchison v. Liddell, June 13, 1821, but from the short note of it in Shaw, the Lord Ordinary would hesitate to rely on it, as there seems to have been something very particular

The cause, however, not being by any means clear, and as he understands that no injury can arise from the delay, the Lord Ordinary has thought it proper to add extract till the box-day."

- No. 236. Ordinary: it is taking up different ground from his. I see no sufficient ground yet stated to satisfy me that Reid is disqualified by adverse interest.
 —
 y 21, 1836. The other Judges concurred, and
 mpleton v.
 otherspoon.

THE COURT altered the interlocutor of the Lord Ordinary, and found, *hoc statu*, that adverse interest was not proved; and remitted to the Lord Ordinary to proceed *quoad ultra*.

J. YOUNG, S.S.C.—HOPKIRK and IMLACH, W.S.—Agents.

- No. 237. JAMES TEMPLETON, Suspender.—*Robertson—W. Bell.*
 WOTHERSPOON and MACK, and OTHERS, Chargers.—*D. F. Hope—Paterson.*

Process—Expenses—Agent and Client.—1. In a multiplepoinding, a claimant obtained successive decrees by default, after much delay on the part of the nominal raiser; the claimant's agent extracted an interim decree for expenses, and charged; the raiser presented a bill of suspension (1.) of that charge, and (2.) as of a threatened charge for the alleged fund in medio: held that he must pay the whole of the claimant's expenses in the multiplepoinding, as a condition of passing the bill. 2. Observed that the Court cannot listen to the plea of an agent's misconduct or irregularity, as a ground for exempting his client from liability for expenses thereby occasioned to the opposite party.

- ay 21, 1836. ON the death of the late John Templeton, he left a settlement appointing his oldest son, James Templeton, farmer, Lanarkshire, his executor.
 —
 ST DIVISION. William Templeton, brother of James, acting for himself and the rest of
 ord Medwyn. the family, raised a multiplepoinding in name of James, in May, 1832,
 ill-Chamber. for the purpose of obtaining a full account of the funds and an adjust-
 B. ment of the various interests of the legatees. In June, 1832, James
 Templeton lodged objections to the competency of the action, accom-
 panied by a denial that he held any funds. The Lord Ordinary appoint-
 ed William Templeton, the real raiser, to lodge a condescendence of the
 fund in medio, and James Templeton to answer it. A condescendence
 stating the fund at £1012, 10s. 6d. was lodged in September, 1832. In
 December following, the Lord Ordinary allowed this condescendence to
 be seen, and appointed parties to debate on the competency. After
 various delays, the Lord Ordinary, in May, 1833, repelled the objections
 to the competency and ordained answers to the condescendence to be
 lodged in eight days. These answers were lodged on 10th June, and
 an order to revise was pronounced on 11th July. The revised condes-
 cendence was lodged on 4th January, 1834, but the lodging of the
 revised answers was delayed on various grounds, till 10th July, 1834.
 The case being then enrolled for decree, a draft of the revised answers
 was produced at the bar, and the Lord Ordinary continued the case till
 next day, when, on the understanding that the revised answers had been

lodged, his Lordship made avizandum with the process. After this the case lay over, but without the revised answers having been lodged. In May, 1835, the cause was again enrolled by William Templeton for decree, and an interlocutor was pronounced, holding him confessed on the fund in medio, and decerning against him. He reclaimed and produced his revised answers, whereupon the Court remitted to the Lord Ordinary to repon on payment of such expenses as seemed just, and the Lord Ordinary, on 10th June, reponed on payment of £2, 2s. On 1st July, in respect that sum had not been paid, the Lord Ordinary of new held James Templeton confessed as before, and again decerned with expenses in favour of William Templeton. This decree became final, and Wotherspoon and Mack, W.S., the agents of William Templeton, had their account taxed at £66, 8s. 2d., and in November, 1835, obtained leave to extract an interim decree for that amount, which they did and gave a charge to James Templeton. He presented a bill of suspension of this charge, and as of a threatened charge at the instance of William Templeton, for the whole alleged fund in medio. He alleged that he had duly supplied his former law-agent in the multiplepoinding both with money and instructions to enable him to carry on the process, but that his agent's insolvency and negligence, which were unknown to him, had been the occasion of allowing the successive judgments by default to go against him. He craved to have the bill passed on payment of a proportion only of the opposite agents' expenses, and without caution as to the alleged fund in medio, as he had never been heard on the merits in regard to it.¹ The chargers besides objecting to the competency of suspending a charge on expenses alone, insisted that the actual payment of the whole expenses previously incurred must be an essential preliminary to the passing of the bill; and that caution should also be found to the amount of the fund in medio.² The allegation of a former agent's negligence could not be listened to, as no allegation could be more easily made, or could lead to more frequent frauds, if it received any countenance from the Court.

The Lord Ordinary made avizandum to the Inner-House.

LORD PRESIDENT.—It is impossible to pass this bill without the full expenses of the agents in the multiplepoinding having first been paid. And as to the allegation that it was the fault of the suspender's former agent, and not of him-

¹ *Leith*, June 7, 1822 (ante, I. 469; or 435, new ed.); *Jeffrey*, Nov. 28, 1826 (ante, 40); *M'Gill*, Nov. 26, 1831 (ante, X. 69).

² *Goodair*, May 17, 1821 (ante, I. 15; or 12, new ed.); *Pratt*, June 9, 1824 (ante, 120; or 79, new ed.); *Taylor*, Nov. 17, 1824 (ante, III. 286; or 201, new ed.); *Wynne*, March 1, 1828 (ante, VI. 673); *Steel*, May 23, 1829 (ante, VII. 648); *Wynne*, June 6, 1829 (ante, VII. 717); *Gibson*, June 4, 1831 (ante, IX. 685); *Wynne*, March 11, 1831 (ante, IX. 582); *Sheille*, July 2, 1825 (ante, IV. 134; or 186, new ed.).

No. 237. self, that the judgments by default were suffered to be taken, we cannot allow that to excuse the suspender. If a man's agent neglects his duty, the loss must fall on the client, and not on the opposite party.

May 21, 1836.
Kirk.

LORD BALGRAY.—It is a matter of essential justice between the parties, that the suspender must, ante omnia, pay all expenses.

LORD GILLIES.—I am of the same opinion; and I cannot listen to the plea that the alleged misconduct of an agent is to screen his client from liability for expenses thereby occasioned to the opposite party.

LORD MACKENZIE.—If such a plea was to be listened to, it would be for the interest of a party to have a bad agent rather than a good one. If the faults of an agent were to be visited on the adversary, and not on the client, a man with a bad agent would rely not only on the merits of his cause, but also on the faults of his agent, for baffling his opponent.

THE COURT passed the bill, but on condition of all the expenses charged for, being previously paid.

A. ANDERSON, S.S.C.—**WOTHERSPOON and MACK, W.S.**—Agents.

No. 238. **REV. JOHN KIRK and OTHERS, Petitioners.**—*H. J. Robertson.*

Curator Bonis—Trustee.—Though it is unusual to appoint more persons than one to the office of curator bonis, yet the Court make such appointment in special circumstances; and accordingly, where a father named trustees to administer an annuity for behoof of a fatuous son, the Court, on their application, appointed “them, and the survivors and survivor of them, curators bonis” to the fatuous person.

May 21, 1836.
1st Division.
D.

THE late Rev. Alexander Carnegie of Inverkeillor, granted a bond of annuity of £100, for the support of Adam Carnegie, a younger son, who was fatuous. He appointed the Rev. John Kirk of Barry, and three others, as trustees for his son's behoof. On the death of Mr Carnegie the trustees assumed his eldest son into the trust; after which they presented a petition stating that besides the annuity, Adam Carnegie was entitled to a share of the Ann, and to a certain provision out of the Ministers' Widows' Fund; that it was necessary to have a curator bonis appointed; and that it would be best for the administration of Adam Carnegie's affairs, if the trustees named by the deceased Rev. Alexander Carnegie for his son Adam, were also appointed curators bonis to him. They prayed the Court to appoint “them, and the survivors and survivor of them, curators bonis to the said Adam Carnegie,” &c.

LORD PRESIDENT.—It is not usual for the Court to confer the office of curator bonis on more persons than one at a time. But there are precedents, in special cases, to justify the Court in making such an appointment when they cause to do so. I think the circumstances of this case are such as to warrant the appointment craved, and I therefore move the Court to grant the prayer of the petition.

other Judges concurred with his Lordship, and the petition was granted. No. 28

J. CARNEGIE, jun. W.S.—Agent.

May 21, 18
Stewart v.
Clyne's Tru
tees.

GAVIN STEWART, Petitioner.—*Speirs*.
CLYNE'S TRUSTEES, Respondents.—*Boswell*.

Dykes v.
Findlay.

Answers—Appeal.—A petition having been presented to apply a judgment of the House of Lords, substantially affirming interlocutors of the Court of Session, and answers thereto having been given in, under an act of the Court applying the judgment, and allowing answers,—on the petition being granted the prayer of the petition, petitioner found entitled to a decree since the date of the order for answers.

May 21, 18
2d Division
T.

JAMES WRIGHT, W.S.—DAVID MANSON, S.S.C.—Agents.

JANET DYKES, Pursuer and Advocator.—*D. F. Hope*.
WILLIAM FINDLAY, Defender and Respondent—*M'Neill—Shaw*.

No. 24

Semiplena Probatio.—Evidence which held to amount to *semiplena probatio* of filiation of a natural child, so as to admit of the mother's oath in her defence.

JANET DYKES, residing at Langside, in the parish of Cathcart, gave evidence that she had borne an illegitimate child on the 5th July, 1834, and thereafter raised the child, before the Sheriff of Renfrew, against William Findlay, farmer, residing at Milnbrae, alleging that he was the father, and claiming in her expenses, and aliment for the child. Findlay having denied the paternity of the child, the Sheriff ordained him to be judicially examined; and having on one occasion taken the pursuer into his father's house in the middle of the day, and having had a "toozle" with her in the stalls, but denied carnal connexion, and stated that this had taken place in the month of July. A proof was allowed, which did not show any other occasion on which connexion could have been had, or any other instances of familiarity. As to the time when this occurred, there was some difference of statement by the witnesses, but, on the whole, the preponderance of evidence was in favour of its having taken place in September.

May 21, 18
2d Division
Lord Jeffrey

The Sheriff-substitute, on considering this proof, holding the date of the alleged occasion of intercourse spoken to by the witnesses to have been at the beginning of August, and that the birth ought consequently to have been in May, and not in July, 1834, refused the pursuer her oath supplement, and assoilzied the defender. To this judgment the pursuer adhered.

No. 240.

May 21, 1836.
Dykes v.
Findlay.

Thereafter Findlay brought an advocacy, in which the Lord Ordinary pronounced the following interlocutor, and note : *—" Alters the interlocutors of the Sheriff complained of, and finds the advocator entitled to her oath in supplement, in respect that it is clearly proved that in the autumn before the birth of the child in question, the advocator and respondent were alone together, in circumstances affording the strongest possible presumption that carnal intercourse then took place between them, as averred by the advocator ; and that the circumstances referred to by the witnesses, who depone to their belief that this meeting was at a period so long before the birth of the said child, as that it could not have been be-

* " There is nothing on which the recollection of witnesses is so little to be relied on, after any considerable interval, as time. The examinations here were fifteen or sixteen months after the occurrence in question ; and, but for the specification of circumstances which bear upon dates in some degree capable of being determined, the mere mention of July, August, or September, is entitled to the least possible regard. Now the fact that is best proved, next to the meeting itself between the parties, is, that this meeting took place a few days before a particular Sunday, where four or five of the witnesses were employed to watch the bean crops, then on the fields of their respective masters ; and while they all agree that the beans were then ' pretty well filled,' one of them (Shearer) says, that ' he thinks they were at that time cut down,' and adds, as his cause of recollection, that some of the party brought an armful of the straw from the field, with the beans on them, of which they all ate ; and ' he thinks that armful was brought from a shorn heap, and not pulled up by the roots.' And on his cross-examination he adds, that ' he cannot say that the whole field was cut,' and speaks only of the part that was next to him. And another witness (May) says, he cannot remember ' whether the beans were cut or not on that occasion, but if not cut, they were pretty well filled,' which the Lord Ordinary thinks amounts to a deposition that they were either cut, or nearly ready for cutting, and pretty much fixes the sense in which the other witnesses used the same words, of their being pretty well filled. Now it is clearly proved that the bean crop in that neighbourhood was not cut down that season till between the middle and the end of September ; a period which would correspond perfectly well with the birth of the child on the 5th of July thereafter.

" The only circumstance of much weight against this evidence, is what relates to the witness Nisbet, who swears (and is in this corroborated by another) that the meeting in the stable was a few days before he went to the Tryst of Falkirk ; and he adds, that he attended that Tryst on the 13th day of August. This would be very powerful evidence if there had been but one autumnal Tryst at Falkirk that year : But it is proved that there were no fewer than three ; one early in August, one late in September, and one in October. Now, without impeaching the honesty of this witness, who is manifestly a friend of the respondent, the Lord Ordinary cannot but think it at least as likely that he may have mistaken the second Tryst for the first, as that, although the bean harvest was not till late in September, the beans on the respondent's farm should have been cut, or nearly ready for cutting, as early as the 8th or 10th of August.

" In such a question as this, too, he cannot lay it entirely out of view, that the advocator is stated by the minister of the parish to have been ' to his knowledge for seven years a regular attender at church, and to have borne a fair character ;' and that there is neither the least surmise of her having been intimate with any other man, or any trace of her having had motives, either of a malignant or interested nature to induce her to make a false charge against the respondent. It appears, therefore, on the whole, that the oath may be allowed in this case without any danger either to law or morality."

otten on that occasion, are nearly balanced by other circumstances, No. 2
 which lead to an opposite conclusion, and that the whole evidence as to
 the time is uncertain and contradictory; and also, in respect that there May 24,
 not the slightest evidence of the advocator having been on terms of Taylor v.
 intimacy with any other man at the period in question, and that she Noble.
 appears to have been of a fair character previous to this occurrence: And
 with this alteration and finding, Remits the cause to the Sheriff, to take
 the oath of the advocator accordingly, and to do thereafter in the cause as
 all be just, and to dispose of all questions as to expenses incurred in his
 suit: Finds the advocator entitled to her expenses in this Court."

Findlay reclaimed, but

THE COURT adhered.

G. and W. NAPIER, W.S.—W. BOWIE CAMPBELL, W.S.—Agents.

JAMES TAYLOR and JAMES FLUCKER (Noble's Trustees), Raisers.— No. 2
Robertson—Chapman.

ROBINSON NOBLE and OTHERS, Objectors.—*D. F. Hope—Pattison.*

Trust—Process—Title to Pursue.—1. Where the beneficiaries under a trust-settle-
 ment, refuse to exoner a trustee extrajudicially, he is entitled to bring a process
 of multiplepoinding for his exoneration, though he has not been exposed to actual
 distress. 2. Where a process of multiplepoinding for exoneration of trust-
 funds and intromissions, is raised in name of two surviving trustees, and one dis-
 misses it—Held, competent for the other to insist alone, to the effect of obtaining
 his own exoneration.

THE late James Comb, fisherman at Newhaven, left a trust-settle- May 24,
 ment, under which James Taylor, S.S.C., and James Flucker, fisherman, 1st Div
 were the surviving trustees. Robinson Noble and others, the five grand-Ld. Cor
 children of James Comb, were the beneficiaries under the trust. The S.
 estate was to be divided equally among them, and one proportional share
 was paid to each of Robinson and William Noble. Elizabeth Noble,
 sister, died. Comb Noble, their youngest brother, was a minor;
 Alexander Noble, the remaining beneficiary, on coming of age, was
 satisfied with the amount offered to him as his proportional share of
 trust-funds, and he raised an action of count and reckoning against
 the trustees. This was submitted to arbitration, and an award was
 made, fixing the share of the trust-funds to which he was entitled.
 Then, the acting trustee, offered to pay him this sum, on getting a full
 discharge of his trust-intromissions; but Alexander Noble refused to
 accept any discharge, except merely of the action of count and reckoning.
 He also offered to pay over the share of the deceased Elizabeth
 to her brothers who represented her, on receiving a similar dis-

No. 241.
 May 24, 1836.
 Taylor v.
 Noble.

charge, but they refused to give it. He therefore raised a summons multiplepoinding in his own name as "as one of the surviving trustees of James Comb, and concluding for exoneration from the trust." The summons was directed against Robinson, Alexander, and William Noble who lodged Objections, 1st, That a summons concluding for exoneration from the trust was irregular, being raised in name of one trustee without the concurrence of the co-trustee, or any reason assigned for his concurrence; 2d, That Comb Noble should have been called, a curator ad litem appointed; and, 3d, That the action was unnecessary there being no double distress.

The Lord Ordinary directed a supplementary summons to be raised in name of both surviving trustees, and also that the minor should be called.

A supplementary summons was raised in name of both trustees. Comb Noble was called, and had a curator ad litem appointed to represent him. The co-trustee, Flucker, lodged a disclamation of the process; Comb Noble, the minor, lodged Objections, similar to those of his father, with the additions, 1. That as Flucker now disclaimed the summons it could not proceed in Taylor's name alone; and, 2. That as the supplementary summons was the only one, even ex facie regular, as it was in name of both trustees, it was necessary to have cited all parties in it, whereas Comb Noble alone had been cited.

Taylor answered, 1st, That he had a right to obtain a judicial exoneration of the trust, which could not be defeated by a co-trustee's refusal to concur with him in the process; and, 2d, That the disclamation of the co-trustee necessarily left it to Taylor himself to pursue the process, and, that being the case, all the parties cited under the first summons were competently cited, as well as those under the supplementary summons, and by conjoining the two summonses, the whole parties having interest were duly brought into the field.

The Lord Ordinary "repelled the objections for Robinson Noble and others to the action of multiplepoinding, and in respect they intended their intention of submitting this judgment to review, found them liable in the expenses of this discussion." *

* "NOTE.—The proceedings in this multiplepoinding are of a very unusual nature. Taylor and Flucker, trustees under the settlement of James Comb, were committed in that character with a certain share of his property, partly heritable and partly moveable, which they held for behoof of the children of his daughter Mrs Noble, who predeceased him. Those children were five in number, four sons and a daughter, and the trustees were also appointed the tutors and curators of such of them as were minors. When Alexander, one of the children, came of age, he raised an action of count and reckoning against the trustees, which, in some proceedings, was submitted to the auditor of Court, by whom the amount of Alexander's share, and of the other four children incidentally, was ascertained.

The Objectors reclaimed.

THE COURT, without hearing Taylor's counsel, unanimously adhered.

No
May 2
Taylor
Noble.

LORD PRESIDENT.—The process of multiplepoinding is the common mode by

for this, nothing remained to be done but to pay over those shares, and to exonerate the trustees, for the amount had been settled; and there neither was nor could be any dispute as to the parties entitled to take them. But Alexander, while he consented, on receiving payment, to discharge his action of count and reckoning, refused to grant a discharge and exoneration to the trustees for their commissions. The form of the discharge was made the subject of a second reference, and the referee was of opinion that Alexander was bound only to discharge his action of count and reckoning. The trustees therefore had no alternative but to call the four sons and the children of the daughter, who had died some time before, in a process of multiplepoinding and exoneration, to have the further claims, if there were any, against them ascertained, and to obtain a judicial exoneration. The present action, with these conclusions, was accordingly raised by Taylor, one of the trustees; but when it came into Court the defenders objected that it was incompetent, 1st, Because Flucker, the co-trustee, did not concur; and, 2dly, Because Comb Noble, the youngest child, then in his minority, and for whom the trustees themselves were tutors and curators, was not cited. The Lord Ordinary gave effect to these objections, and directed that a supplementary summons should be raised at the instance of both Taylor and Flucker, and that the son should be cited. When this second summons came into Court, Flucker, co-trustee, a fisherman in Newhaven, was brought forward to disclaim the action, apparently with no view but to render the whole proceeding abortive, and his objections are now stated against the competency of the actions.

First, It is said that Flucker disclaimed, but it is plain that his disclamation could not operate to the prejudice of his co-trustee, who was entitled to exonerate judicially, since he could not obtain it extrajudicially. Then it was said that the process was unnecessary, because there was no double distress—there being no question either as to the amount of the shares, or the parties entitled to them. This is very true, if the defenders had admitted that they had no other claim against the trustees except what the auditor had ascertained, and were willing to tender them on payment, in terms of the auditor's award. But so far was this from being the case, that there is written evidence that Alexander refused to grant absolute discharge, and all the other defenders, as well as he, concur in stating that 'this action relates only to a portion of the trust-funds, where there cannot be any partial process of exoneration, nor can exoneration be granted while the trust-funds are not wholly disposed of, which they are not in the present case.' This statement is of itself sufficient to show that the present action is not only competent, but absolutely necessary for the safety of the trustee, who insists

The last objection is, that all parties are not called, for it is said that although the minor, Comb Noble, is cited in the supplementary action, the other defenders, who were cited in the original action, are not cited in the supplementary action. Perhaps there might have been something in this if Flucker had not disclaimed; but in consequence of his disclamation, there is but one pursuer, and the pursuer has confessedly cited every individual interested in the fund. It appears to the Lord Ordinary that this multiplepoinding is not only competent, but has been rendered necessary by the conduct of the defenders, and that all parties are in the field.

It is much to be regretted that the slender provisions left to the defenders by the trustee, amounting only to about 100 guineas for each, should be squandered in a litigation as useless as it is expensive."

No. 241. which trustees seek to obtain judicial exoneration. They do not require to allege actual double distress to entitle them to bring that process. The Lord Ordinary has disposed of the case as its merits required.
 The other Judges concurred.

J. TAYLOR, S.S.C.—A. SIMPSON—Agents.

No. 242. JOHN MACARTHUR, Pursuer.—*D. F. Hope—Shaw.*
 HUGH MATHIE and ROBERT THEAKSTONE, &c., Defenders.—*Sol.-Gen. Cuninghame—Thomson.*

Process—Admiralty.—A process was in dependence before the High Court of Admiralty, when that Court was abolished by 1. W. IV. c. 69; the Judge-Admiral had pronounced several interlocutors which were final in that Court; the cause was transferred directly into the Court of Session, by a joint note of the parties, in terms of the statute;—Held, that the interlocutors of the Judge-Admiral had no privilege of finality in this Court, but were liable to be impugned as erroneous. Observed, that the above transference of the cause was substantially a joint-advocation by both parties, and let in the power of review of this Court, of all the procedure in the Admiralty Court, as a necessary preliminary to following out the process to a conclusion in this Court.

May 24, 1836. In 1822, John Macarthur, merchant in Glasgow, raised an action against Hugh Mathie and Robert Theakstone, as a company, and as individuals, before the High Court of Admiralty. The action libelled on an expired partnership, between the pursuer and defenders, in regard to certain carrying-vessels between Glasgow and Liverpool, and concluded, 1st, For reduction of several, ex facie, absolute venditions; by the pursuer to the defenders, purporting to transfer his interest in these vessels, but which he alleged to be mere securities for debts, which were now paid; 2d, Failing this reduction, for declarator that the pursuer held a certain interest in the vessels, which the defenders were bound to convey to him, or to pay him £6000 as the value thereof; and, 3d, Failing this conclusion, then for a count and reckoning as to the profits of the copartnery, which the pursuer alleged to have subsisted to a later period than the defenders had ever given him credit for, in their mutual accounting.

The defenders alleged, 1. That the venditions were absolute and unqualified; 2. That the pursuer had no remaining interest in the vessels; and, 3. That they had already accounted for the full profits due to the pursuer under the expired copartnery.

Replies were lodged, and the Judge Admiral, on 13th November, 1822, pronounced this interlocutor:—“Finds, that though in the transaction in question it appears to have been the original intention of parties that the pursuer should receive accommodation from the defenders by bills, on the security of the pursuer’s shares of the ships belonging to the parties, &c.

nds that the transaction was completed by venditions of the pursuer's No
 nterests in the vessels, without any regular back-bond being granted; May
 nd that the obligation of the defenders to reconvey is expressed only in Mac
 etters which passed at the time, and qualified with the condition that the Math
 ills granted by the defender should be punctually retired by the pursu-
 r, which was not done: Finds, that whatever equitable claim the pur-
 uer might have to insist for a reconveyance of his interests in the ves-
 els, had he remained solvent, and the same had been followed up debito
 empore, yet the pursuer is barred, by the special^c circumstances founded
 n by the defenders, from availing himself of such a plea in equity.
 Therefore, Repels the reasons of reduction, and appoints parties' procu-
 rators to be heard viva voce on the import of this interlocutor, and if the
 pursuer shall be dissatisfied with the principles thereof, recommends to
 im to bring it under the review of the Court of Session, and dispenses
 with any petition."

The pursuer lodged a reclaiming petition, which was followed by an-
 wers, and refused. Minutes being ordered, the pursuer prefixed to his
 minute a statement that it was lodged "under protest and without preju-
 ice to his right to submit the interlocutors pronounced by your Lord-
 ship to the review of the Court of Session; and that his statement in this
 minute is not to be held as an acquiescence by him in the above interlo-
 cutors."

The Judge Admiral, on 15th July, 1824, remitted the process "to Mr
 Villiam Gallaway, accountant, with instructions to investigate the mu-
 al claims and pleas of the parties, as they stand, on the footing of the
 al interlocutor of 13th November last, and to report thereon; and in
 rticular to report, First, What balance will be due by the one party to
 e other, on the supposition that the venditions by the pursuer to the
 efenders are to be held as valid from their dates respectively. Second-
 y, To report what balance will be due by the one party to the other, on
 he supposition that the pursuer is to be held a part owner of the vessels
 own to the balance in 1815, immediately preceding his failure. Third-
 y, To report upon the justness and correctness of the accounts made up
 y the pursuer's trustee in 1816; and, in general, to report upon such
 oints as shall appear to him to be material, relative to the rights of
 rties, as they ought to be regulated by the principles of said interlocu-
 or of 13th November, with power to the accountant to call for the pro-
 duction of additional writings, or to put interrogatories to the parties in
 relation to the points in dispute."

After much discussion before the accountant, he lodged a report in
 July, 1825. The defenders lodged observations on the report, to which
 he pursuer put in answers, and the Judge Admiral "remitted the pro-
 cess of new to the accountant, with instructions to report whether and
 for the remarks made in said observations affect the views given in
 the report," &c.

No. 242.

July 24, 1836.
Macarthur v.
Mathie.

The accountant reported, in May, 1826, that a diligence was necessary to enable him to fulfil the remit made to him; and the diligence was granted to him. Considerable discussion before the accountant followed, and he was preparing his report at the time when the statute 1. W. IV. c. 69, was passed, which (§ 21) "abolished the High Court of Admiralty." The same section farther enacted, in regard to the jurisdiction in Admiralty causes, above £25 in value, "That hereafter the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this act." By § 22 it was enacted, that the Sheriffs should have "original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that heretofore held and exercised by the High Court of Admiralty." By § 23 it was provided that the judgments of Sheriffs, in such causes, should be subject to review in the same manner as their judgments in other causes previously were. By § 25, it was enacted "that all actions and proceedings which shall be depending before the High Court of Admiralty shall be transferred to the Sheriff of any court wherein such action and proceeding might have originated, if this act had been passed previously to the commencement of such actions or proceedings, and the same shall thereupon be heard and determined in the same manner as if they had been brought before such Sheriff in the first instance." "Provided also, that where the parties to any such cause shall, previously to such transmission, give in a joint note to the said clerk, setting forth their wish that such cause should proceed in the Court of Session, instead of being so transferred to the Sheriff, and shall therein specify the Lord Ordinary by whom they are desirous that such cause should be decided, the clerk of the High Court of Admiralty shall thereupon transmit the process, together with the said note, to one of the principal clerks of Session, and such cause shall be enrolled before such Lord Ordinary, and shall thereafter be heard and determined in the same way as if such cause had been instituted in the Court of Session, in terms of this act."

Under this section, the agents of Macarthur and of Mathie and Theakstone signed a joint note, stating it was their wish, "that this case should go to the Court of Session, and be heard and determined there. The parties are desirous that it should proceed before Lord Newton." When the cause came before the Lord Ordinary, another remit was made to the accountant, before whom farther discussion took place, after which he prepared and lodged a report. Parties were then directed by the Lord Ordinary, now Lord Fullerton, to make up a record. This being done, the pursuer stated, among other pleas in law, some which impeached the interlocutors of the Judge Admiral above recited, and which contended that they must be disregarded, as unfounded in law. The defenders

jected, that it was incompetent to go back on these interlocutors, which were final in this process. The Lord Ordinary reported the question on minutes of debate.

Pleaded by the Defenders,—

If parties wished to preserve any power of reviewing the Judge Admiral's interlocutors, the only mode left by the statute was to transfer the process to the sheriff court, and follow it out there to a final interlocutor, for which the whole could have been brought to this Court by advocacy, like any other sheriff process. But they chose to transfer the cause to this Court, where the statute (§ 25) directed it to be "heard and determined, as if such cause had been instituted in the Court of Session." Dealing with the cause on that footing, the interlocutors now pronounced were long ago final and unchallengeable, at least in this process. There might be, perhaps, a competent form of review, after the present process was first prosecuted to a conclusion; but it must now be allowed out, in the mean time, on the footing that the final interlocutors of the Judge Admiral could not be touched any more than final interlocutors of any cause instituted in this Court.

The defenders pleaded separately, that the conduct of the pursuer had effected a homologation of the interlocutors of the Judge Admiral, subsequently to the cause being brought to this Court.

Pleaded by the Pursuer,—

Though the Judge Admiral's interlocutors had been transferred by a proper process into this Court, than if they had first been passed through the Sheriff Court, this was only because the statute had furnished to the parties a more compendious mode of bringing, what was substantially a final advocacy. It was never intended to trench on the supremacy of the power of this Court to review all the judgments of the Admiral, so soon regularly brought before it; and nothing but the most express enactment could so invert the relative positions of the inferior and superior courts, towards each other. So the Court had recently held in an analogous question as to the judgment of a sheriff allowing a proof in a case which might be advocated under 6 G. IV. c. 120, § 40, and in which this Court held their supreme power of regulating the whole case to be in no degree fettered.

The pursuer pleaded also that there had been no homologation.

LORD MACKENZIE.—I rather think that this is a *casus improvisus* under the statute. But it is necessary for us now to extricate it in the best way that we can, having due regard to the provisions of the statute. I am of opinion, therefore, that we retain the right to review the interlocutors of the Judge Admiral, and that we may and should exercise that right at present. Considering that our jurisdiction is superior to that of the Judge Admiral, and that we are the supreme Civil Court in Scotland, I cannot hold our right to review the judgment of an inferior court to be held abrogated by implication. And as the statute, in abolishing the Admiralty Court, established a short method of transfer-

No. 242. ring a depending process to this Court, under a joint note by the parties, I must regard this as being substantially a quasi advocacy. I regard it in the light of a joint advocacy, at the instance of both parties, which, by special statute has been allowed as a method of bringing an inferior court process into this Court. But this does not alter the inherent character either of the Admiralty jurisdiction or of our own. And though the Admiralty process comes here, by an unusual and statutory mode, it comes here as an inferior court process, and necessarily subject to our review *ab initio*. I consider it to be an essential preliminary to our proceeding farther in the cause, that we should have a right to review the Judge Admiral's interlocutors, and to alter them, if we think them erroneous. We are no longer able to review our own judgments in any cause depending before us; and therefore, before we can be required to carry forward this process a single step, we are entitled to examine the previous interlocutors of the inferior court, and alter them in so far as we find them erroneous. It is only after we have done so, that we shall have laid a proper basis for our own ulterior procedure, no part of which it is in our power afterwards to review. If any other construction than this was adopted, it would lead to the most anomalous and extraordinary results. If we were to hold that the interlocutors of the Judge Admiral preserved all their finality here, it might fairly be contended that this necessarily reduced all subsequent procedure, which followed on such a basis, to the level of an Admiralty process, and that, after running the course of litigation here, and even in the House of Lords, still, the whole decrees should be as open to review as a mere Admiralty judgment would be; and for this strong reason, that, from beginning to end of such a process, the original interlocutors of the Judge Admiral had never once been reviewed, but had only been followed out. These interlocutors are said to be most material to the issue of the cause, and if, in this process, the Court of Session is to be deprived of the jurisdiction of reviewing them, and reduced to the mere function of following them out, however erroneous, to their result, there would appear to be good ground for maintaining, that all such procedure would be ultimately liable to review, in some shape, by reduction or otherwise. And if such a process of review was to be attempted, it is evident that an embarrassing difficulty would remain, in consequence of the decrees of this Court having been superinduced upon those of the Judge Admiral. On the whole, therefore, I feel that, according to the best interpretation which I can put on the statute, and having due regard to the nature of our jurisdiction and that of the late Admiralty Court, we are entitled to review all the proceedings in the Admiralty Court as an essential preliminary to our own ulterior procedure in the cause, which procedure, it is beyond our own power afterwards to review.

LORD PRESIDENT.—The difficulty seems to me to be just this. Are we now sitting as in the Admiralty Court, or are we properly in the Court of Session, with an Admiralty process before us, in which we are required judicially to dispose of the rights of parties? If we are to be viewed as being truly the Admiralty Court, then, whether we think the Judge Admiral's interlocutor right or wrong, it is enough for us that they are final. We can no more alter them than we could alter a judgment of the Lord Ordinary in this Court, if once it was allowed, whether right or wrong, to become final. But I am at a loss to see why the pursuer should not repeat a reduction in this Court, and put an end to all this puzzle.

Dean of Faculty for pursuer. We are quite willing to do that, and have prepared a summons of reduction for the purpose.

Solicitor-General for defender. It is impossible to raise a reduction *hoc statu*. May Sheri there can be no review but by a process of reduction, such process cannot be Brodli instituted until after the present process is brought to a final decree.

LORD MACKENZIE.—I fear that a reduction of an inferior Court process would be premature, before the process came to a final decree.

LORD PRESIDENT.—I should have had less difficulty in adopting the view of LORD MACKENZIE had the statute merely declared that the depending process could be transferred to this Court. But it goes much farther, and expressly provides not only that it shall be transmitted to this Court, and enrolled before a Lord Ordinary selected by the parties; but also that “the cause shall thereafter be heard and determined in the same way as if such cause had been instituted in the Court of Session, in terms of this act.” Now, had the cause been instituted in this Court, the interlocutors in question would have been long ago final. But although his Lordship’s view is one which I cannot adopt without difficulty, yet, on the whole, it seems to be liable to less objection than any other which I am able to take, in extricating the present case.

LORD BALGRAY was understood to concur with the Lord President.

LORD GILLIES was absent.

LORD PRESIDENT.—I should think a party was exposed to much hardship, if any of the proceedings in which he had acquiesced, were to be held as thrown aside by our judgment to-day.

Dean of Faculty.—There is nothing of that sort contemplated by the pursuer.

THE COURT found the pursuer entitled to state those pleas in law which impugned the final interlocutors of the Judge Admiral as erroneous, and requiring to be set aside.

J. BURNSIDE, W.S.—R. WELSH, S.S.C.—Agents.

JOHN SHIRREFF, Pursuer.—*Ivory—Moncreiff.*

GEORGE BRODIE and OTHERS (Shirreff’s Trustees), Defenders.—*Walker.*

Process—Title to Pursue—Res Judicata.—After a record was closed, but before any interlocutor was pronounced which necessarily inferred absolutor, the pursuer of a reduction of a deed, lodged a minute craving the Court to allow him to abandon the action, and find him liable in expenses; he did this avowedly for the purpose of bringing a new action; the Court “in respect the pursuer had abandoned the case, assoilzied the defenders from the whole conclusions of the libel, and returned; and found the defenders entitled to expenses:” the pursuer raised a new action of the same deed, to which the defenders objected, that as there was no reservation of a right of new action, in the previous interlocutor, and as that interlocutor had “assoilzied” from all the conclusions, in place of merely “dismissing” the action, the pursuer was not within the benefit of 6 Geo. IV. c. 120, § 10, and A. S., 11th November, 1828, § 115; and that his new action was therefore incompetent:

No. 243. —Held that the new action was competent, notwithstanding the phraseology of the previous interlocutor of the Court; and that, in so far as such interlocutor interfered with the pursuer's statutory right of new action, it should be viewed, in the circumstances, as a clerical error, and disregarded accordingly.

May 24, 1836.
Shirreff v.
Brodie.

1st Division.
J. Cockburn.

JOHN SHIRREFF, commercial agent in Edinburgh, raised a reduction of the trust-settlement of the late James Shirreff, merchant in Leith. The action was directed against George Brodie, advocate, and others, the trustees of James Shirreff. Defences were lodged, a record was made up, and an issue was adjusted, to try "Whether the said deed was not the deed of the said James Shirreff?"

Immediately before the day of trial, notice of countermand was served by the pursuer, intimating at the same time that the action was to be abandoned, in order to raise a new action. The defenders afterwards moved to be assoilzied, when the pursuer moved, and was allowed, to lodge a minute of abandonment of the action. He then lodged a minute, stating that "by the advice of counsel he had countermanded the trial with the view of proceeding with a new action. In these circumstances he humbly craved the Court to allow him to abandon the action and to find him liable in expenses."

The Court pronounced this interlocutor:—"In respect the pursuer has abandoned the case, assoilzie the defenders from the whole conclusions of the libel, and decern; find the defenders entitled to expenses; appoint an account thereof to be given in," &c.

After this the pursuer raised a second action of reduction of the deed. The defenders pleaded that although by the 10th section of the late Judicature Act, and § 115 of the relative Act of Sederunt, a pursuer might abandon his action "before an interlocutor has been pronounced assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor," yet the pursuer could not bring himself within the benefit of this provision, as there was an actual judgment of absolvitor from all the conclusions of the first libel, standing against him. And, even if he had, in this summons, varied any of the reasons of reduction (which they denied), still he had necessarily retained the same reductive conclusions, as in the former libel, and as to all these, they had a judgment of absolvitor in their favour. The pursuer had himself to blame in not having taken care to have his right to bring a new action, reserved, in the interlocutor dismissing the first action. And the defenders alleged, that the ordinary style of interlocutors, where such new action was to be left competent, was to "dismiss" the first action, and not to "assoilzie" from its conclusions.

The pursuer denied that there was any substantial difference between the use of the word "assoilzie" and the word "dismiss:" but whether there was or not, it could not, in this instance, affect him. He had abandoned his first action confessedly for the purpose of bringing the second; he was entitled to do so, but for the peculiar phraseology of the

interlocutor of absolvitor; that interlocutor, in gremio, proceeded “in respect the pursuer has abandoned the case,” and it was pronounced on the pursuer’s own motion. If its terms really were such as to go beyond the ordinary style of the interlocutor, proper for such a case, that was a mere clerical error, and could not have the fatal effect of destroying the pursuer’s whole right of action. To give it that effect would be to proceed directly in the face of the statute, and was ultra vires of the Court: but, in place of compelling the pursuer to take the more circuitous mode of reducing or appealing, the erroneous interlocutor, it should be construed now, so as not to bar the pursuer’s right of action.

The Lord Ordinary reported the case orally.

LORD BALGRAY.—It would have been safer for the pursuer to have got a reservation inserted in the interlocutor, saving his right to bring a new action.

LORD PRESIDENT.—I certainly think it was a mistake to assoilzie altogether, and unqualifiedly. But the error stands clearly demonstrated to the Court, and it is plain that we had no authority to pronounce, and did not intend to pronounce, such an interlocutor as should bar the pursuer from bringing a new action. I think we cannot allow the pursuer to be thereby deprived of so important a right.

LORD MACKENZIE.—I consider this to be a question affecting our own forms and styles merely, but which ought not to be allowed to destroy the pursuer’s right of new action. Indeed I think it of comparatively no moment what were the precise words in which the interlocutor was framed. It was pronounced on the pursuer’s own motion, and in respect of his abandonment of the cause, a step which he took avowedly to avail himself of a right conferred on him by the statute. He was entitled under the statute to take the step of abandoning the cause, and quitting the Court, leaving it to pronounce any judgment it chose, or as moved by the defenders to do. No such judgment could touch the pursuer’s statutory right to bring his new action. Even had our interlocutor expressly said, that “he had no right to bring a new action,” he would have been entitled to say that such an interlocutor was in the face of the statute, and was not worth farthing against the statute. I feel myself bound to read the interlocutor in such a manner as is consistent with the provisions of the statute, and with the feelings of the parties. I cannot, therefore, give the effect which is contended for, in this instance, to the word “assoilzie;” and, in general, I am not inclined to such questions of construction, to go too metaphysically to work, and strain the phraseology of an interlocutor against the plain meaning and rights of the parties, as well as the duty of the Court.

Their Lordships therefore directed the Lord Reporter to find, that the pursuer was not barred by the terms of the interlocutor from insisting in the new action, on complying with the statutory condition of paying full expenses.

J. KNOX, S.S.C.—**WALKER, RICHARDSON, and MELVILLE, W.S.**—Agents.

No. 244.

May 24, 1836. ALEXANDER HOWDEN and ALEXANDER PEARSON (Paterson's Trustees),
 Pursuers.—*D. F. Hope—H. J. Robertson.*
 Howden v. Porterfield.

JAMES CORBETT PORTERFIELD, Defender.—*Anderson—G. G. Bell.*

Interest—Expenses.—1. Circumstances in which, when an action was raised for payment of a heritable bond, granted under the permissive powers of an entail, the Court refused to allow the principal and interest to be formed into an accumulated sum as at the date of citation, but allowed this to be done at a certain term in the currency of the action, and awarded interest on the accumulated sum thereafter. 2. Where the Court considered that modified expenses, generally, should be awarded to a pursuer, their Lordships, in the circumstances, modified the expenses, *in plano*, by awarding them up to a certain stage in the cause; this award being held equivalent to a general award of modified expenses, and being a means of modifying at the same time with deciding the cause itself.

May 24, 1836. SEQUEL of the case reported June 17, 1834 (ante, XII. 734), which see. The Court then found that the bond granted by Boyd Porterfield, in 1791, was effectual, under the permissive powers of the entail, and became exigible in 1815, after the male issue of the granter died. The defender, the heir of entail, now in possession, carried the judgment to appeal, where it was affirmed, and the cause having returned to the Lord Ordinary, it remained for his Lordship to dispose of the defender's plea, that the bond being for £2400 exceeded three years free rents; and also to determine the questions of interest and expenses. After inquiring into the rental of the estate, his Lordship found that three years' free rental did not exceed £2351, 16s. 11d. His Lordship, therefore, pronounced the interlocutor, disposing of the several questions above-mentioned:—"Finds the said rental, under the deductions as now ascertained, to be £783, 18s. 11½d. sterling, and decerns against the defender for three years' amount of the said rental, being £2351, 16s. 11½d. sterling, with legal interest on said sum from the 11th of November, 1815, until the date of decree, and legal interest on the accumulated sum from the date of decree until payment; and further, finds no expenses due to either party."

The pursuers reclaimed as to the interest, which, they contended, should be accumulated as in 1832, the date of citation; and also as to expenses, which they craved should be awarded in their favour.

LORD MACKENZIE.—In regard to the interest, if it be usual in raising action on an ordinary heritable bond, to accumulate past arrears at the date of citation, and to crave decree for interest on the accumulated sum thereafter, I think the same thing should be allowed here. I would deal with this, precisely as an ordinary heritable bond. It is neither better nor worse than that.

LORD BALGRAY.—I think it would be rather sharp, in the circumstances of this case, to allow interest on the accumulated sum from the date of citation.

LORD PRESIDENT.—I think Candlemas, 1833, would be, in all the circumstances, a proper date to accumulate principal and interest, and allow interest on the accumulated sum from and after that date.

LORD GILLIES was absent.

their Lordships then intimated an opinion that modified expenses should be No.
red to the pursuers.

Dean of Faculty for pursuers. It would be advantageous, and would save fu- May 24
trouble and cost, to modify the expenses now, if possible, when the merits Menzie
the case are in full possession of the Court. Perhaps this might be equitably
e, by awarding the whole expenses to the pursuers up to a certain stage in
cause; as, for instance, the date of the appeal. This course would save the
rt and the parties from a fresh debate on the modification to be allowed, after
auditor's report is returned, and after the case has been for a considerable
out of the recollection of the Court.

THE COURT adopted this suggestion, and their Lordships accordingly al-
tered the interlocutor of the Lord Ordinary to the effect of allowing inte-
rest on the accumulated sum of principal and interest, due as at Candle-
mas, 1833; and also awarded expenses in favour of the pursuers up to
the date of the appeal, it being stated at the same time, that this was
done as being the equivalent of a general award of modified expenses.

PEARSON and ROBERTSON, W.S.—GIBSON and DONALDSON, W.S.—Agents.

HUGH MENZIES, Pursuer.—*C. Robertson.*

HIS CREDITORS, Defenders.—*W. Forbes.*

No.

Cessio.—*Cessio* granted to a sergeant having a pension of £26, 10s. a-year, without
having to assign any part of it to his creditors.

THE pursuer, Menzies, a serjeant, having a wife and child, had served May 24
twenty-one years in the artillery, and received several wounds, from which 2D D
never completely recovered. He was discharged in 1834, with a pen-
sion of 1s. 5½d. a-day, or £26, 10s. 10d. per annum; and having there-
after entered into partnership with a mason whose circumstances were
 embarrassed, he became liable in debts and obligations to the amount of
£8. He offered to make over to his creditors £8 a-year of his pension,
which offer was not acted on. Having applied for the benefit of *cessio*,
the creditors insisted that a deduction from his pension to the extent of
what he had previously offered, should be assigned to them. Menzies
contended, on the authority of the case of *Fraser v. Kennedy*¹ (June
1824), and on the ground of the offer not having been accepted, and
being made while he was in ignorance of his legal rights, that he
was not bound to assign any part of it.

THE COURT, proceeding chiefly on the authority of the case referred
to, by a majority, refused the demand of the creditors, and decerned
in the *cessio*.

JOHN HUNTER, W.S.— ——— CUMMING, W.S.—Agents.

¹ Ante, III., 130 (New Ed. 88).

No. 246.

May 26, 1836.
 Moncreiff v.
 Durham.

WILLIAM SCOTT MONCREIFF, Pursuer.—*Sol.-Gen. Cunningham—Wilson.*

LADY DURHAM and HUSBAND, Defenders.—*Ivory.*

Prescription, Triennial—Agent and Client.—A law-agent was also the political agent of his client; his agency continued from 1796 to 1813, and his account included not only ordinary law-agency in processes, &c., but also cash advances; travelling charges for journies to London, &c. in support of the client's election; fees paid to the town-clerks of parliamentary burghs for extracts from their minutes, or for commissions to delegates at elections; and fees due to the agent himself as town-clerk of one of these burghs: after 1813 the agent received, at intervals, four letters from the client, but one only came through the post-office, and it was received above three years prior to the client's death; the account was rendered a month before the client's death, which happened in 1817; action was raised for payment of it against the client's representative in 1831;—Held, (1.) that the triennial prescription applied to that part of the account which consisted of charges for business done as a law-agent, and that this was not elided by the postage of the letter, seeing that it occurred more than three years prior to the client's death; and, (2.) that prescription did not apply to the account so far as composed of advances of money, or travelling charges, or town-clerk's fees.

May 26, 1836.

1ST DIVISION.
 D. Corshouse.
 D.

THE late David Black, town-clerk of Dunfermline, was both the man of business, and the political agent, of the late Sir John Henderson of Fordel, for a long term of years, commencing in 1796. Sir John Henderson died on 12th December, 1817, and Black in 1822. In 1831, William Scott Moncreiff, accountant, as trustee for the creditors of Black, raised an action against Lady Durham, as the daughter and alleged representative of Sir John Henderson, for payment of £445 4s. 7d., being a balance of account due to Black at Sir John's death, of which £262, 9s. 8d. was charged as principal, and £180, 14s. 11d. as interest. The account went back to 1796, and consisted, in part, of ordinary law-agency, but was chiefly made up of charges for repeated journies to London, and detention there, in support of Sir John's parliamentary elections; and of fees paid to the town-clerks of Inverkeithing, &c., or incurred to Black as town-clerk of Dunfermline, for expending commissions to the delegates chosen by these burghs, for electing the Member of Parliament. It contained items of disbursement for entertaining town-councillors, &c. Lady Durham did not allege payment since her father's death, but stated that she knew nothing personally of the claim, and therefore denied both its constitution and subsistence. She pleaded also that it, the whole account, was cut off by the triennial prescription, as it stopped at 1st May, 1813.

The Lord Ordinary remitted to an accountant "to examine the books of the late Mr Black now exhibited, and to report as to the continuity of the account libelled, after the 1st of May, 1813, up to which date the continuity of the account is admitted; and generally as to the consti-

and subsistence of said account, in so far as any part of it may be No. 1
 cted by the plea that the triennial prescription had run upon the May 20
 e, previous to Sir John Henderson's death, on the 12th day of De- Moncre
 cember, 1817." Durha

The accountant reported, " 1. That the account pursued for, which is
 posed almost entirely of travelling expenses, fees of extracts, and
 agates' commissions, &c., and progressive interest thereon, corres-
 ds very nearly with that entered in Mr Black's ledgers from 1796
 nwards.

" 2. That no entry is to be found in the ledgers inferring payment
 my part of the account, other than what is duly credited in the ac-
 nt itself."

He also reported that in 1817 the following entries appeared :—

1817. To postages,	£1 10 10
Nov. 11. To my clerks for booking and making copies of a variety of correspondence during the long period of this account,	4 4 0
To interest due to me upon this account per state annexed,	180 14 11½

Of these, the only entry seeming to imply a continuation of the
 unt, is the £1, 10s. 10d. stated for postages," &c.

As regards to the details of the postage account, the accountant stated
 the greater part of the postages were for letters addressed to Black,
 as agent of Sir John, but in some public official capacity held by Mr
 ck, such as collector of taxes, &c. ; " and that the only letters to that
 tleman as the agent or friend of Sir John Henderson, between 13th
 y, 1813, and 11th November, 1817, seem to be Nos. 38, 44, 47, and
 of Process."

Only one of these four letters had been sent through the post, so as to
 nion any charge in Black's books, and that was dated on 1st January,
 4, being more than three years prior to Sir John's death.*

It appeared that in 1813 Sir John had executed a trust-conveyance of
 estates in favour of Sir James Gibson-Craig and others. And these
 tees having advertised for the creditors of Sir John to lodge their
 ms, a claim was lodged by Black on 21st November, 1817, accom-
 id with a letter to Sir James, describing it as an account " for fees
 xtracts, delegates' commissions, travelling expenses, &c. for the last
 ty years."

The account included, inter alia, disbursements for journies to Lon-

The defender also contended that only two of these four letters fell within
 6 years before Sir John's death, and that these were not addressed by Sir John
 Black as his agent, or in reference to any employment by him.

No. 246. don, which Black had made in support of Sir John's election as Member of Parliament, &c. To this claim no objections were stated in the lifetime of Sir John; and the account was made up from books said to be regularly kept by Black.

ay 26, 1836.
oncreiff v.
irham.

On considering the accountant's report, the Lord Ordinary ordered minutes of debate on the plea of prescription.

The defenders pleaded—

1. That, even supposing the account to have only closed, on 12th November, 1817, the day when it was rendered by Mr Black to Sir John's trustees, still, that date was one month before Sir John's death, and therefore the triennial prescription was begun before Sir John died; and as no action was raised till 1831, the pursuer's claim fell under that prescription. Nor could the mere circumstance that Lady Durham knew nothing of the claim suffice to elide prescription.¹

2. But in truth, a period of more than three years had elapsed, prior to Sir John's death, as the last item was a postage on 1st January, 1816.

3. The whole account, whether incurred in political agency, as paying fees for commissions to delegates at parliamentary elections, or making journies on Sir John's employment, was just one account, for business done by a law-agent, and therefore fell under the triennial prescription.

4. There was no sufficient proof that the account was ever incurred.

The pursuer answered—

1. If the term of prescription had not fully run, at Sir John's death there was no legal presumption of payment having been made by him, and as his representative admitted non-payment since that date, the debt remained still due. This had been repeatedly decided in express terms.²

2. Whether all the four letters came through the post, or not, they were proof of the continued currency of the agency or employment, at their date; and if so, they elided prescription as effectually as if they had happened to be sent through the medium of the post-office, and so to incur postage.

3. The claim was composed chiefly of travelling expenses, including journies to London and elsewhere; and fees for extracts of minutes of town-councils, &c.; and delegates' commissions, &c. But cash advances and travelling charges were exempt from prescription. And the

¹ Stirling, March 11, 1817 (F.C.); Wilson, Feb. 17, 1826 (ante, IV. 427; or new ed.); 1 Bell, 334.

² Syme, Jan. 15, 1789 (5354); Leslie, Nov. 15, 1808 (F.C.); Broughton, Feb. 24, 1826 (ante, IV. 496; or 501, new ed.); Elder, May 15, 1833 (ante, XI. 501); Ritchie, Jan. 15, 1836 (ante, p. 216.)

to Black himself as town-clerk, for extracts of minutes, or for delegates' commissions, was also exempt.

4. The books of Black, and the fact of his claim having been made, without objection, in Sir John's life; especially when coupled with the mission that he had acted as Sir John's agent for so long a period, was sufficient proof of the constitution of the debt. But that was a point for further discussion.

The Lord Ordinary "sustained the plea of the triennial prescription with regard to all the articles in Mr Black's account, which are charges for business performed by him as a law-agent; and repelled that plea with regard to the articles of the said account for advances of money made by him for Sir John Henderson's behoof, and for his travelling charges in going to London or elsewhere on account of Sir John, and his fees as town-clerk: Appointed parties to be farther heard as to the evidence by which those advances and travelling charges are said to be substantiated," &c. *

Lady Durham reclaimed.

The Court did not call on the pursuer's counsel to support the judgment.

LORD PRESIDENT.—Part of the account claimed by the pursuer is quite different from the rest, though all the items charged have happened to be thrown into one account and pursued for together. For example, the fee of £10, 10s. to Black as town-clerk of Dunfermline, or the fee of £5, 5s. to the town-clerk of Inverkeithing, and similar items, are not on the same footing with charges for employment as an ordinary agent. The Lord Ordinary's interlocutor is quite right.

The other Judges concurred, and

THE COURT adhered, reserving expenses.

A. WILSON, S.S.C.—J. ADAM, S.S.C.—Agents.

* "NOTE.—It is plain, from the Accountant's Report, that the postages of letters founded on by the pursuer, are not sufficient to render the account conclusive, or to bar the operation of the triennial prescription; because, of the four years which he specifies, one only was sent through the post-office, and that one was received more than three years before Sir John Henderson's death. The plea of the triennial prescription is therefore sustained, in so far as charges for business are concerned; but that principle does not apply to disbursements made by Mr Black for Sir John, either as fees of commissions to delegates, travelling expenses, or the like. With regard to these articles, evidence is necessary; but a general employment as a private agent during the year in which these charges were made, together with regular entries of the amount of charges in Mr Black's books, may be thought sufficient for that purpose, especially as the account was rendered to Sir John's trustees in his lifetime, and no objections made to it."

No. 247.

y 26, 1836.

Anderson v.
Currie.PETER ANDERSON, Suspender.—*M'Neill—Shaw.*JAMES CURRIE, Charger.—*D. F. Hope—Pyper.*

Process—Suspension.—A party, who was charged as a partner of a certain company, on a bill of exchange accepted by the company firm, having presented a bill of suspension on the allegation that he was not a partner, there being no prima facie evidence of his being so—Held, that the charge was competent, but the bill of suspension passed to try the question of the partnership.

y 26, 1836.

Division.
Chamber.
Lord Jeffrey.
T.

PETER ANDERSON was charged “as an individual partner of the firm of Alexander Anderson and Company, sugar refiners, Greenock,” to make payment of £430, contained in a promissory-note granted by the Company to Martin, one of the partners, and by him indorsed to the charger, Currie. The acceptance, which was by the company firm, was not in the handwriting of Peter Anderson, nor did his name appear at all upon the note. Peter Anderson brought a suspension of the charge, denying that he was a partner of Alexander Anderson and Company, but admitting that he was this Alexander Anderson's brother, and that he had had money transactions with him. He offered caution in common form. Currie, in his answers, distinctly averred and offered to prove, that Peter Anderson was a partner of the firm in question. He did not allege that any evidence thereof was exhibited to the messenger employed to execute the charge.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : *—“ In respect that the name of the suspender does

* “ If this charge is supported, it will be in the power of any one who holds a bill drawn, accepted or indorsed by a company firm to charge any individual pleased in the united kingdom, for payment, and to drive him to the remedy of a suspension ; a form of process in which the natural position of the suspender is that of a pursuer or a party bound to instruct his reasons for resisting the charge, and not that of a defender, having nothing to do till a case is made out against him.

“ The charger relied almost entirely on the case of Liddell, 2d July, 1810. But there it is manifest from the report, that the fact of the suspender being partner was fully and throughout admitted, and the charge was accordingly supported in argument upon that assumption ; and not by one offer on the part of the chargers (as in the present case) to prove the fact in discussing the merits of the suspension. The short note of the Judges' Opinions in the close of the report plainly proceeds on the supposition, that any individuals who could be charged individually on a horning against a company, must at all events be partners ; and when it is said that the messenger must discover whether they were so or not, this seems at least to imply, that some evidence of the fact must have been before him, other than the allegation, or mere mandate rather of his employer. The cases of Anderson against Bolton, 26th January, 1810 (F.C.), and of Cairns 30th June, 1810, there referred to, though also cited by the charger, are, in so far as they go, decidedly against him. In both these cases, a party charged as partner, and denying that he was so, was found entitled to have his bill of suspension

not appear on the bill charged upon; that the said bill is accepted only by a company firm; confessedly adhibited by a person different from the suspender; that the said firm does not include the name of the suspender; that he positively denies that he is, or ever was, a partner of the said

May
And
Curr

ion passed without caution, which was all the relief he could possibly get in that stage of the proceeding, and it is not alleged that the chargers in these cases ever succeeded farther with their diligence. On the other hand, there is a variety of cases in which it has been held sufficient to protect a party against any summary or privileged course of proceeding, and to drive his opponent to the ordinary remedies of the law, that he denies or does not admit that he is in the situation which would justify such summary or privileged proceeding. Such was the case of *Thorburn and Grahame*, 17th June, 1825 (4 Shaw, 101), which related to the act of *Sederunt*, 6th February, 1806, as to the summary recovery of agents' accounts, and where it was expressly found by the Court, that 'where the party denied the employment, the agent must constitute his debt by an ordinary action;' and such also was the case of *Brown and Turner*, 9th February, 1827 (5 Shaw, 11), which related to the privilege of Members of the College of Justice, to sue this Court for sums under £25; and where the mere denial of the opposite party, that the pursuer was pursuing in his own right, though he averred that he was, was held to exclude the privilege. And truly this seems accordant to plain principle.

"Privilege and summary forms of proceeding are allowed against parties in a certain situation. But if it be not either admitted, or instanter verified, that they are in such a situation, it would plainly be more unjust to subject them in the first instance to the disadvantage of these forms, than to refuse an extraordinary remedy to a party who cannot show, at the moment of seeking it, that he is entitled to that benefit.

"Nothing more was settled by the decision in *Liddell's case*, than that it was incompetent to charge individual partners on a horning against a company, that being the only point there presented for judgment. If the dicta ascribed to the judges in the short note of the reporter are to be held as carrying the law further, they cannot well be held, in any view, to amount to more than this, viz. that even though persons do not admit that they are partners, they may still be charged as such, if before charging them the messenger has such strong *prima facie* evidence of the fact, as would put the onus of proving the contrary in a suspension on them. In the present case, it is not pretended that any evidence whatever was exhibited to the messenger, and it certainly appears to the Lord Ordinary, that it would be perverting the natural relation of parties in such a process if a charge was allowed, against which it was only necessary to oppose a mere denial, and which left the messenger, after a suspension was passed without caution, under the very same necessity of proving his case, as if he were the pursuer in an ordinary action. It naturally occurs, that, if this be his position in the suspension, he ought to have succeeded in the course of ordinary action, and that he had no right by a summary charge to force his opponent, who is substantially a defender, to take the initiative litigation for his necessary protection. It occurs also, that it is rather a startling proposition, that the King's writs for summary execution may be put in force against a public officer against parties not only not named in the warrants, but of whose connexion with such warrants, the officer has no shadow of evidence but the mandate of his employer. If the charger had any such means of verifying the alleged partnership *de plano*, as might have justified him in proceeding by summary diligence, he ought at all events to have applied for his horning by bill, and exhibited evidence in the Bill-Chamber, as the ground of craving warrant against the suspender individually, instead of merely taking out a horning on the registered process against the company, 'and the individual partners thereof,' without naming any one of them, and summarily charging the suspender thereon on his own naked allegation, that he was one of these partners."

No. 247. company; that it is not alleged that any evidence whatever of his being such partner was exhibited to the messenger employed to execute the charge, and that the charger has not produced, even with the record, any conclusive evidence to instruct that fact, but only offers to establish it in this process of suspension, before a jury, at which trial, though now actually proceeding to execution as on a decree of registration, he admits that he must stand exactly as if he were the pursuer of an ordinary action, finds the proceeding by summary diligence against the suspender incompetent, and therefore suspends the letters and charge simpliciter, and decerns: Finds the suspender entitled to expenses."

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Currie.

Currie reclaimed and pleaded—

The Lord Ordinary has confounded the competency of the diligence which has been used with the effect of it. The competency of the diligence is not affected by there being no evidence of the suspender having been a partner, the charger's averment that he is so rendering this unnecessary and excluding at this stage of the proceedings all investigation of the fact. It is clear that if a man be a partner of a firm it is competent to charge him on a bill accepted in the name of the firm,¹ and this must be equally competent, whether it appear ex facie of the proceedings that he is a partner, or the charger offer to instruct that he is so de facto, otherwise the partners of trading companies could very rarely be charged at all. As to any alleged hardship, this is not different from the case of a man charged on an obligation to which his signature appears adhibited, but which he alleges to be a forgery, where the charge is undoubtedly competent. In such a case as the present, a remedy is provided by the process of suspension, and because there may possibly be an abuse of diligence, a party is not to be prevented from using a form of summary proceeding which is salutary in itself and sanctioned by law.

The suspender answered—

This proceeding is equivalent to the use of general letters of horning and general warrants, which are illegal. The present is not like the case of a charge on a forged bill, where, ex facie of the document, the party appears to have adhibited his signature; and the hardship which may ensue to individuals from such a proceeding being sanctioned is very great, as a warrant for diligence against Alexander Anderson and Company may be a warrant for diligence against any party whatever.

LORD JUSTICE-CLERK.—I am for altering the interlocutor and remitting to pass the bill. I cannot consider this charge incompetent. It is averred by the suspender that he was not a partner, but that is just what occurred in the case of Anderson v. Bolton,² and no question was there raised as to the competency of the charge. In the position in which the parties will be placed on the bill being passed, we shall not be making the suspender prove a negative, but the case

¹ Thomson v. Liddell, July 2, 1812 (F.C.)

² Jan. 26, 1810 (F.C.)

probandi will be put upon the charger, the whole matter depending on the circumstance of the suspender being proved to be a partner. The charger proceeds *in* *no* periculo.

LORD MEDWYN.—I concur. The only point discussed in the case of *Ander-Mil-son v. Bolton* was whether the bill should be passed without caution or not. In the present case caution is offered, and there is *prima facie* evidence that the suspender is a partner of the company in question as his name is the same, so that this is a strong case in favour of the competency of the charge. If any one point is settled, I should say that the one now under discussion is so.

LORDS GLENLEE and MEADOWBANK concurred.

THE COURT accordingly altered the interlocutor of the Lord Ordinary, and remitted to pass the bill, allowing the expenses of this discussion.

W. B. CAMPBELL, W.S.—J. B. GRACIE, W.S.—Agents.

WILLIAM FORBES STUART, Pursuer.—*G. G. Bell.*

JOHN and JAMES MILLER, Defenders.—*Patton.*

Proof—Confidentiality.—1. Correspondence relating to the subject-matter of an existing suit between one of the parties and two persons who acted for him in the matter in question, but were not professional agents, held not to be protected against a diligence for the production of such correspondence, although admitted to have been of a confidential character. 2. Question, whether communications made to an intermediate person by a party, to be conveyed to a professional agent, are protected?

THE late Mr Matthew Bell was tacksman of certain salmon-fishings in the Tay, for payment of the rents of which for the year 1832, the pursuer, Stuart, fish-salesman in London, accepted bills, receiving in return consignments of fish from Perth. In January, 1833, Bell being then indebted to Stuart in a sum of £518, it was agreed between them that Stuart should grant bills for the rents of that year to the amount of £800, on getting consignment of the produce of the fishings, and also receiving an assignation in security to the subsisting leases between Bell and the proprietors of the fishings. The defenders, Messrs John and James Miller, writers in Perth, acting under instructions from Bell, but with the knowledge and consent of Stuart, prepared a deed in terms of the agreement, which was thereafter executed, and bills for the rents of the current year accepted by Stuart. In May following, Bell became bankrupt, on which event Stuart sent down from London Mr Elmslie, one of his clerks, to attend to his interest, requesting at the same time James Bell, factor for Lord Gray, one of the proprietors of the fishings, to act with Elmslie. Stuart also wrote to James Miller in the following terms:—"Mr Davis, jun. told me that, as you are personally concerned, you would not act as the agent of any of the creditors in this

tion to the leases held by Matthew Bell, which they had agents for him, and on his behalf, had through their neglect to be an insufficient security, and concluding against them for had lost in consequence of Bell's failure.

Against this action it was maintained, generally, that they were not guilty of any wrong or negligence in regard to the so as to subject them in damages, and more particularly, that they had proved inoperative in consequence of Stuart himself properly neglected to make the assignation effectual at Bell's bankruptcy, he having then declined claiming upon assigned, and actually refused to connect himself with them.

After the pursuer had given in a revised condescendence, with the view of instructing his knowledge of the nature of the leases, and his repudiation thereof, moved for to recover the documents enumerated in a specification, and inter alia, the following:—"1st, All letters, memorandums, &c., by the pursuer, Mr W. F. Stuart, to Mr Elmslie, or agents in Perth, in the months of May, June, or July, 1833; 2d, All letters from Mr Elmslie, or others, the pursuer's agent employ, to the pursuer, regarding the fishings held by Mr Stuart, date of his insolvency, in the said months of May, June, or July, 1833; 3d, All letters from the pursuer, in relation to said fishing to the said Mr Elmslie, or others, their agents in Perth, 1833."

The Lord Ordinary granted the diligence for recovery of the documents specified, reserving the objection of confidentiality.

likewise examined as a haver, and “being interrogated for the pursuer, whether he was employed by the pursuer in this cause, to act for him as his agent at Perth, on the subject of the fishings referred to in process, in or about the month of May, 1833, and whether he held the communications which passed between him and the pursuer of a private and confidential nature? Depones, and answers in the affirmative.”

Upon these depositions, the pursuer and the havers objected to the production of the correspondence between them and Mr James Bell and Mr Elmslie, on the ground that that correspondence having passed between the pursuer and the said parties, acting in the capacity of agents for the pursuer, and being confidential in its nature, production of it could not be demanded by the defenders. The pursuer's objections were reported by the commissioner to the Lord Ordinary, and, some partial discussion having taken place before him, a remit was made by his Lordship to Mr Duncan M'Neill, with directions to consider and report upon the objections stated in the report of the commission.

The commissioner returned a specific report, in which he stated, with reference to the objection of confidentiality, “At a meeting with the agents for the parties, the agent for the defenders expressed a wish that the reporter should report specially on the fact, whether Mr James Bell and Mr Elmslie acted in the matter as agents for the pursuer, receiving payment for their services, or acted as friends gratuitously. The reporter has examined the correspondence in reference to that point, and begs leave to report, that it appears, from the correspondence, that Mr James Bell was employed by the pursuer on the footing of being remunerated for his trouble by a commission, but it does not appear whether Mr Elmslie was or was not to be remunerated.

“From the correspondence, it appears to the reporter, that both Mr James Bell and Mr Elmslie acted as the confidential agents of the pursuer, charged with his interest in the matter of Mathew Bell's bankruptcy, and matters arising out of that event—that the correspondence in question was had with them in that character, and upon that footing, and that it embraces matter unconnected with the immediate subject of the present action. The correspondence with Mr Condie does not appear to have been of that description.”

The matter having again come before the Lord Ordinary upon the commissioner's report, his Lordship found that the correspondence between the pursuer and Messrs Elmslie and James Bell ought to be produced, in respect there was no reference in any of the letters, with two exceptions, to the existing action, or to any action whatever against the defenders, and then in contemplation of the pursuer, adding at the same time the note subjoined.*

* The Lord Ordinary, in spite of the case of Gavin and Montgomerie, 17th December, 1830—9 Shaw, 213—would have been inclined, in the circumstances

No. 248. The pursuer reclaimed against this interlocutor, praying the Court find that the letters in question were of such a private and confidential nature as to exclude the defenders' right to get possession of the evidence, at least in the mean time, and until the averments of fact are fully seen and ascertained upon a closed record." The Lord Ordinary, raised appearing to the Court to be of importance, their Lordships ordered minutes of debate.

For the pursuer it was pleaded—

1. There is no principle and, in Scotland, no authority for holding that in order to give a communication the protection of confidentiality should be shown to have been made to attorneys or other individuals acting professionally; the principle of the protection is founded not upon the mere capacity in which the party receiving the communication is acting, but properly upon the character of the matter communicated; the general dicta of the law writers and judges refer to the nature of the communication more than to the actual situation of the party receiving it.¹

2. The correspondence in question is in its nature confidential, and is regarded as such by all the parties concerned; but taking the practice of the Court in the matter which this consideration suggests, it will be seen that the inconvenience may result from the power proposed to be assigned to the Lord Ordinary of deciding not merely from the deposition of the parties, but by personal examination of the documents or other extraneous evidence, how far particular writings are or are not to be produced.

3. To entitle the letters to protection as confidential, it is not necessary that they relate either to an existing or meditated suit.²

4. The protection arising from confidentiality is permanent, continuing after the cause or business in which the communications took place has come to an end, and after the party has ceased to be agent.³

of this case, to repel the objection of confidence, as to the letters to James Elmslie and James Bell, in respect that neither of these persons were law agents. But, as the point may be thought attended with difficulty, and the letters which have been excepted are truly of no consequence, he thought it better to grant deliverance on the ground expressed in the interlocutor, to which he thought no objection can be stated, and to confine the production, *hoc statu* at least, to what falls under that rule.

"Some parts of the correspondence may, in a certain popular sense, be regarded as confidential, but not in the sense which can alone entitle them to protection. No part appears to be of the nature of consultations as to an existing or meditated lawsuit, or communications made *eo intuito*, still less of consultations or communications having any reference to the particular suit in dependence, in which alone the protection would seem to be limited. See *Bowes v. Russell*, 10 May, 1810 (Fac. Coll.)"

¹ *Gavin v. Montgomerie*, Dec. 17, 1830 (ante, IX. 213).

² *Executors of Lady Bath*, Nov. 12, 1812 (F.C.); see also *Fisher v. Fisher*, Dec. 22, 1827 (ante, VI. 330); 1 Phillips, 134; Cases in Howison's Index, 1.

³ *Kerr v. Duke of Roxburgh* (3 Murray, 141); *Wight v. Ewing* (4 Murray, 587); Phillips, I. 131; Starkle, II. 229.

For the defenders it was pleaded—

1. Communications, though not meant to be divulged, passing between parties other than clients and their law agent, are not protected.¹

2. The privilege of confidence attaching to the communications with agents or counsel is exclusively confined to communications made with them in a professional character in regard to professional matters, and has no relation to matters of a different nature coming under their cognizance.²

3. Communications are not privileged unless they bear reference to a suit in dependence or in contemplation.³

The Case was this day put out for advising.

LORD JUSTICE-CLERK.—I am of opinion that the interlocutor of the Lord Ordinary is well founded. I find no sufficient authority in our law for extending the privilege of agency or confidentiality to persons who are neither counsel, attorneys, nor professional agents. On looking to the opinion of the Lord President in the case of Gavin, for which I have the greatest respect, I am satisfied it was not necessary for the decision of the point which then occurred, and I cannot find that the principle it recognises is established in the law of Scotland. In the case of Wright against Arthur,⁴ which was the case of an accountant, we found that the objection was not to be extended to other than professional persons; and there appears to me to be nothing in the situation of James Bell and Elsie to induce me to go against this established principle.

LORD MEADOWBANK.—I am of the same opinion. I understand it to be a general rule of the law of evidence, that every individual cited as a witness is bound to give evidence, so far as he knows. If he plead an exception as applicable to his situation, he must prove his exception. Now, I find no authority from which it is to be inferred that the exception of confidentiality is to be extended to the situation of a confidential friend. The law of England is clear upon the point, and the reasons for the judgments in England apply equally to the state of the law in Scotland.

LORD GLENLEE.—I agree. The objection in the prayer of the reclaiming note is not an objection to these letters being admitted in modum probationis, but to their being produced at present for the purpose of enabling the defenders to contend. I admit there is a fundamental distinction between those two situations; but I incline in this case to adhere to the interlocutor, as, in the sum-

¹ 1 Phillips, 144; Wilson v. Rastall, June 10, 1792 (4 Term Rep. 758, 758); Bramwell v. Lucas (2 Barn. and Cress. 748); Broad v. Pitt (1 Mood. and Malk. 100); Wright v. Arthur, Dec. 15, 1831 (ante, X. 139); 1 Phillips, 144; Peake, 107; Burnet, 439; 2 Hume, 330; Tait, 386.

² Bramwell, supra; 1 Phillips, 145; Peake, 195; Burnet, 438; Tait, 384.

³ Burnet, 436, et seq.; Bower v. Russell, May 26, 1810 (F.C.); Campbell of Marline, Jan. 21, 1823 (ante, II. 139, new ed. 128); Preston v. Carr, Dec. 12, 1826 (Young and Jervis, 175); Bolton v. Corporation of Liverpool (3 Sim, 467); Coburn, 4 Term Rep. 431; Williams v. Muudie, Feb. 26, 1824 (1 Ryan and Mudie, 10); Broad, supra; Clark v. Clark (2 Mood. and Malk. 3)

⁴ Supra.

No. 248, mons, it is especially averred, that the pursuer had actually declared th
 — were so and so, while the defenders positively aver, that the pursuer ha
 y 26, 1836. ally declared he was to abandon the leases. Now, are the defenders not
 art v. to see the evidence of this, in order to enable them properly to shape
 ler. cord? As to the question of confidential communications, if a person v
 a friend not an agent or attorney, and authorises him to apply to an ager
 gard to a lawsuit, and he accordingly goes to the agent, the communica
 tween the friend and the agent is sacred, but I should hold the letter to th
 not sacred.

LORD MEDWYN.—I am averse to fishing diligences in making up a
 If correspondence is allowed to be produced, it should be only regardi
 matter as has reference to the transactions between the parties. I am
 to agree with the observations of the Lord President in the case of Gavi
 am disposed to think a communication made to an intermediate person
 a party and his professional agent, as sacred as a communication made
 to the agent. I consider the communications now in question to be sac
 defenders are entitled to see, but would hesitate as to allowing a s
 diligence for the recovery of letters not relating to transactions betw
 parties.

LORD JUSTICE-CLERK.—We have no intention that parties, under
 of getting at matter relating to this cause, are to be allowed to recover
 pondece having reference to other subjects. As to a person passing
 communication from a party to his agent, I am willing to consider suc
 mediate person as *eadem persona* with the agent.

On the suggestion of the Court, the defenders put in a minute,
 their understanding to be, that the demand for production of
 pondece between the pursuer and Messrs James Bell and Elms
 restricted to the recovery of correspondence relative to the acc
 or rejection, on the part of the pursuer, of the leases held by M
 thew Bell; whereupon

THE COURT adhered, and remitted to the Commissioner, re
 all questions of expenses.

WOTHERSPOON and MACK, W.S.—WILLIAM SPALDING, S.S.C.—Agents.

HENRY ALEXANDER DOUGLAS (Stein's Assignee), and **MANDATARY,**
Pursuers.—*Rutherford—Sandford.*

BRUNTON'S TRUSTEES, and EBENEZER WARDLAW, Defenders.—
More.

Principal and Agent—Sale—Arbitration—Bankrupt.—Special circumstances, in which, where part of the stock of a man who became bankrupt, had been consigned by him in security of advances, and with powers of sale; and the consignee had been obliged to sell for his own relief; and the purchaser alleged the goods, on examination, to be unmarketable; the consignee, in accounting for the proceeds, to the bankrupt's creditors, was allowed to take credit for the expense of a submission into which he had entered with the purchaser for deciding whether the goods were marketable; and also for a sum of damages which had been awarded, as a deduction from the price, in respect that the goods were held by the referees not to be marketable.

SEQUEL of the case reported Feb. 12, 1833, ante, XL 373, which see. In 1812 Williamson came under large advances, by bills, in favour of John Stein, who consigned 50 puncheons of whisky to him, with a power of sale. Stein failed during the currency of the bills. Williamson then sold the whisky in several parcels for his relief. Messrs Ainslies were the purchasers of one parcel, consisting of 20 puncheons, and they objected that the article was unmarketable. Williamson offered to take it back, but they insisted on damages, and threatened an action to recover them. A reference was agreed on, to fix whether any and what damages were due, the referees being George Dunlop of Leith and the late Kincaid Mackenzie. The referees found the spirits not marketable, and assessed the damages at £56, 14s. 8d., which Williamson, in accounting with Ainslies, deducted from the price of the 20 puncheons. Williamson's advances considerably exceeded £3000, and the balance of proceeds of the whole fifty puncheons, after satisfying these, was, according to his accounts, only £264, 10s. Williamson had not consulted with the party acting for Stein's creditors, or obtained any sanction from them for entering into the reference, and, a few months afterwards, Sir James Gibson-Craig, acting for the creditors, intimated that the reference was unauthorized, and that no deduction, in their accounting with Williamson for the sales of the spirits, would be allowed on account of the damages assessed by the referees.

Brunton and Wardlaw had become cautioners that Williamson should duly account for the proceeds of the whisky. Williamson failed, and, after a long interval, the assignee of Stein's bankrupt estate raised action against Brunton and Wardlaw, to account under their cautionary obligation. After Brunton's death, the action proceeded against his trustees. The principal question was decided by the judgment above referred to.

No. 249.
 May 27, 1836.
 Douglas v.
 Munton's
 trustees.

There still remained the consideration, in detail, of objections made by Stein's assignee to various items for which credit was taken in Williamson's account; the principal item being the sum of damages awarded by the referees and the expense of the submission.

Stein's assignees contended, that it was ultra vires of Williamson, a consignee, though under heavy advances, and holding powers of sale, to enter into a reference whether the spirits were marketable, and what damages were due to the purchaser of them; because Stein's creditors, or the party acting for them, were in the country and should have been advised with.

The cautioners answered, that the case was one of very special circumstances. The bills granted by Williamson were current when Stein failed. The power of sale was intended to relieve him of these bills, and the sale required to be effectually carried through, without delay. A purchaser having alleged that the spirits were not marketable, and threatened legal claims for damages, a reference was best for the interest of Stein's creditors, as well as the consignee, and was within the powers of the consignee. The defenders also alleged, that Williamson had offered the whole spirits back to Stein's creditors, if relieved of his advances; and as the creditors failed to do this, there necessarily remained to Williamson the power of protecting himself, by acting to the best of his judgment in carrying through a sale and satisfying a purchaser's objections by a bona fide reference, in place of standing the brunt of a doubtful lawsuit with him.

The Court viewed the question as entirely of special circumstances. The Lord Ordinary repelled the objections of Stein's assignee, and, on his reclaiming, the Court adhered.

LORD BALGRAY.—Williamson acted throughout with perfect bona fides. I have no intention of trenching on any general principle of mercantile law by this judgment, but every mercantile transaction depends on its own circumstances. Williamson was consignee with a power of sale, which was intended to be used for his own relief; and it became necessary for him to use it. He had made large advances on the security of the consigned whisky. Indeed his advances were so heavy, that he had the principal interest in seeing that it sold to good account, and brought the highest possible price for his own relief. Keeping these things in view, and that he acted bona fide in entering into the reference, in which he selected two referees, who were exceedingly well qualified to dispose of the question, I think the damages awarded by them, on account of the unmarketable state of the spirits, should be allowed in accounting for the price.

LORD PRESIDENT.—I am of the same opinion. Williamson was placed in very peculiar circumstances, and he acted with perfect bona fides in entering into the reference. I think he did exactly what Sir James Gibson-Craig, or any party acting best for the interest of Stein's creditors would have done in his place.

LORD MACKENZIE.—In the special circumstances of this case, I concur. But I should hesitate long before I laid down any such rule as that a consignee, with power of sale, has a power to enter into a reference as to the marketable condition of the goods consigned, especially where the consigner is in the same country, and can be advised with. But this case is peculiar, and does not involve any such general principle as that.

THE COURT, in the special circumstances, adhered.

D. FISHER, S.S.C.—**W. A. G. & R. ELIAS, W.S.**—Agents.

MRS MUNRO or ROSS and HUSBAND, and OTHERS, Pursuers.—

Sol.-Gen. Cuninghame—Robertson—Buchanan.

HON. MRS HAY MACKENZIE, and HUGH MUNRO, Defenders.—

D. F. Hope—H. J. Robertson.

Process—Jurisdiction—Reclaiming Note.—1. A summons of declarator set forth, that, in a previous process between the same parties, a judgment, favourable to the pursuers of the declarator, was pronounced by the Court of Session; that subsequent interlocutors, inconsistent with this one, were afterwards pronounced by the Court; that both parties then appealed, and the whole interlocutors were affirmed; the summons subsumed that all the subsequent interlocutors, though their meaning was not doubtful or obscure, were “utterly illegal, null and void, and incapable of operating or receiving legal effect;” and it concluded for declarator of the rights of parties, in terms of the first interlocutor, and in contradiction to the subsequent interlocutors:—Held, that the summons was incompetently laid, in respect that it contained no reductive conclusions, to cut down the interlocutors which were repugnant to the judgment craved; and that one formal and probative judgment of this Court is equally effectual with another formal and probative judgment (however erroneous either may be in reality), so long as both are unreduced. *Circumstances in which the Court refused to admit a minute of amendment of a libel.*

MRS MUNRO or ROSS and husband, together with the burgh of Dingwall, their vassal, were proprietors of the lands of Breakenord on the banks of the river Conon, in which they possessed a right of fishing. The Hon. **Ld. Mrs Hay Mackenzie** was proprietor of the adjoining lands of Balblair, and had also a right of fishing in the river. In conjoined processes of declarator between the predecessors of the respective parties, it had been fixed by an interlocutor, on 24th January, 1778, that the right of fishing of **Mrs Munro** and others extended “from the march at Breakenord down to the sea.”

In 1825, **Mrs Hay Mackenzie**, and her tacksman, **Hugh Munro**, raised an action of declarator, molestation, and damages, against **Mrs Munro** and the burgh of Dingwall, alleging that the defenders were encroaching

No. 250.

May 27, 1836.
 Mrs. Mackenzie v. Hugh Munro.

on her right of fishing. The import of the words in the interlocutor 1778, "from the march at Breakenord down to the sea," was disputed by the parties; Mrs Munro and others, on the one hand, alleging this march to be the upper march between Balblair and Breakenord; and Mrs Mackenzie and Hugh Munro, on the other hand, alleging that it was the lower march, nearest the sea, and that the other parties could fish no higher than that.

On 12th November, 1828, the Lord Ordinary (Corehouse) pronounced an interlocutor, finding that the judgment in 1778 was res judicata between the parties, and therefore, repeating the finding that Mrs Munro and others had a right of fishing "from the march at Breakenord down to the sea, and to that effect assoilzied the defenders (Mrs Munro and others) from the conclusions of this action, and decerned; but in respect parties are not agreed as to the march between the lands of Balblair and Breakenord, appointed the pursuers to put in a condescendence, specifying what they aver to be the situation of the march."

Mrs Mackenzie and Hugh Munro reclaimed against that judgment, but the Court adhered.

When the cause returned to a new Lord Ordinary (Newton), parties were at issue whether the interlocutor of Lord Corehouse, of 12th November, 1828, had found and adjudged by his interlocutor, that "the march at Breakenord," in the interlocutor 1778, was also the march betwixt the lands of Balblair and Breakenord: or whether the true meaning of the interlocutor 1778, on that point, was still open for argument.

The Lord Ordinary (Newton), on March 11, 1831, found "that by the words 'the march at Breakenord,' as used in Lord Corehouse's interlocutor of 12th November, 1828, is meant, as shown by the subsequent part of that interlocutor, the march betwixt the lands of Balblair and Breakenord; and that it is not now competent to enquire in what sense these words were employed in the interlocutor in the former process of 24th January, 1778."

The pursuers reclaimed, and the Court, on June 17, 1831, "reconsidered the interlocutor reclaimed against, and found that it was competent to enquire in what sense the words 'the march at Breakenord' were used in the decree 1778: For that purpose, allowed the parties to give in cases on the import of the evidence in process, so far as concerns this point, and in particular, on the import of the proof led, the pleadings and other proceedings in the cause on which the decree 1778 proceeded."

Farther discussion followed, which resulted in a judgment by the Court on July 11, 1832, finding that it was not the march between Balblair and Breakenord, which was meant by the "march at Breakenord," in the interlocutor 1778; and fixing a certain line, drawn upon a plan, which

ad been prepared by an engineer, under a remit, as describing the true march indicated by these words, and forming the upper boundary of the right of fishing of Mrs Munro and Others.

Both parties appealed against the judgments of this Court, and, on 12th April, 1834, both appeals were dismissed, and the judgments complained of, affirmed. In October, 1835, Mrs Munro and the burgh of Dingwall raised a summons of declarator against Mrs M'Kenzie and Hugh Munro, setting forth the judicial procedure now narrated, and especially that, in respect the judgment of Lord Corehouse, dated 12th November, 1828, and the interlocutor of the Inner House, adhering to it, on 20th January, 1829, had been affirmed, "it was now res judicata finally adjudged by the Court of last resort, that the pursuers, under the terms and true meaning and import of the judgment of the Court pronounced on the 24th January, 1778, have a sufficient title to the fishings in the river Conon, from the march between the lands of Balblair and Breakenord down to the sea; and that to that effect the pursuers stand finally and for ever assoilzied from the conclusions of the action at the instance of the said Hugh Munro and Mrs Maria Hay Mackenzie: That all the subsequent proceedings and interlocutors of the Court, in so far as the same are at variance or inconsistent with the said interlocutors of Lord Corehouse and of the Court, are utterly illegal, incompetent ultra vires, and funditus null and void, and are farther incapable of operating or receiving legal effect."

The pursuers, therefore, concluded to have it "found and declared, by decree of the Lords of our Council and Session, that under the terms and according to the true meaning and import of the judgment of the Court, pronounced as aforesaid on the 24th of January, 1778, as the said judgment has been interpreted and explained by the interlocutor of Lord Corehouse, Ordinary, of the 12th November, 1828, and the interlocutor of the Court, of 20th January, 1829, adhering thereto, and the judgment of the House of Lords, of the 12th April, 1834, affirming the two last interlocutors, and under the terms, effect, and true meaning of all the said judgments, the pursuers have the only legal, just, and undoubted right to the whole salmon fishings in the river or water of Conon, from the march between the lands of Balblair and Breakenord down to the sea," &c.

There were subordinate conclusions, of interdict, &c., against the defenders.

The defenders pleaded, especially in their third and fourth defences, that the precise conclusions now insisted in, had been expressly discussed and decided against the pursuers, in the process of declarator, &c., which was finally disposed of in the House of Lords, on 12th April, 1834. There were no grounds for reducing any of the judgments in that cause, and accordingly no reduction was attempted. But, without a reduction,

lo. 250. it was incompetent even to entertain a declarator, that any right was in the pursuers, which was inconsistent with the express findings of the judgments pronounced in foro by this Court, and affirmed on appeal.

27, 1838. The Lord Ordinary found "that the summons as laid is incompetent; and to that effect sustained the third and fourth defences; dismissed the action, and decerned; and found the pursuers liable in expenses." *

The pursuers reclaimed, and craved the Court "to recal the above interlocutor, and to find that the summons as laid is competent; and to repel the third and fourth defences, and to remit the cause to the Lord Ordinary to proceed therewith as shall be just; or otherwise, to do in the premises as to your Lordships shall seem proper."

LORD PRESIDENT.—I have no doubt that this interlocutor must be adhered to. I have now known this Court for a period of fifty years, and I never saw any instance of an attempt such as that which is made in this action. It is altogether incompetent. Suppose, however, that we were to sustain the competency, and that we were even to find in the very terms of the declaratory conclusions of this summons, what would such a finding avail the pursuers? Our former judgments stand unreduced, and the pursuers do not attempt to reduce them. But so long as these judgments remain, they are the judgments of this Court, and have all the strength of our judgments in foro, and what more would our judgment in this very action itself be, than this? It would just be one judgment standing against another. So that the course now adopted is equally nugatory and incompetent. Had the pursuers tried a reduction of the previous judgments, and had they succeeded in cutting them down, they would then have opened the way for their ulterior declaratory conclusions, but they have not attempted this, and we cannot entertain the declarator, as a competent form of proceeding.

Solicitor General, for Pursuers. We submit that we ought to be allowed to

* "NOTE.—It is competent to bring an action of declarator, for the purpose of ascertaining the meaning of an interlocutor of this Court. But the present action is of a different nature. It sets forth, that certain interlocutors were pronounced in this Court, which were afterwards affirmed in the House of Lords; that this Court, notwithstanding, proceeded to pronounce subsequent interlocutors inconsistent with their first interlocutors, and it assumes that these subsequent interlocutors, the meaning of which is not said to be doubtful or obscure, 'are utterly illegal, null and void, and incapable of operating or receiving legal effect;' and it concludes, that the rights of parties should be declared in terms of the first interlocutor, in contradiction to the subsequent interlocutors, with which they are said to be inconsistent.

"Whatever might be the case in a reduction, it is thought that this is clearly incompetent in a declarator. It is calling on the Court to declare, that their own final judgment, which is regular and probative, in every respect, shall be held null and void, because it proceeded on error. But one judgment of this Court is equally effectual with another judgment (neither being impeachable as informal or improbate), however incorrect one of them may be in reality, or erroneous in point of law, while both remain unreduced. A reduction, therefore, is the form of action to which the pursuers ought to have resorted."

send our libel, to the effect of adding reductive conclusions. We tender a minute of amendment to that effect; and, if there be any difficulty in allowing it, be received now, a remit might be made to the Lord Ordinary to dispose of it.

Dean of Faculty, for Defender. This minute cannot be received. The prayer of the reclaiming note is quite incompatible with any such proposal as this, which would be substantially changing the nature of the action; and no notice even of this proposal was given in the prayer of the note.

LORD MACKENZIE.—I am not inclined to allow a summons to be patched up in such a manner as this, after the cause has reached its present stage. On the merits of the case, as presented to us under the reclaiming note, I entirely concur with the reasoning in the note of the Lord Ordinary, which is perfectly conclusive.

LORD BALGRAY concurred.

LORD GILLIES was absent.

THE COURT refused to admit the minute of amendment of the libel. Their Lordships adhered to the interlocutor under review, and awarded additional expenses against the pursuers.

SARG and ADAM, W.S.—J. BURNES, S.S.C.—Agents.

ALEXANDER M'NEEL and OTHERS, Suspenders.—*D. F. Hope—Marshall.*

WINGATE ROBERTSON, Charger.—*Rutherford—M'Neill—Cowan.*

Church—Diligence.—The magistrates of a royal burgh having been decerned by a presbytery to erect a new church, the old one having become ruinous and been condemned, and the magistrates having, after entering into contracts, proceeded to stent the expense upon the proprietors, and letters of horning having been obtained thereon, and a charge for payment given to the individuals stented—Bill of suspension, on the ground of the incompetency of the diligence, passed.

THE ancient church of Stranraer having fallen into decay, the last March was built in the year 1784, the expense being defrayed from the funds of the burgh, with the aid of two donations from private parties. In 1833, the building became insecure, and was found, upon inspection, to be repairable. Intimation of this having been made by the minister to the presbytery of the bounds, they, after receiving a report, condemned the church, and, on the 29th May, ordained “the magistrates, rioters, feuars, and proprietors of houses, and all others bound by law bear a part in the expense, to build a good and sufficient church to accommodate the population of the burgh of Stranraer, in terms of law, and give in at an early meeting of Presbytery plans and estimates of the said church, when the presbytery will fix the time when the said church

lo. 251. is to be finished, and crave the Right Honourable the Lords of Council and Session to interpose their authority, if need be.

27, 1836. " The presbytery appoint Mr Wilson to intimate this sentence from the pulpit, and also appoint the clerk to send an extract of the minute to the magistrates of Stranraer."

Neel v.
Robertson.

The burgh of Stranraer having no funds, various meetings of the magistrates and inhabitants were held, with the view of considering the best mode of defraying the proposed expense. At last it was determined that a compulsory assessment should be levied, the presbytery, in the mean time, pronouncing renewed orders for proceeding, and for giving in plans and specifications. After some delay, building contracts were entered into by the magistrates, and preparations made, by appointing a collector, &c., for levying the assessment. At a meeting on the 30th December, 1835, they " resolved, that the collector shall proceed forthwith to uplift the sum of 3s. 1d. upon the said valuation roll, as the first instalment of the said assessment of 8s. 4 $\frac{3}{4}$ d. per pound sterling." On 17th February, 1836, the presbytery renewed their appointment of 29th May, 1833, " and also ordain the magistrates, heritors, feuars, and proprietors of houses and all others bound by law, to bear part in the expense, and to proceed with the building of the new church, as soon as the season will permit, and to use all possible diligence that the church may be roofed in before the end of the present year; and the presbytery did, and hereby do, crave the Lords of Council and Session to interpose their authority, if need be, to give effect to this sentence."

Thereafter, the charger, Robertson, as " collector of the stent imposed upon the burgh and inhabitants of Stranraer, and also collector of the assessment imposed or to be imposed on the heritors of property within burgh, for the erection of a new church in the burgh of Stranraer, nominated and appointed by the magistrates and town-council."

The letters set forth generally the proceedings in regard to the church, and, inter alia, the magistrates' resolution of 30th December, 1835, enumerating " feuars" as among the parties to be charged for payment of the assessment, and stating, as the warrant of the letters, that " the Lords have seen the extracts of the proceedings, and decreets of presbytery, and certificates above-mentioned."

Upon this, certain of the parties, against whom the letters had been issued, brought a suspension, on the grounds that the horning was incompetent; that not being heritors of the parish, they were not liable in the expense of erecting the proposed church; and that the church was unserviceable of repair. Answers having been given in, the Lord Ordinary reported the case, and issued the subjoined note.*

* " The Lord Ordinary reports this cause as the most useful course for the parties. He thinks that there is a great deal both of statement and of argument in the bill, which is not of much importance, and is sufficiently obviated in the

It was assumed, both in the bill and answers, that the parish of Stranraer was wholly burgal; but, at the advising, the suspenders alleged that it was partly landward, as appeared from "feuars" being mentioned among the inhabitants of the parish; and, in regard to the competency of the horning, they maintained, that, as the parish was partly landward, and the letters were directed against persons included in the landward portion, as well as against individuals within burgh, the diligence was incompetent; that the letters were without legal warrant, in so far as the decrees of Presbytery were for no specific sum, and were only generally founded on, besides being otherwise no good warrant, and the resolution of the town-council to levy an assessment, in a matter where they were not acting under a statute, was not a ground on which diligence could legally proceed.

The charger, in answer, alleged, that the complainer had, in his bill, stated the parish of Stranraer to be entirely burgal, and maintained that the decree of the presbytery was a sufficient warrant for the letters.

THE COURT were of opinion that, on the point of form, the horning was incompetent, and accordingly remitted to pass the bill.

CAMPBELL and MACDOWALL, S.S.C.—DONALDSON and CAMPBELL, W.S.—Agents.

answers; and the inclination of his opinion is, that the bill should be refused. But the material point the case is new and peculiar. It is very clear to him, that it is not at all affected by the case of Porterfield, or by the cases of Crieff, &c. Here the presbytery have had sufficient evidence, obtained in a regular way, and not objected to for years, that the church is dangerous and irreparable. They have proceeded correctly in ordering the heritors to provide a church. There is no doubt that the corporation of the burgh in this case constitute the heritors, which, instead of supporting the argument of the complainers, is the very thing which takes the case entirely away from the doctrine on which the complainers found. The presbytery have no power to take estimates, or give decrees for money, unless the heritors refuse to assess themselves. Here the proper heritors undertake the duty; and the only real question is, how this is to be done, in the case of a corporation of a burgh having no landward, and where the corporation itself has no lands. The obligation for the church is a debt of the entire corporation of the burgh,—the community. The question is, Whether, in the emergent necessity, the ruling corporation appointed by the community, must not be entitled to assess the proprietors within burgh, according to their discretion? If not, there seems to be no alternative, but that the presbytery might give a warrant to attach any property making part of the burgh, leaving the proprietor to his relief. The case has no resemblance to such cases as Peterhead, &c. But still it is new, and deserves consideration."

RE...

No. 252.

JEAN HAGGART, Pursuer and Advocator.—*Maidment.*

y 31, 1836.

WILLIAM CROLL, Defender and Respondent.—*M'Neill—Mure.*Haggart v.
Croll.

Proof—Semplena Probatio.—In an action of filiation of a natural child, evidence which held to amount to *semplena probatio*, so as to entitle the pursuer to her oath in supplement.

y 31, 1836.

D DIVISION.
Lord Jeffrey.
T.

JEAN HAGGART, residing in Dundee, having been delivered of an illegitimate child in May, 1834, brought an action of filiation before the Magistrates of Dundee, against William Croll, a clerk in the office of a writer there. Croll, in defence, denied the paternity. On the record the pursuer made no distinct averment of connexion, or specification of the time and place thereof, but alleged generally that Croll was the father of the child, and that he had admitted the fact of his being so.

Croll, on being judicially examined, declared, “ That he has seen the pursuer in the office of Mr William Thoms, writer in Dundee. That he knows her name to be Haggart, and he has heard people, in passing the foot of Mr Thoms’ stair, 73, High Street, call her Jean, as he himself might have called her Jean, although he does not recollect. Declares, That he knows the pursuer’s mother. Declares, That he was an apprentice to Mr Thoms for three years, and his apprenticeship expired in the month of April last. Declares, That during his apprenticeship he was not absent from the office for any length of time. Declares, That the pursuer was in use sometimes to clean out Mr Thoms’ office in the mornings, and sometimes her mother did so : That the declarant, during the whole time of his apprenticeship, was in the practice of attending a Latin class in the morning, sometimes at seven, and sometimes at eight, and in the immediate adjoining close to the westward of Mr Thoms’ office, for 18 months of the last two years of his being with Mr Thoms as an apprentice ; and the hour was according to the season of the year : That when he went to Mr Thoms’ office for his books, which he did occasionally, and at other times when he went there on his master’s business, in the morning, he has seen sometimes the pursuer, sometimes her mother, and he has seen them both together there. Declares, That he never was long in the office in the morning, but he has sometimes been from ten minutes to a quarter of an hour ; and on Monday mornings, when the newspaper came to the office, he remained longer than upon other occasions. Declares, That he has seen the pursuer alone occasionally in the office at seven o’clock in the morning, well as her mother ; and he has been there for three months at a time without having seen the pursuer. Interrogated, Whether or not he has seen the pursuer in the office alone at any time during the months of August, September, or October last ? declares, That he paid no particular

on to the months, and he went out and in to the office as if she, the pursuer, never was there. Interrogated, declares, That he had no conversation with the pursuer in the office, farther than asking her if there were any letters, or asking her to clean the window, or such like. Interrogated, Whether he was in the practice of visiting the mother's house? declares, That when the keys of the office were not at hand, either by Mr Brand having them, or Mr Sanderson's shop was not open, he has gone to the pursuer's mother's house for the key of the office, which she kept. Declares, That he never stayed long there: That he could not specify time, but he never stayed long. Interrogated, If he ever went to the house of the pursuer's mother except when he went for the keys? declares, That the declarant had agreed, upon the asking of Mrs Haggart, to write a letter to a friend of hers in America, and appointed her to come to the office of an afternoon, and as she did not come, the declarant went to her house, to tell her that he had been waiting for her; and upon another occasion, the pursuer's mother came to Mr Thoms' office, at nine o'clock in the evening, and asked the declarant to come down to her house, when the office shut, to read a letter which he had received from America: That he went down accordingly, when he was told by the pursuer's mother, in presence of the pursuer, that the pursuer was with child by the declarant, and seven months gone: Declares, That this was the first time such had been told the declarant: That the pursuer desired her mother to go out of the room. Declares, That he did not, upon that occasion, promise to maintain the child if she would keep it quiet. Declares, That he never mentioned to Mrs Haggart that he intended going to America. Interrogated, If the pursuer, her mother, were in use to call him by his Christian name 'William?' declares, That the mother has done so often: That she was in the practice of dealing with a shop in the neighbourhood of her residence, wherein the declarant was a shopman previous to his becoming a clerk to Mr Thoms: That in Mr Thoms' office the mother seldom called him by any name, but when she wanted money, merely stated that it was pay-day: That the pursuer might have called him 'William,' but he does not recollect of her doing so. Interrogated, If he ever admitted to Mr Brand, clerk to Mr Thoms, or to any other clerk or apprentice to Mr Thoms, that he was the father of the pursuer's child? declares negatively.

The magistrates having allowed a proof, James Brand, a clerk in the office, deponed, "That he knows the parties to the present action: That he was informed that certain objections had been taken to his admissibility as a witness in this cause, and these objections were read over to the deponent by Mr Reid, the pursuer's agent, in his, Mr Reid's presence, who asked the deponent whether the facts stated in these objections were true: That one of these objections was, that he, the deponent,

No.
May 3
Haggart
Croll.

No. 252. had stated to one or two individuals that he, the deponent, had had connexion with the pursuer, Jean Haggart, and Mr Reid asked the deponent whether he had made any statement to that effect: That he, the deponent, told Mr Reid that he had made such a statement. Interrogated, If he has any objection to answer the question whether, in point of fact, he, the deponent, ever had carnal connexion with the pursuer, Jean Haggart? depones and answers, That he has had such connexion with the pursuer. Interrogated, depones, That he dares to say he has stated, although he does not recollect precisely of having done so, that he was afraid of the child being fathered on him, or coming his way, or words to that effect. Interrogated, Whether the deponent, after that it was known that the pursuer was with child, and when it was reported that the child was to be fathered on the defender, or at any other time, ever said that the deponent would do what he could to get the child fathered on some other person than himself, or used expressions of a similar import? depones, That he has repeatedly said that he would do what he could to get the child fathered on the defender. The defender's agent objected to the admissibility of the witness, for the reasons appearing upon the face of the deposition. And the commissioner having heard parties verbally on the objection, repels the objection to the admissibility of the witness, reserving all objections to his credibility for the consideration of the Court. And the witness being warned by the commissioner and purged, &c. depones, That he knows the pursuer, Jean Haggart. Depones, That he was for sometime employed in the office of Mr William Thoms, writer in Dundee, as a clerk, and he knows that the pursuer was in the practice of cleaning out the office: That the deponent entered into Mr Thoms' service in April 1833, and left Mr Thoms' employment in May last, 1834: That the defender was in Mr Thoms' employment during all that time. Interrogated, If the defender stated to the deponent, on various occasions, that he had carnal connexion with the pursuer? depones, That the defender so stated to the deponent, but whether he did so more than once the deponent does not recollect: That the statement was made to the deponent in Mr Thoms' office, and during the time the deponent and the defender were in Mr Thoms' employment. Interrogated, If it is consistent with his knowledge that the pursuer, in the month of May last, was delivered of a female child? depones, That he of his own knowledge does not know, but he has heard and believes such to be the fact. Cross-interrogated for the defender, depones, That he has no recollection of any other person being present when the defender stated that he had had carnal connexion with the pursuer, other than the deponent and the defender himself: That when the defender so stated, he was laughing at the time; and the deponent does not recollect of the defender mentioning any time at which he had had that connexion. Depones, That he has seen the defender come into the office of a morning

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roll.

for his books, to enable him to attend a Latin class : That the deponent sometimes came across from Fife at eight o'clock in the morning to the office, to enable him to get away earlier in the afternoon. Depones, That he has seen the pursuer's mother as often cleaning out the office as the pursuer herself, but never saw them both together cleaning out the office : That the deponent has often been in the office when the pursuer alone was cleaning out the office."

Grace Reid deponed "that she knows the pursuer, Jean Haggart, and has been acquainted with her for some years : That she knows the defender by sight. Interrogated, If the defender said to her, that if the pursuer's mother had not exposed him, he would have punished his own belly to enable him to support her (the pursuer) and her child? depones affirmative; and that these were the very expressions used by the defender. Cross-interrogated for the defender, depones, That it was on the street of Dundee that the defender told the deponent what she has deponed to, and that this happened before the pursuer's child was born; and there were no persons close by the deponent and defender at this time : That this happened of an evening : That the deponent spoke to the defender upon the street about the pursuer being with child to him; and it was on her speaking about this that the defender expressed himself as above deponed to. And being desired by the defender's procurator to repeat the expressions used by the defender on that occasion, depones and answers, That the defender said, that if Jean and her mother had not gone about and exposed him, he would have seen to the child, although he had punished his own belly. All which is truth, &c. And being further interrogated by the defender's procurator, Whether the defender said, on the occasion referred to, that if he had had connexion with the pursuer, and the child had been his, he would have seen to it, although he had punished his own belly? depones and answers, That she does not recollect of the defender using the expressions stated in the interrogatory, but that he said that the other fellow had had as much connexion with the pursuer as he. Interrogated, depones, That the defender did not say to the deponent that he had not had connexion with the pursuer, nor does she recollect of his saying that he had had connexion."

With reference to the witness Brand, Haggart subscribed the following certificate:—"I, Jean Haggart, residing in Dundee, do hereby certify that I have no claim whatever against James Brand, presently clerk in the Dundee Guardian newspaper office, for aliment or otherwise, in regard to the female child brought forth by me on the 4th day of May last—William Croll, late clerk to Mr William Thoms, writer, Dundee, now clerk to Messrs Gray, wood merchants, Dundee, being the father. And she farther certifies that she never had connexion with the said James Brand."

No. 252. The magistrates, holding the evidence not such as to amount to a
 ay 31, 1836. semiplena probatio, refused the pursuer her oath in supplement, and
 crown v. Hay. assoilzied the defender.

The pursuer thereupon brought an advocacy, in which the Lord Ordinary found that there was such a semiplena probatio as to entitle her to her oath in supplement, adding to his interlocutor the subjoined note.*

Croll reclaimed.

THE COURT, although they considered that the record in the inferior court had not been very skilfully made up, and that Brand's evidence was liable to suspicion, yet holding the evidence of Reid, together with the implied admission in Croll's own declaration, sufficient to warrant the oath in supplement, adhered, with additional expenses.

JAMES BURN, W.S.—JOSEPH MITCHELL, W.S.—Agents.

No. 253.

JAMES BROWN, Pursuer.—*Shand*.

JOHN HAY, Defender.—*More*.

Process—Aliment.—A party having executed a trust-disposition for payment of his debts, which contained a clause declaring that during the subsistence of the trust he should be entitled to receive from the trustee, out of the annual produce of the estate, such sums of money as might be necessary for providing a suitable maintenance for himself and family; and having thereafter, founding on this clause, raised action against the trustee for payment of a yearly aliment, and the Lord Ordinary having made great avizandum therewith—held that this was not a proper process of aliment to be summarily disposed of as such, and the cause remitted to his Lordship.

* “ The Lord Ordinary does not see it denied that the defender had causal connexion with the pursuer. Indeed, he thinks this is substantially admitted in his judicial examination, and it is implied at least in his statement of facts on the record. He does not even distinctly deny that he had such connexion at a period which might correspond with the birth of the child, and all that he really denies is that he is the father. But such proof of connexion, generally, is no small ingredient in a semiplena probatio. The Lord Ordinary, however, goes chiefly on the testimony of the girl Reid, which it is impossible to hold as any thing else than proof (in so far as it is credible) of an actual acknowledgment of the paternity by the defender. The witness may not be extremely respectable; but it is remarkable, that, after being allowed a reprobatory proof, and indulged in a re-examination, the defender withdraws his reprobator, and allows the evidence to stand unimpeached. The substance of that testimony does not appear to the Lord Ordinary to be at all incredible, any more than that of Brand; who, if he had been disposed to screen himself, by a false accusation of the defender, would certainly have given a stronger and more specific testimony. At all events, there is quite enough to entitle the pursuer to her oath.”

In 1830, the pursuer Brown, executed a trust-deed conveying his whole property, which was chiefly heritable, to the defender Hay, for behoof of his creditors. After stating the purposes of the trust, the deed provided "that during the subsistence of the present trust, I, the said James Brown, shall be entitled to require and receive, and the said John Hay, or other trustee or trustees, shall be bound and obliged to pay me out of the annual produce of the subjects, means and estate hereby conveyed, such sums of money as may be necessary for providing a suitable maintenance to myself and my family; such payments being so regulated as not to interfere with the proper execution of the purposes of the trust."

In the beginning of 1836, Brown raised action against Hay as trustee, libelling on the trust-disposition, and more particularly on the clause above quoted, and concluding that he should be ordained to make payment of £100, or such other sum as should appear to be a suitable aliment for himself and his family, and that yearly from the date of the trust-disposition and henceforward, deducting such payments as had been already received.

To the summons, which was styled a "summons of aliment," Hay lodged defences on the merits, pleading that Brown's demand under the clause in question could not be sustained in competition with the claims of heritable creditors, and with his own claims for advances.

The Lord Ordinary, on the motion of Brown, made great avizandum with the process to the Inner-House, as in a proper action of aliment, issuing at the same time the subjoined note.*

THE COURT, "in respect it was not necessary to make great avizandum in this cause as in a proper process of aliment, remitted to the Lord Ordinary to dispose thereof as he shall see fit."

JOHN SHAND, W.S.—CAMPBELL and MACK, W.S.—Agents.

* "The Lord Ordinary is by no means satisfied that this is one of those proper actions of aliment, which, being Inner-House processes, can only be disposed of by making great avizandum. It rather appears to him to be an ordinary action for execution of a trust, or for specific implement of a particular instruction or condition in a trust-deed. That the sum directed to be paid by the trustee is stated to be for the maintenance of the truster himself and his family, will scarcely make the action for implement a proper process of aliment, any more than a similar implement as to the object or motion for granting a legacy or annuity in an ordinary testament would give this privileged and peculiar character to any action for payment which the legatee might bring against the executor.

"As the pursuer, however, expressed much anxiety to have the point settled, and his circumstances are obviously such as to make it material for him to obtain final judgment with the least possible delay and expense, the Lord Ordinary has thought it better to bring the case before the Inner-House in this form, that their Lordships may be enabled, in case they should adopt the views of the pursuer and even perhaps, though they should not), at once to dispose of the case upon its merits."

No. 254.

June 1, 1836.

M'Kenzie v.
Ferrier.THOMAS M'KENZIE, Petitioner.—*D. F. Hope—Ivory.*WALTER FERRIER (Common Agent in Cromarty Ranking), Respondent.—*Keay—A. Wood.*

Ranking and Sale—Judicial Factor—Trust—Title to Pursue.—The judicial factor on a trust-estate presented a petition, stating that certain lands which formed a part of the trust-estate had been improperly included in the ranking and sale of a third party's heritage; and he craved authority to make up a feudal title to the lands; petition refused, *hoc statu*, as unnecessary, in respect that the judicial factor's proper remedy was to apply to have the lands struck out of the ranking, and that he was entitled to present such application, without making up a feudal title.

June 1, 1836.

1ST DIVISION.

THOMAS M'KENZIE of Applecross, W.S., presented a petition, stating that George Ross, formerly of Cromarty, who died in 1786, had left a trust-deed conveying, *inter alia*, the property of the lands of Little Farnese to trustees, one of whom was the late Alexander Gray Ross; that Alexander was also, in his individual right, infeft in the superiority of these same lands; that all the trustees under George Ross's trust conveyance had died, and the petitioner had been appointed judicial factor on the trust-estate; and that it was necessary for him to make up a title to the property of the lands of Little Farnese, in order to enable him to compete with the creditors of Alexander G. Ross, who had brought a ranking and sale of his estate, and had improperly included therein the lands of Little Farnese, both property and superiority. M'Kenzie also stated that Mrs Munro and her husband were the parties interested in the residue of the trust-estate, and that this application was made at their request. He prayed the Court "to authorize him as judicial factor to institute and follow forth all processes and proceedings necessary for completing a feudal title to the lands of Little Farnese in the person of the petitioner, as judicial factor, and for vindicating his right thereto."

Walter Ferrier, W.S., Common Agent in the ranking and sale of Cromarty, besides contending, in his answers, that the lands were properly included in the ranking, also pleaded that the petition was irregular, because the petitioner, without making up any feudal title, might appear in the depending process of ranking and sale, and crave to have the dominum utile of the lands of Little Farnese struck out of the ranking. A personal title was enough to warrant such an application; and the Court should therefore refrain from granting any extraordinary powers to a judicial factor, where there was no necessity for them. Ferrier also stated, that the effect of granting the petition would be very prejudicial to the ranking, in causing a delay till M'Kenzie made up his feudal title; and, from the state of the titles, this delay would be very considerable.

LORD PRESIDENT.—I think the petitioner had a right to apply to the Court No
to have the lands struck out of the ranking, without making up any complete
feudal title to them. And that appears to be the most proper mode of proceed- June
ing for him to adopt. It is, therefore, unnecessary for us to grant the unusual Hally
powers which are here asked, because, even if a feudal title was made up, the Blair
petitioner would not be better enabled to vindicate the rights of the trust-estate
than he already is at this moment. Besides, I think it would be prejudicial to
the other party to grant the petition, as it would occasion considerable delay.

LORD BALGRAY.—I am clear for refusing the petition, but I would do so in
respect that the petitioner can crave to have the lands struck out of the ranking
as well without completing a feudal title as after he has done so. I am not sure
that the true cause of presenting the petition is that which is stated to the
Court; and, at any rate, I think the petition should be refused *hoc statu* as un-
necessary.

LORD MACKENZIE.—I do not think the prayer of the petition, which is sub-
stantially to make up a feudal title, can be granted without prejudicing, in some
degree, the opposite party. And I think the petition should be refused as unne-
cessary.

LORD GILLIES was absent.

THE COURT pronounced this interlocutor:—"In respect it is legal and
competent for the petitioner to appear in the ranking and sale, and to
require the lands of Little Farnese, in question, to be struck out of that
process, Refuse, in *hoc statu*, the desire of this petition as unnecessary,
and reserve all questions of expenses."

T. MACKENZIE, W.S.—J. and W. FERRIER, W.S.—Agents.

Honourable DOUGLAS G. HALLYBURTON, Advocate.—*Rutherford* No
—*Coventry*.

ANDREW BLAIR and WILLIAM BLAIR, Respondents.—*D. F. Hope*
—*Neaves*.

Process—Record—Advocation.—Special circumstances in which, although an advoc-
ator had stated, in limine, an objection to the competency of a petition to the
Sheriff, yet he became a party to so much subsequent procedure in the Sheriff
Court, especially after this petition was conjoined with another at his own instance,
that he was held personally barred, in his subsequent advocation, from recurring to
the plea of incompetency: the Court, at the same time, observing, that the case was
entirely peculiar, and not to be drawn into a precedent.

ANDREW and WILLIAM BLAIR were tenants of the Hon. Douglas G. Hallyburton of Pitcur, under a lease from 1804 to 1825. By the lease June
there was power reserved to Mr Hallyburton to plant and enclose part 1st
of the farm, on condition of the tenant being allowed a corresponding Ld. F.

No. 255. deduction from his rent; which was to be ascertained by two men mutually chosen. There were other provisions in reference to claims of abatement, for opening quarries, &c.; and it was also provided, that the tenants should have a claim for certain meliorations, such as building dykes, &c., at the end of the lease. In 1811, and again in 1816, Mr Hallyburton planted and enclosed a considerable part of the farm; he also opened a quarry in 1819; and the tenants made various ameliorations, including the construction of dikes. No abatement of rent was made during the currency of the lease, and no meliorations were allowed at the end of it; but, in 1828, the Blairs presented a summary petition to the Sheriff of Forfarshire, stating these facts, and craving a remit to fit persons to inspect the farm and the meliorations, including the dikes; to ascertain the annual value of the lands which had either been planted or which had been broken up by the quarry; to authorize the inspectors to examine witnesses viva voce, and to report; and finally to decern for £1000, less or more, as the amount due, under deduction of a sum of £80, which had been in the interim allowed for dikes, with interest from the date when the several items fell due to the tenants.

Mr Hallyburton lodged answers, in which, besides pleading to the merits, he expressly objected to the competency of the application, in respect of its summary nature, and contended that such claims could only be made in the form of an ordinary action. The first plea in law which he stated, was, accordingly, that the petition was presented in an incompetent form.

The Sheriff-Substitute repelled the objection of incompetency, except as to a claim not above-mentioned, and appointed the petitioners to put in a condescendence, &c.

Mr Hallyburton did not appeal to the Sheriff-Depute against this judgment.

One of the Blairs (Andrew) was the tenant of Mr Hallyburton under a new tack; and, on the day after their petition was presented, Mr Hallyburton presented a petition for sequestration against Andrew Blair for certain alleged arrears, amounting to £626, and for the current rent.

Answers were lodged, which, inter alia, pleaded compensation on account of the unsatisfied claims under the previous tack.

Much procedure followed in these processes, including the making up of a record in each of them; the leading of a proof; a remit to inspectors, &c.; and, in September, 1830, they were conjoined, after which a great deal of farther procedure ensued, which resulted in a decerniture against Andrew Blair for £287, 4s. 6d., as due on 30th June, 1832, with certain interest thereafter. The claims made by the Blairs in their petition were taken into account in bringing out this balance.

Mr Hallyburton brought an advocacy, and resumed his plea of the

incompetency of the action at the instance of the Blairs; who answered, that he was barred by personal objection from stating that plea, as he should have brought an advocacy at an earlier stage of the proceedings, but he had meant seriously to insist in it. Mr Hallyburton replied, that he had distinctly stated the plea, in limine, on the record, and he was not bound to do any thing more,* though, he alleged, he had repeatedly intimated that he was to persevere in the plea of incompetency.

The Lord Ordinary “remitted to the Sheriff, with instructions to sustain the advocator’s objection to the competency of the summary petition, except in so far as it prays for the inspection and valuation of the lands alleged to have been built by the respondent, and to dismiss the same under the above exception; and thereafter to do farther in the case as to him shall appear just: and found neither party entitled to the expenses hitherto incurred, and decerned.”†

* A number of specialties were founded on, hinc inde, in reference to the personal exception: but the enumeration of these seems unnecessary where the Court intimated that the case could not be drawn into a precedent.

† “NOTE.—It is with reluctance that the Lord Ordinary dismisses an action in which so much procedure has already taken place, on the single ground of the incompetent form of the writ by which it was brought into Court. But upon looking attentively at the nature of the case, and the circumstances under which the procedure commenced, the conclusion has been forced upon him, that unless the distinction between ordinary action and summary petition is to be entirely disregarded, the objection must be sustained.

“By the lease, 1804, which terminated in 1823, and was extended by missive for two years longer, the landlord was entitled to take off for planting such ‘ground as he chose, the value of the ground so taken off and planted, and the deduction to be allowed therefor to the tenant, to be ascertained by men mutually chosen.’ He was also entitled to open quarries, upon paying the tenant damages, ‘to be ascertained in manner aforesaid.’ Various pieces of ground, some of them of considerable extent, were taken off in the years 1811 and 1816, and a quarry was opened in the year 1819. But no deduction from rents, nor damage, was ascertained at the time. On the contrary, the tenant continued to pay the rent without deduction; and, at the close of the lease, the whole rent was settled for, a bill for a certain amount having been granted by the tenant, without any reservation of claims of deduction either in the bill or in the discharges which he took from the landlord.

“Afterwards, in the year 1828, three years after the lease had expired, and upon a sequestration being threatened by the landlord for certain rents due by the tenant under a new lease, the tenant presented a summary petition to the Sheriff of Forfarshire, setting forth the above-mentioned clauses of the lease of 1804, the taking off of the various pieces of ground, and praying the Sheriff to appoint persons to inspect the ground so taken off, and to decern against the advocator for the sum of £1000, or such sum as should be fixed by the valuers as the amount of the respondent’s claim against the advocator under the old lease. The petition also prayed for the inspection of the enclosures, for the improvements on which the tenant had a claim against the landlord, at the expiry of the lease, by another clause. The landlord did not object to the last part of the application, respecting the fences; but he maintained, that the first and most important part of the claim could be competently enforced only by ordinary action. The Sheriff repelled the plea, and the inspection was ordered, the advocator always protesting that he

duly states a preliminary objection, in proper season, on the record, the benefit of it, though he should go into the merits of the cause ferior judge, without advocating immediately after the plea of inc repelled, but delaying to advocate until the final issue of the cause i court. But I do not think this case can be brought within that It is a very special case, particularly in reference to all procedure w

should be entitled, at the close of the proceedings, to insist in his ob competency.

" The summary application of the respondent is founded on the b hardly necessary to observe, that if the application had been made in and for the purpose of determining the abatements of rent to which i entitled, there could have been no doubt on the point. The las bound himself to stand by the judgment of two inspectors ' mutus summary application to the Sheriff to name inspectors was the approj on the occasion of the landlord's refusal.

" But when the tenant makes no such application during the en lease—on the contrary, continues to pay his rent in full to the close without reservation, and makes this claim three years after the lease and as happens in regard to one of the articles here, sixteen years a of deduction emerged, his case stands in a very different situation Ordinary does not say that the tenant is absolutely foreclosed by the and the presumption arising from his silence. He may possibly still case; but then it must be made out like any other disputed claim, b action. The present is truly a kind of *condictio indebiti*, a claim for i of rents which were overpaid during the currency of the lease; an inspection of the ground taken off may, after the respondent's right form an element of the evidence for ascertaining the amount, still th and the landlord's defences against it, do appear to the Lord Ordinar appropriate subject of an action in ordinary form, and not a summary

" Holding this opinion, the Lord Ordinary cannot listen to the ple founded by the respondent on the advocate's delay in bringing the S

at the conjunction of Mr Hallyburton's own petition with that of the Blairs. No. the whole, I consider it, however, to be a question of difficulty, to decide whether Mr Hallyburton is barred from now recurring to the objection of incompetency: but, provided that our judgment is rested on the peculiar circumstances of this case, I rather think it is sufficiently well-founded, and that he is barred in any such plea.

LORD GILLIES was absent.

THE COURT accordingly altered; found Mr Hallyburton barred from insisting in the plea of incompetency; and remitted to the Lord Ordinary to proceed accordingly, reserving the expenses of this discussion.

J. F. GORDON, W.S.—M'INTOSH and DUCAT, W.S.—Agents.

CHRISTIAN ANDERSON, Advocate.—*E. Maitland.*
GEORGE MOON, Respondent.—*G. G. Bell—Jamieson.*

Advocation—Process—Master and Servant.—A petition, alleging that a mill-spinner had deserted her service, prayed the sheriff to imprison her till she found caution to return to her service, and faithfully work till the expiry of her term; and also to find her liable in damages and expenses:—after a closed record, and a proof, the sheriff ordained her to return to her service at the mill, and to work there, till the expiry of her term, “with certification;” he found her liable in expenses, and referred to her master any claim of damages he might have, and to her, her defences, and accords; the clause “and decerns,” was omitted:—The servant brought an advocation, to which the master objected that it was incompetent, in respect that the sheriff's judgment had not finally exhausted the case, and did not contain any demeriture so as to be capable of extract: Objections repelled, in respect (1.) that the judgment had exhausted the whole merits of the petition, and had decided the question of expenses; (2.) that the words “with certification,” did not affect the validity of the judgment; and (3.) that the omission of the word “decerns” might prevent extract, but could not prevent advocation.

In December, 1834, George Moon, proprietor of two spinning mills, presented a petition to the Sheriff of Fife, stating that Christian Anderson was engaged to serve with him till Martinmas, 1835, that she had wrongfully deserted her service, and he was thereby put to loss and inconvenience; on which account he craved the sheriff “to cite her to appear personally for examination, &c.; and, upon the premises being admitted or proved, to grant warrant for imprisoning her person in Cupar gaol, therein to remain on her own expenses, until she shall find sufficient security, acted in your court books, to return to the petitioner's service, and to remain there until Martinmas next, and faithfully perform her usual work; as also to find her liable in £10, or such other sum as your Lordship shall fix in name of damages, to this complainer, as also the expenses of this application, &c.”

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ne 1, 1836.
Anderson v.
Moon.

Christian Anderson was judicially examined, after which she lodged answers, and a record was made up and a proof was led. The sheriff then, in May 1835, pronounced an articulate interlocutor, narrating the facts which he found to be proved, hinc inde, after which he "repelled the defences of Christian Anderson, ordained her to return to her service at Russell Mill, upon Thursday next, at 10 o'clock forenoon, and to continue therein, or at Hospital Mill, as the petitioner may think fit, until the term of Martinmas next, with certification." The sheriff at the same time "found the respondent liable in expenses, &c., reserving to the petitioner any claim of damages he may have against her for deserting her service; and her defences, as accords." The judgment did not contain the clause "and decerns," in any part of it.

Anderson brought an advocacy, to which Moon objected that it was incompetent, in respect that the judgment of the sheriff was interlocutory and not final: (1.) It did not dispose of the whole conclusions of the petition; (2.) It ordained Anderson to return to her service "with certification," which contemplated ulterior procedure in that process, if she failed to return; and (3.) It contained no decerniture, and was unextractable, so that nothing could have followed on it.

Anderson answered, that the interlocutor was final. (1.) Besides the prayer for a judicial examination, which had been satisfied, the only other prayer in the petition was to imprison her till she found security to return to the petitioner's service till Martinmas, and to award damages and expenses; but the sheriff had ordained her to return straightway to her service, which, right or wrong, disposed fully of the application for imprisonment; and he had specially reserved the claim of damages and awarded the expenses; (2.) The words "with certification," did not affect the question whether a final interlocutor had exhausted the cause; and (3.) The absence of the word "decerns," could not deprive her of the remedy of advocacy, by which process of review she hoped to set aside the whole procedure of her opponent.

The Lord Ordinary "repelled the plea of incompetency; found the advocacy competent; and in respect the respondent stated his intention to reclaim against this interlocutor, found him liable in the expense of this discussion." *

* "NOTE.—The objection to the competency of the advocacy, that the sheriff's judgment is interlocutory and not final, appears groundless. The whole merits of the cause were disposed of, for the advocator's defences were repelled absolutely, and she was found liable in expenses. There is, indeed, no warrant for extract, because the sheriff has not added a decerniture; but when the advocator's cause was given against her on every point, it was certainly not incumbent on her to move the sheriff to decern against her before she had a right to advocate. It is said that one of the prayers of the respondent's petition was not exhausted, because warrant was craved for imprisoning the advocator's person, until she should find caution."

Moon reclaimed. The Court did not call on counsel to support the Lord Ordinary's judgment.

LORD PRESIDENT.—I think the Lord Ordinary has taken a proper view of his point. The judgment of the sheriff was a final judgment, exhausting the whole cause, and was meant to be so. To be sure the sheriff has not inserted the word “decerns” in his interlocutor; but it would be too much to say that the advocator was under the necessity of applying to the sheriff to decern against herself, before she could obtain the right of advocating.

LORD BALGRAY.—I am of the same opinion. I cannot see what part of the merits of the cause was left open by the sheriff for future procedure. Unless it is to be maintained that the advocator was bound to go to the sheriff, and to ask him to ordain her to be incarcerated forthwith, before she could become entitled to bring her advocacy. In short there was a final interlocutor pronounced, and his perfectly competent to bring an advocacy.

LORD MACKENZIE.—I concur in the opinion of the Lord Ordinary, that the judgment of the sheriff exhausts all the petition, and that an advocacy is competent. As to the words, “with certification,” which are annexed to one of the findings in the judgment, I do not know what precise effect they can have. Suppose that it was an action for £30, and that the sheriff decerned for payment of “with certification,” I cannot say that the defender would know exactly what that was; but certainly I should not think him bound to wait and see—I should hold him entitled to bring his advocacy immediately. In the present instance, the words “with certification” have no effect in preventing the finality of the judgment so as to impair the right to advocate. And as for the omission of the word “decerns,” in the judgment, that may prevent extract, but it cannot prevent advocacy.

THE COURT adhered, and awarded additional expenses against the respondent.

MACKENZIE and MACFARLANE, W.S.—D. M. ADAMSON—Agents.

return to her service. But that prayer was virtually refused by the sheriff, because he ordains her to return to her service at Russel Mill, ‘on Thursday next, at ten o'clock forenoon,’ and to continue there until Martinmas. She could not have obeyed that order if she had at the same time been imprisoned at Cupar. Neither does it render the judgment interlocutory, that it is pronounced under certification on general terms, for that merely imports that if she disobeys she will be exposed to the legal consequences of her disobedience, in any action that may be brought against her for that purpose. It could never be intended that she should be kept in Court in this action until the whole period of her service should be expired.”

No. 257. **THOMAS LONGLANDS, Advocate.—*Rutherford—H. J. Rol***
JOHN JAMES EISTON, and JAMES MEIKLE, Respondents.—*D*
—*Robertson.*
 June 1, 1836.
 Longlands v.
 Elston.

2D DIVISION.
 Lord Jeffrey.
 F.
 Graham v.
 Wilson.
 THIS was a special question as to the extent of a right to us
 loan, originally entertained before the sheriff of Stirlingshire,
 wards advocated, in which the Court altered the Lord Ordin
 locutor, and decided in favour of the respondents.

EDMUND LOGAN, W.S.—JAMES MEIKLE.—Agents.

No. 258. **JAMES GRAHAM, Advocate.—*Sol.-Gen. Cuninghame—l***
JOHN WILSON, Respondent.—*G. G. Bell.*

Process—Advocation—Res Noviter Veniens.—Circumstances in which, E
 allegation of res noviter veniens, which was made in the sheriff court
 cord was closed, that the sheriff had not allowed sufficient scope to
 bring his averments before the Court, and that this ought still to be doi
 expenses.

June 2, 1836.
 1ST DIVISION.
 Ld. Fullerton.
 D.
 IN February, 1832, James Graham, farmer, sold a mare
 £11, 11s, to John Wilson, farmer, who was entitled to ret
 Whitsunday, “in a like condition,” and at a price of £10,
 26th May, which was Whitsunday, old style, Wilson sent bac
 to Graham, who alleged she was in inferior condition, and
 receive her. Wilson then sent her for a short time to the Blu
 at Dumfries, and gave notice to Graham that she was there
 and risk. He afterwards took her to his own premises, but so
 alleged, to save the expense of her keep at livery. On 11th J
 he raised an action before the Sheriff of Dumfries-shire, again
 concluding for payment of £10, 10s., in implement of the barg
 fences were lodged, a record was made up, and a joint proof w
 the course of these proceedings, the mare was sold by warr
 sheriff, in September, 1832, for a price of £5. The proof on
 was directed to the single point, whether at Whitsunday, the
 in as good and marketable a condition, and was worth as much
 at the date of her sale in February. The sheriff, in June, 183
 it proved, that the pony in question was, as expressed in th
 libelled on, in ‘like condition,’ when offered back to the d
 Whitsunday, 1832, as it was in when sold by him to the pursu
 February preceding; and therefore found it was incumbent on
 der to have taken the pony back, when offered by the pursuer
 the defences; decerned against the defender for £10, 10s., wil

libelled; and found him also liable in the expense of keeping the pony. It was sold by authority of this court, and in the expenses of the sale and of this process.”

An appeal to the sheriff was lodged; but, before it was disposed of, Graham tendered a minute, stating, as *res noviter veniens*, that the mare had foaled early in 1833, and that she must have been covered while under Wilson's care and management, which totally changed her condition, and deprived him of the right of returning her and exacting back the price. Graham explained that, as the mare was not in his keeping, he had only learnt the fact recently. The sheriff considered that the fact now alleged was not material to the defence maintained by Graham, unless he could aver that the mare was in foal prior to Whitsunday (or 26th May), when the right to return her was exercised by Wilson. He therefore allowed Graham to give in a condescendence, but restricted him in his averments to a period preceding 26th May. Graham refused to avail himself of a condescendence so restricted; and the sheriff-depute, on appeal, adhered to the interlocutors of the sheriff-substitute. Graham brought in advocacy, in which the Lord Ordinary “found it proved that, in the essential particulars of health, soundness, and fitness for work, the pony in question was, at Whitsunday, 1832, in like condition to that in which it was when sold to the respondent at Candlemas preceding: Found it not proved, that the pony was in inferior condition in any other particular; therefore found that the advocator was bound by the agreement to take back the pony, at the price of £10, 10s., when returned at said term of Whitsunday, 1832: remitted the case simpliciter to the Sheriff of Dumfries-shire, and decerned; and found the advocator liable in expenses.” *

Graham reclaimed.

LORD PRESIDENT.—I concur with the Lord Ordinary in the view which his lordship has taken of the proof in this case. But I am not satisfied that the

* “NOTE.—It is now admitted that, by the terms of the original bargain, the advocator was bound to take back the pony at Whitsunday, 1832, at the price of £10, 10s., if it was in like condition as at the time of the sale at Candlemas preceding, so that the only point in dispute, is the state of the pony when sent back. It is clearly proven, that it was perfectly sound, healthy, and fit for work. In other points, such as fineness of shape and of coat, &c., matters of comparatively little moment in regard to a pony, whose full value was only £10, 10s., the witnesses were in opinion; but, on the whole, the Lord Ordinary thinks the respondent's case sufficiently made out by the proof. As to the ‘*res noviter veniens*,’ it appears to the Lord Ordinary, from the minute given in to the sheriff, that the fact averred by the advocator truly was that of the pony having foaled, subsequently to the making of the record, and at a time which showed that it must have been in foal when sent back at Whitsunday, 1832. This was clearly relevant; and accordingly, it was admitted by the sheriff's interlocutor of 17th December, 1833, appointing the advocator to give in a condescendence; but the advocator failed, or rather refused to give in such condescendence, and cannot be allowed now to open up the record.”

No. 258.
June 2, 1836.
Lawrie v.
Charles.

question which arose in the sheriff court, after the record was closed, he properly disposed of. After the mare had been for a short time at the inn was taken back again by Wilson into his own possession, and it may very well be, that his subsequent conduct may have deprived him of the right of retaking her. Considering the fact of her having foaled, which fact only emerged after the record was closed, I think there should be leave given to Graham to proceed on the condescendence of a less restricted sort than was allowed by the sheriff.

LORD BALGRAY.—I rather think the sheriff put the case on the right footing. Even supposing that Wilson did make an improper use of the mare in returning her in terms of the contract of sale, I am not sure that any result would follow, except that he would thereby subject himself to a claim for damages at the instance of Graham, as owner of the mare.

LORD PRESIDENT.—I am not prepared, however, to say that such a claim that cannot be disposed of in this process. If it be possible, it would certainly be a desirable thing, where the subject-matter of the suit is of so small a value. But, before deciding as to this, the facts respecting the treatment of the mare would require to be more fully laid before the Court.

LORD MACKENZIE.—I think there ought to be a statement of the facts laid before the Court, as to this part of the cause. It is quite possible that the mare was taken back from the inn by the common consent of both parties, in order to save the expense of her keep, as she would soon enough have eaten off her keep if she remained in the stables of the inn; and it may very possibly appear that she was covered by consent of both parties. But there ought to be a statement of the facts laid before the Court; and I have no doubt of Graham's right to bring forward new facts in this Court, at least on paying expenses. Whether expenses shall ultimately be due, in this respect, they should, I think, in the mean time be reserved.

LORD GILLIES was absent.

THE COURT pronounced this interlocutor: "In hoc statu, recall the interlocutor reclaimed against, and remit to the Lord Ordinary before whom answer, to hear parties on the circumstances averred by the advocates, and to the usage which the pony met with, and to do as to his Lordship shall seem just, reserving all questions of expenses."

HAMILTON and COOPER, W.S.—W. STEWART, W.S.—Agents.

No. 259.

ROBERT LAWRIE, Pursuer.—*M'Neill—Macallan.*
MATHEW CHARLES, Defender.—*Rutherford—Macro.*

June 2, 1836.
2d Division.
Lord Jeffrey.
F.

SPECIAL question as to a bill transaction, in which the Court adjourned to an interlocutor of the Lord Ordinary decerning in terms of the bill with expenses subject to modification.

AINSLIE, MACALLAN, and GRAHAM, W.S.—GEO. COMBE, W.S.—Agents.

JOHN LOW, Advocate and Pursuer.—*D. F. Hope—Pyper.*
 GEORGE W. BANKS, Respondent and Defender.—*Rutherford—Ivory.*

No.

June 2

Low v.

Judicial Reference.—After an award in a judicial reference, remit to the referee hear parties farther refused, although the referee, on being examined, admitted he was not himself acquainted with the practice of merchants in a certain branch of trade out of which one of the claims referred to in his award arose, and having previously expressed his willingness to receive evidence on that point, ultimately decided without such evidence.

BANKS, merchant in Dundee, brought an action of count and reckoning against Low, manufacturer there, before the Sheriff of Forfarshire, including for payment of a balance alleged to be due on certain transactions between the parties. After defences had been given in, a judicial reference of the cause was made to Mr William Adam, of Dundee, who pronounced an award in favour of Banks. The Sheriff decerned in pursuance of the award, upon which Low brought an advocacy, and raised at the same time an action of reduction of the Sheriff's decree, on the ground, inter alia, that the award was not entitled to receive effect, having been pronounced by the referee without taking, or allowing to be taken, requisite evidence, and without a fair and sufficient hearing of the parties. Low having applied for an examination of the referee, the Lord Ordinary allowed him to give in a minute of what he offered thereby to prove. In the minute he stated, inter alia, that "the pursuer (Low) stated upon the referee, and after some conversation, in the course of which the referee expressed his ignorance of the custom of trade on which the said point decided in the first finding depended, the pursuer requested him to take the evidence of merchants in Dundee, and examined, that, as he was going to Liverpool, he would procure the evidence or opinions of merchants there on the subject; and the referee thereupon agreed that a delay should take place for this purpose, and that no farther step should be taken in the reference until the pursuer should return from Liverpool;" and farther, "that the pursuer, accordingly, went to Liverpool, on the faith that this arrangement was to be observed; but the award was issued during his absence there, and without the arbiter having made any further communication to the pursuer on the subject."

June 2

2d Div.

Lord

The Lord Ordinary having allowed the examination, the following deposition was emitted as to the matter above stated:—"Interrogated, whether Mr Low requested the deponent to take the evidence of merchants acquainted with the Canada trade, as to one branch of the notes issued by the deponent? Depones, That Mr Low did make such a request, and that the deponent expressed his willingness to accede to it, and advised Mr Low to bring forward a merchant acquainted with the Cana-

pool on the subject? Depones, That there never was any ment; that there was an understanding between Mr Low a nent that he was to bring forward the evidence of merce Dundee, viz. James Gilroy, and James Taws, before he w pool, and the deponent expressly told Mr Low, that if he c forward such evidence before he went to Liverpool, he nent, would not wait for his return, but would issue the awa the deponent did accordingly. Interrogated, Whether the pressed to Mr Low his ignorance of the custom of trade the point on which the first finding of his award proceeds That he did. Interrogated, Whether the deponent took relative to the custom of trade between Dundee and C issuing his award? Depones, That he did not."

Thereupon the Lord Ordinary in the advocacion remitte and in the reduction assoilzied, but without expenses, issu subjoined.*

* "The advocator has clearly failed to instruct any material par tions in his Minute of February last, on which he was allowed t judicial referee and his clerk. The only thing that raises any diffic referee admits that he was not himself acquainted with the practic in that branch of trade out of which one of the claims referred to arose, and that, though he had expressed his willingness to receive this point, he ultimately decided without any such evidence. It w to be a sufficient answer, that, though he was willing to receive s brought forward within a certain time, he considered the matter t point of law, and not on any rule of practice; and that, as the evi

Low reclaimed on the merits, and Banks on the point of expenses. No support of the note, Low referred to the case of *Baxter v. Mac-
thar,*¹ and contended that he was entitled, in respect of the deposition of the referee, to have the case remitted to him to take evidence and hear parties farther. June 7
Fergus
Graham

LORD JUSTICE-CLERK.—It is a very hazardous thing to interfere with a judicial reference. I am not sure that I would have listened to the offer to instruct what was alleged in the minute, but since the allegations have not been proved, I can have no hesitation in adhering.

The other Judges having concurred,

THE COURT adhered on the merits, but found Low liable in expenses.

C. F. DAVIDSON—WILLIAM MILLER, S.S.C.—Agents.

COLIN FERGUSSON, Pursuer.—*Robertson—J. Anderson.* No
HUMPHREY GRAHAM and OTHERS (Graham's Trustees), Defenders.—
Keay—H. J. Robertson.

Partnership—Proof.—1. Circumstances held sufficient to establish the existence of joint adventure. 2. Where the existence of a joint adventure is proved, and also the number of the joint adventurers, but the shares of each are not specially proved, the Court must presume that each has an equal share, and regulate their mutual accounting accordingly.

In 1810, mutual actions of accounting, &c., were raised against each other, by Colin Fergusson, merchant in Inverary, and the late Colonel Humphrey Graham, who had been chamberlain to the Duke of Argyle, Inverary. The processes were conjoined, and some delays having occurred, they were not brought to a final issue in the lifetime of Colonel Graham, whose trustees and executors were therefore sisted as parties. In disposing of the mutual accounting, a question arose whether Colonel Graham had a share, as socius, in a cargo of meal which had been purchased by Fergusson in 1808, the invoice and the bill of lading being taken to himself alone; and which was imported by him into Inverary and sold by him there in his own premises. Graham's trustees alleged that Graham was a partner in the adventure, and Fergusson denied this. It appeared, however, that Fergusson had at one time expressly admitted in conversation, that Colonel Graham was to have a share in the profits of the adventure; that Graham had advanced funds to Fergusson to reimburse him for the price of the cargo, amounting to fully two-thirds of the June 3
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to be disturbed on light or questionable grounds, or to deprive them of protection which the policy of our law has so long and so largely extended to

No. 261. whole; that he had applied to the sheriff to interdict Fergusson from dealing part of the meal to one M'Intire, in implement of a contract between Fergusson and M'Intire, which application Graham made on the foot of the meal being his property; that Fergusson had made no appeal to oppose this interdict: and that he had then stated to the law-agent M'Intire that the whole or part of the cargo was Colonel Graham's property, in consequence of which M'Intire was advised not to oppose the interdict, but to claim damages from Fergusson, which he did, extrajudicially, and received a small sum in name of damages from him. There were other circumstances, also, particularly certain letters of Fergusson which were founded on by Graham's trustees, as incompatible with his being sole owner of the meal: and on the other hand, Fergusson founded on various circumstances and jottings, accounts, &c., of an opposite tendency, the general effect of which, however, was rather to throw a doubt upon the amount of the share truly held by Colonel Graham, as a partner in the adventure, than to prove that he had no share at all. In the circumstances, Graham's trustees pleaded, that as it was proved that Colonel Graham had a share in the adventure, and that there were two joint adventurers, each must be presumed to hold a half-share: though they might, perhaps, have maintained a higher plea, they restricted their claim to an accounting on that footing.

The Lord Ordinary "found it proved that the pursuer was not the exclusive proprietor of the cargo of meal of which the price and profit formed the subject of these conjoined actions of accounting; that the Lieutenant-Colonel Humphrey Graham had an interest in the said cargo at least equal to that of the pursuer, and therefore, and in respect of the said Colonel Humphrey Graham and his executors have on their part limited their claim in the said accounting to one half of the profits of the said cargo, found that the accounting between the parties must proceed on the footing of each party being equally interested, and appointed the case to be enrolled, that parties may be heard on the adjustment of the accounts on the principle of the above findings." *

* "NOTE — The only point in dispute here is the principle of the accounting, viz. whether or not the pursuer is to be held as the sole proprietor of the cargo of meal, and consequently entitled to the whole profits obtained on its resale. It is clear that it was imported into Inverary on his order, and in his name; there are many other circumstances in the conduct and proceedings of both parties which might render it somewhat difficult to ascertain what was the true nature and amount of their relative rights and interest in the cargo. But looking to the interdict obtained by Colonel Graham against the pursuer selling the meal to M'Intyre, and that upon the ground that the meal was not the property of the pursuer—at the admitted fact of the interdict being acquiesced in by both those parties—at the evidence of Archibald Bell M'Lachlan, M'Intyre's agent, respecting the grounds on which it was acquiesced in, and at the pursuer's own admission, particularly that of No. 54 of process, the Lord Ordinary held it to be proved that the pursuer was not the sole proprietor, and that the

Fergusson reclaimed. The Court, without calling on counsel in support of the Lord Ordinary's judgment, adhered.

LORD PRESIDENT.—Wherever a joint adventure is proved, and the number of the adventurers is also proved, but the share of each is not the subject of distinct proof, it follows that each adventurer must be presumed to have an equal share. That is all which is now claimed by Colonel Graham's trustees, and they are entitled to it, as I think the fact of the joint adventure is sufficiently made out.

LORD BALGRAY.—I am entirely of the same opinion.

LORD MACKENZIE.—It is clear that Colonel Graham had some interest in the adventure, and as the precise share is not proved, it must be assumed to be equal with that of the only co-adventurer, Fergusson. The Court have no warrant for finding his share to be greater than this, and no warrant for finding it to be less.

LORD GILLIES was absent.

THE COURT, in adhering, and remitting to the Lord Ordinary, reserved expenses.

J. LIVINGSTON, W.S.—H. GRAHAM, W.S.—Agents.

INCORPORATED TRADES OF EDINBURGH.—*D. F. Hope—Neaves.*
GOVERNORS OF HERIOT'S HOSPITAL, and MAGISTRATES AND COUNCIL
OF EDINBURGH.—*Rutherford—More.*

Burgh—Clause—Incorporation—Testament.—Heriot's Hospital was founded in 1623 for educating the orphan and destitute sons of freemen of the town of Edinburgh; by the Will of the founder, and by the statutes of the foundation, the government of the hospital was intrusted to the provost, magistrates, and ordinary council of Edinburgh, for the time being, and to the ministers of Edinburgh for the time being: at the date of the foundation, certain representatives of the trades were necessarily constituent members of the council, and one of these members was specially nominated by the statutes to concur with certain other governors in discharging some important trusts, such as auditing the accounts, and keeping the common seal of the hospital:—Held, that, under the terms of the Will, and the statutes of foundation, a share in the governorship was not bestowed upon the representatives of the trades, excepting in their character of being also members of the town council for the time being; and that, as they were deprived of that character by the Burgh Reform Act, passed in 1839 (3 and 4. W. IV. c. 76), they had no longer a right to be governors.

In 1623, George Heriot, jeweller to James VI., founded the hospital now called Heriot's Hospital. On 10th December of that year he executed a settlement conveying the residue of his estate "unto the provost, bailiffs, ministers, and ordinary council for the time being of the said

Graham had at least that equal right and interest in the cargo to which his claim is now limited."

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town of Edinburgh, for and towards the erecting of an hospital within the said town of Edinburgh, in perpetuity, and for and towards purchasing certain lands in perpetuity, to belong unto the said hospital, to be employed for the maintenance, relief, and bringing up of so many poor fatherless boys, freemen's sons of the town of Edinburgh, as the means which I give, and the yearly value so purchased by the said provost, bailiffs, ministers, and council of the said town shall amount or come unto: And I give and devise unto the said provost, bailiffs, ministers, and council, and their successors for ever for the time being, all these my messuages, lands," &c.—“ And my will and mind is, that the said hospital shall be there erected and governed, and the said fatherless children ordered, taught, and guided by such instructions, ordinances, and directions, and in such manner and form as shall be digested, limited, appointed, and set down in a certain book or writing, framed and ordained for that purpose, either by myself in my lifetime, and signed by my hand, or by the said Dr Balcanqual” (Walter Balcanqual, Doctor in Divinity, Dean of Rochester, and minister of the Savoy, named executor in a previous clause of the Will), “ after my death, and signed with his hand, and given and delivered unto the said provost, bailiffs, ministers, and council of the aforesaid town of Edinburgh for the time being, who are named and appointed feoffees of trust in this behalf: And I do ordain and appoint, by this my last will, the said provost, bailiffs, ministers, and council, and their successors, as trustees, to be governors of the lands, possessions, revenues, and goods of the said hospital.”

At this date the Episcopal Church was established in Scotland, and the ministers of Edinburgh, who were eight in number, were of the Episcopal persuasion. The town council was composed of thirty-three members, namely, one provost, four bailies, twelve merchant councillors, fourteen deacons of the incorporated trades, and two trades councillors. Sixteen members thus belonged to the trades; but the two trades councillors were not elected by the incorporations, nor were the fourteen deacons elected by the trades alone. In each incorporation a leet of six was transmitted to the town council, who reduced the leet to three, and the incorporation then selected their deacon out of the reduced leet. Only six out of the fourteen deacons formed part of the “ Ordinary Council;” the remaining eight were termed “ Extraordinary Councillors,” and did not perform all the functions of the Ordinary Council.

George Heriot died without laying down regulations or statutes for the government of the hospital; but his executor, Dr Balcanqual, made a code of regulations, which contained, inter alia, the following:—“ The perpetuall governors of the said hospitall salbe the lord provest, bailleis, ministeris, and ordinarie counsell of Edinbrugh for the tyme being, and thair successors.” “ Lyikas the said hospitall, and whole estait yairis, sall be guyded and governed be the provest, bailleis, ministeris, and counsell for the tyme, and according to the pluralitie of the voyces of the

ids provest, bailleis, ministeris, and ordinar counsall of the said burgh No. r ye tyme, as also the electione of all officeris, scholleris, and bursaris June 7
 airunto anyway belonging, salbe whollie ordered governed and rewled." Incorp
 The treasurer was to be elected "by the plurality of suffrages of the Trade
 ordinary council and ministers of Edinburgh, and the master of the Edinb
 hospital:" Four auditors were to be yearly chosen to examine all the Gover
 accounts "of the hospital, viz. one of the bailleis of the said burgh, one Herio
 f the ministeris of the same, one of the merchands, and one of the craftis Hosp
 men of the counsall of the said burgh." The common seal of the hospi-
 al was directed to be kept in a chest, secured by four locks, each of a
 ifferent construction from the rest; one of these keys was to be delivered
 y the governors, annually on 24th June, to the dean of guild of the
 burgh for the time being; "at which tyme also by pluralitie of voyces
 hey sall chuse thrie more of yair awin number to keep the uther thrie
 keyis of whiche the one salbe one of the ministeris of the towne; the
 ither, a merchant of the bodie of the counsell; the thrid, one of the
 leacones of the craftis."

The set or constitution of the burgh of Edinburgh continued the same until the Scots Burgh Reform Act, 3 and 4 W. IV. c. 76, was passed. But in the mean time, the ministers of Edinburgh had undergone a great change from the time of George Heriot. Episcopacy had been finally abolished, and the Presbyterian form of worship and church government established at the Revolution; and the ministers of Edinburgh had gradually increased in number from eight to eighteen. All these Presbyterian clergymen acted as governors of the hospital, in respect of their being "the ministers of Edinburgh."

By 3 and 4 W. IV. it was enacted (§ 19) "that (except as hereinafter excepted) the offices and titles of deacon, and of convener and dean of guild, and of old provost and old bailie, as official and constituent members of any town council" should be abolished; and that the distinction between the trades, and the merchant, bailies or councillors, should be abolished; under a certain provision for performing the functions of the dean of guild, by a member of council to be elected by the council for that purpose:— (§ 20) that "where any trust, management, or direction is, by the terms of any public or local act, or of any charter or deed of foundation, or other deed, conferred on any members of the council, under the denomination of old provost, old bailie, or old dean of guild, or of merchant or trades bailies, or merchant or trades councillors respectively, the town councils to be named and elected in terms of this act shall, immediately after their own acceptance and induction into office, nominate and elect from their own body such a number of persons to be such trustees, managers, or directors, as are by such acts, charters, or deeds appointed to those offices under the said denominations; and the whole powers and functions now belonging to the said offices of trustees, managers, or directors, shall belong to and be as fully vested in the per-

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sons so elected, as if they had possessed the denominations used in the said acts, charters, or deeds:”— (§ 21) that “nothing herein contained shall be held or construed to impair the right of any craft, trade, convenery of trades, or guildry, or merchants house or trades house, or other such corporation, severally to elect their own deacons or deacon convener, or dean of guild or directors, or other lawful officers, for the management of the affairs of such craft, trades, conveneries of trades, or guildries, merchants or trades houses, or other such corporations,” but that these several bodies should freely elect their own office-bearers for the management of their affairs without any control by the town council:— (§ 22) that, in Edinburgh, the persons elected to the office of dean of guild, and of deacon convener or convener of the trades, by the guild brethren, and convenery respectively, should, in virtue of such election, “be constituent members of the town council of Edinburgh, and should enjoy all the powers, &c. now enjoyed by such office-bearer:”— (§ 23) “that where any trust, management, or direction of any charitable or other institutions is vested in any number of deacons, or in a deacon convener, or convener of trades, or in any dean of guild, or other office bearers elected, or hereafter to be elected by the several crafts, trades, guildries, or merchants or trades houses, then, and in all such cases, the persons so elected as such deacons, conveners, deans of guild, or other officers, shall always be and continue trustees and managers of such charities or institutions, whether such persons shall hereafter be members of council or not; and the town councils shall in no such case have power to elect from their own body any other trustees or managers in place of such deacons, conveners, deans of guild, or other officers: Provided always that in any burgh in which trades councillors or merchant councillors are or may be ex officio trustees or directors of any such institutions or charities, the convenery or trades house, and the guildry or merchants house in such burghs shall elect an equal number from their own bodies respectively to be such trustees or directors, any thing herein contained to the contrary notwithstanding:”— (§ 31) Under this statute the total number of the Edinburgh town-council remained the same as before, but it was provided equally as to the whole thirty-three members, that they should “in all respects stand in relation to the administration of the affairs and property of such burghs, or of property under the care and management of such burghs, in the same situation in which the magistrates and council and office-bearers of such burghs did stand previous to the passing of this act; and the magistrates and council and office-bearers to be elected under the provisions of this act shall have such and the like jurisdiction, and the same rights and powers of administration of the property and affairs of the burgh, and of making all usual and necessary appointments, as heretofore lawfully belonged to and was exercised by their predecessors in office; any thing in the set, usage, or custom of any such burgh to the contrary notwithstanding.”

After this statute was passed, the convenery of Edinburgh, in October 1533, elected six of the deacons of incorporations to be governors of Heriot's Hospital for the ensuing year. In November following, the magistrates and council of Edinburgh, having been elected under the new act, passed a declaratory resolution, and entered it on their minutes, that they, as coming in place of the former ordinary council of the burgh, and as being the ordinary council for the time, were all governors of the hospital. And at a subsequent meeting of the governors, the whole thirty-three members of the new town council were sworn in as governors, and the six deacons were excluded. Upon this footing the election of governors was continued next year, and the convenery of the incorporated trades then raised a declarator against the governors of the hospital, and the magistrates and council, concluding to have it declared that the number of governors was not increased by the recent statute; and "that the incorporated trades had a vested interest in the management of Heriot's Hospital, to the extent of having six deacons governors thereof, and that such number of deacons are and shall always be and continue managers of the said hospital, whether such persons shall hereafter be members of the town council or not; and that the right of selection of these six deacons is vested in, and shall henceforward be exercised by the pursuers, the convenery of Edinburgh: And farther, as two trades councillors were, ex officio, managers of Heriot's Hospital, it ought and should be found and declared, that the convenery of Edinburgh are entitled to elect an equal number from their own body to be such managers, any thing in the said act of Parliament contained to the contrary notwithstanding: And it ought and should be further found and declared, that the town council of Edinburgh shall in no case have power to elect from their own body any other managers of Heriot's Hospital, in place of the deacons and trades councillors so to be elected by the convenery; but on the contrary, that in computing the twenty-five governors, the said town council must deduct the lord provost and four bailies as being, ex officio, governors, and the eight members of the trades to be chosen as aforesaid; and shall annually, immediately after their own induction into office, nominate and elect, from their own body, such a number of persons to be governors of Heriot's Hospital, as were governors under the said denominations of old bailies, dean of guild, old dean of guild, treasurer, old treasurer, old provost, and merchant councillors, and as shall complete the number of twenty-five, being the number of the former ordinary council."

The Governors pleaded in defence, that by the Will of the founder, he had committed the government of the hospital to those persons who were intrusted respectively with the municipal and the ecclesiastical government of the city for the time. He had described these as "the provost, bailies, ministers, and ordinary council for the time being, of Edinburgh:" and in the Balcanqual statutes the same description was repeated. These

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meant on the one hand, the ministers of Edinburgh, for the time; and accordingly, though the ministers all became Presbyterians in place of Episcopalians, and increased in number from eight to eighteen, they all were governors under the founder's will, because they were the ministers of Edinburgh for the time. In like manner, whatever change might occur in the constitution of the town council of Edinburgh, it was to the council or ordinary council for the time, that the governorship was committed. And in particular, it had never been committed to any deacons of the trades, as such, but only as members of the council. And even as to the express direction to name an auditor and a key-keeper who should be "one of the craftsmen of the council," it was always implied as essential that the craftsman or deacon should be a councillor. There was always one craftsman, the deacon convener, who, *ex officio*, was in the council, as now constituted, and to whom these offices could be committed. But, had it been otherwise, and had it become impossible to comply literally with the founder's will, in naming an auditor, key-keeper, &c. the only result would be that the body of governors at large would have to exercise the right, thereby devolving on them, of regulating these minor details anew.

The pursuers answered that the object of the foundation was to provide for educating the sons of freemen and burgesses of Edinburgh, and, in order to place among the governors a certain number of those who had the most material interest in administering such a foundation, George Heriot had named the ordinary council for the time to be governors. They then consisted of twenty-five in number, and of necessity included six deacons of trades, and two trades councillors, all of whom were freemen and burgesses. It was evident that the founder had never contemplated the possibility of the trades being excluded from the governorship. For it was enacted, both as to the auditing of accounts, and the custody of the common seal, that one of the four governors to whom these important trusts were to be delegated, must be a member of the trades. It was true he was also described as a councillor, because George Heriot never contemplated a council in which members of the trades did not form a constituent part: but the quality of being member of the trades, was as essential an ingredient in the character of the governor who was to be chosen a key-keeper, &c. as the quality of being a councillor. And if a subsequent statute had the effect of leaving the trades members out of the council it should not be extended to affect their right of governorship, which had been bestowed on them by the founder, not merely as councillors, but as representing the trades, and in respect of the important interest which the trades had in the institution.

The Lord Ordinary "sustained the defences, assoilzied the defenders, and decerned, and found the pursuers liable in expenses." *

* "NOTE.—When Heriot's Hospital was founded, the town council of Edin-

The pursuers reclaimed. The Court did not call on counsel to support the judgment.

LORD PRESIDENT.—Had the office of governor been bestowed on the deacons' incorporations in virtue of their holding that office, they would have had a right to retain the governorship still, notwithstanding the act 3 and 4 W. IV. c. 76, which was passed in reference to the constitution of the town councils of Edinburgh. But the governorship was bestowed on the council for the time being, without reference to its numbers or constitution, and also on the ministers of Edinburgh for the time being, without reference to their numbers, or to any other quality in their ecclesiastical character excepting that of being ministers of

Edinburgh was composed of various classes, in certain proportions, and known by certain peculiar names, such as trades councillors, merchant councillors, &c. &c.; but the foundation is not in favour of the component parts of the council, or of any portion of them, but of the ordinary council for the time being; and however worthy of the founder's trust any of the trades or merchants may have been individually, or in their vocation, it was not in these characters that they attracted the donor, who makes them governors merely as members of the council. The statutes and ordinances by Dr Balcanquhal contain passages which make it plain that he was aware that the council was composed partly of craftsmen; and it cannot be questioned, that these persons must also have formed part of George Heriot's idea of the town council of Edinburgh in the year 1623: Nevertheless, neither of them express any limitation of their confidence to the council, as composed in their day; but though aware of the possibility of its elements being changed, they commit the governorship, partly to the council generally for the time being, exactly as they committed it partly to 'ministers' for the time being, although this class of public officers have been greatly increased in numbers, and much changed in their qualifications and circumstances.

"The 3d and 4th William IV. cap. 7, therefore, required to make no special provision on this subject, because the alteration which it introduced in the mode of the members' appointment would have produced no change in the right of the council as such, to govern the hospital. But it does make provisions which meet the pursuers' idea, that the foundation is not in favour of the council, whatever it may consist of, but of its original parts.

"The 19th section destroys the distinction between certain members of the council, and thus makes the keeping up of the class of governors, for which the pursuers contend, impossible. There may be no deacons in the new councils; and if the pursuers be right in saying, that because there were deacons in 1623, there must always continue to be deacons among the governors of the hospital, then there must always be merchant councillors, and an old provost, and old bailies, all of whom were necessary to constitute a town council anciently, but who cannot now be got. These names and characters are all extinguished. But then the 20th section enacts, that where any trust has been conferred on any members of the council, under any of the old names or denominations, persons selected by the new council shall come in place of these. The 23d clause, referred to by the pursuers, does not apply to this subject, but to trusts, not in favour of town councillors, but of officers of crafts.

"Cases may possibly emerge hereafter which may create difficulty, by producing a repugnance between the foundation and the modern constitution of the council. The complaint of the pursuers, that their deacons may be altogether excluded from the management, if it be stated as a mere grievance, is not for a court, which is only to settle rights. But they ought to recollect, that formerly only eight of them could ever be governors, whereas now, the whole thirty-three, of which the council consists, may. It is said that there are more than eight of them in the council now."

No. 262. Edinburgh for the time. Accordingly, although there were but six, or at most eight, ministers, at the date of the foundation, and all of them were Episcopalian, because Episcopacy was then established in Scotland, still "the ministers of Edinburgh" continued to be entitled to the office of governors under the will of the founder, even after they were all Presbyterians, in consequence of the Presbyterian form of worship having superseded the Episcopalian, and although their numbers had gradually increased to eighteen. And, in the same manner, although a change has been effected in the constitution of the town-council, and it is now differently made up from what it was at the time of George Heriot, it was to the provost, magistrates, and ordinary council, for the time being, that he committed the governorship, and with them it must, in terms of the foundation, continue. It may be a subject of regret that the representatives of the incorporated trades are thus deprived of their share in the government of an institution in which the Trades of Edinburgh have so large an interest, especially as this results only from a change of circumstances which the founder could not foresee. But he bestowed the governorship on the members of the ordinary council, and as the deacons of the incorporated trades no longer possess that character, they have no longer a right to the office of governor. As to the plea that there may no longer be a deacon of any of the trades in the council, to be intrusted with one of the keys of the chest containing the common seal, or to perform similar functions, I consider it to present a difficulty of a minor sort only, and that a remedy must be provided by the governors at large passing a regulation on the subject.

LORDS BALGRAY and MACKENZIE concurred.

LORD GILLIES was absent.

THE COURT accordingly adhered.

A. CUNNINGHAME, W.S.—MACHITCHIE, BAYLEY, and HENDERSON, W.S.—Agents.

No. 263. MRS HELEN FISHER and JAMES FISHER, Suspenders and Pursuers.
—*More—Murray.*

DUKE OF ATHOLL'S TRUSTEES, Respondents and Defenders.—
Keay—W. Forbes.

Property—River.—A party was proprietor of a certain tenement of land, situated immediately below the bridge of Dunkeld, and declared in the title-deeds to be bounded "on the south by the water of Tay;" the statutory trustees under an act of Parliament, empowered to perform whatever operations on the bank of the river might be requisite or convenient for the maintenance of the bridge, formed, by means of deposits of rubbish, an embankment extending into the river ex adverso of the tenement;—Held, that, at common law, it was not competent to any party, by artificial operations in the alveus of the river, to acquire or interpose property between the tenement above-mentioned and the water,—that, under the provisions of the statute, the ground so gained was subject to the absolute use and command of the statutory trustees, so far as necessary or useful for the protection, repair, or preservation of the bridge, or for any road of access thereto,—but that it belonged to the property to the proprietor of the tenement.

MRS HELEN FISHER was one of several feuars possessed of small tenements of land holding of the Crown, on the left bank of the Tay, immediately below the Bridge of Dunkeld. Her property, which included a house and garden, was declared in the title-deeds to be bounded "by the water of Tay on the south." In these subjects she was infeft as liferentrix, and James Fisher as fiar.

By the 43d Geo. III. c. 33, entitled "An act for enabling the most noble John Duke of Atholl and his heirs to build a bridge over the river Tay, at or near the town of Dunkeld in the county of Perth, and make roads of communication thereunto," the late Duke of Atholl and his presoids were authorized and empowered "to build and erect a bridge over the river Tay, at or near the said town of Dunkeld, and to dig and make proper foundations in the said river, and in the lands lying on each side thereof, for the piers and abutments of the said bridge, and to cut and level the banks of the said river, in such manner as should be necessary and proper for building the said bridge, and to cut, remove, take, and carry away all trees, roots of trees, gravel, sand, mud, or any other impediment whatsoever, which might in any way hinder the erecting, building, repairing, or completing the said bridge, and to widen or enlarge any foot, bridle, or horse roads, so as to make the same fit for carriages; and to make all such new or other roads or ways, to and from such bridge, as might facilitate the approach to and over the same; and also to do, perform, and execute all other matters and things requisite and necessary, useful, or convenient, for erecting, building, repairing, maintaining and supporting the said bridge, according to the true intent and meaning of the said act;" and it was farther declared, that the Duke or his heirs "should from time to time have full power and authority to go and on either side of the said river, all materials and other things to be used in and about the same, and there to work and use such materials and things accordingly, doing as little damage as may be, and making such satisfaction" as is provided in the act, to the respective owners and occupiers of all such grounds and lands as should be altered, damaged, spoiled, taken, or made use of by means, or for the purposes thereof.

The duke and his heirs were further authorized and empowered "to treat, contract, and agree for the purchase of any lands, grounds, tenements, or hereditaments, which he or they should think fit or necessary to be employed or used, for the erecting, building, or repairing the said bridge, and for the amending, widening, making, enlarging, and facilitating the ways, roads, and passages on each end of the said bridge, and leading to and from the same, with the owners and occupiers of the said lands, grounds, tenements and hereditaments, and other persons interested in the same, and also to settle, adjust, and agree with the several owners, occupiers, and persons interested, or any of them, what recompense, com-

No. 263. **pensation, or satisfaction ought reasonably to be made for any**
June 3, 1836. **mages, or expenses they respectively shall or may sustain, or**
Fisher v. Duke **for or by reason, or on account of the building or repairing**
of Atholl's **bridge, or the execution of any of the powers of this act."**
Trustees.

Under the powers so conferred, the late Duke of Atholl cons present bridge of Dunkeld, with the necessary approaches ther it had been built, his Grace, and occasionally other parties, w practice of causing stones and rubbish to be deposited on the l the river, below the bridge ; and this practice was, after the D in 1830, continued by his representatives, the trustees under ment. The effect of this operation was gradually to fill up a sl formed by the stream, and to extend the bank in front of M property, about 150 feet into the alveus of the river. No opp made to the deposition of the rubbish by Mrs Fisher, or the ot in front of whose properties the formation proceeded.

The Duke's trustees having proposed to appropriate the gr acquired, to their own uses and purposes, Mrs Fisher and Jar presented a bill of suspension and interdict against building on tl enclosing, selling, feuing, or using or interfering with it in any ever. Interim interdict was granted as craved, and thereafter Ordinary (Moncreiff), on advising the bill and answers, passe and continued the interdict, in so far as it was prayed for a trustees' building upon the ground in dispute, or enclosing, le ing, or selling the same ; but, quoad ultra, recalled the interdict statu. A record having been made up on revised reasons of and answers, Mrs Fisher and James Fisher further instituted a declarator, in which, setting forth their infestments as liferentri in the tenement above-mentioned, and stating that their at themselves had hitherto peaceably possessed and enjoyed it, w in the alveus of the river opposite thereto, and that the tru some time ago, without any right or title, assumed or attempt some possession of the piece of ground belonging to the pursuer next the water, they concluded to have it found and declared said ground was part of and comprehended within the bounds of the foresaid tenement, and belonged to them heritably in pr virtue of their respective rights and titles.

In this action the record was closed on the summons and defe the process conjoined with the suspension, the parties consenting the averments and pleas in the latter process as repeated in t rator.

On the merits of the conjoined processes, it was pleaded for F

A proprietor, whose infestment describes his property as bo a river, has right to the bank of the river, ex adverso of his pr well as a right in the alveus, or channel, no one being entitled

se in any way between his lands and the water : and although the piece No
ground in dispute has been gained from the river by artificial means, June
has become, nevertheless, part and pertinent of Mrs Fisher's tenement.¹ Fish
For the Atholl Trustees it was contended, inter alia, in answer :— of A
This case is to be taken out of the common rule of law, in respect Trus

of ample powers conferred on the Duke, and after him on his representa-
tives, as statutory trustees under the bridge act ; thus, they are entitled
to embank in the immediate neighbourhood of the bridge, and to employ
the ground so formed in any way which may tend to promote the pur-
poses of the trust ; Mrs Fisher cannot claim this ground, which is the
opus manufactum of another, and she has no right to it by way of com-
pensation, although she may have a claim of damages for any want of
caution occasioned by the trustees' operations thereon ; Mrs Fisher and
her authors have besides acquiesced in the formation of the ground in
question, and in the trustees' possession thereof.

The Lord Ordinary pronounced the following interlocutor, adding the
joined note :—* “ Finds, that the property of the pursuers is, by the
law thereof, bounded on the south by the river Tay, and that at com-
mon law it was not competent to any party, by artificial operations in the
course of the river, to acquire or interpose property between that of the
pursuers and the water of the said river : Finds that, in virtue of the act
of Parliament founded on by the defenders, 43 Geo. III. c. 33, it was
competent to the Duke of Atholl, or the trustees thereby appointed, to
perform any operations on the banks or alveus of the said river, which
might be necessary for the erection or preservation of the bridge to be
constructed under the powers thereby given, and to acquire from other
proprietors all grounds which might be required, either for those pur-
poses.”

¹ Campbell v. Brown, Nov. 18, 1813 (F. C.) ; Culross v. Geddes, Dec. 17, 1809
decided in Campbell, supra ; Boucher v. Crawford, Nov. 30, 1814 (F. C.) ; Mar-
shall of Tweeddale v. Kerr, May 14, 1822 (ante, I. 396, N. E. 373).

“ The Lord Ordinary must own, that, independent of the statute, he can see
room for doubt, that the Duke of Atholl could not possibly, by any opus manu-
factum, and still less by any natural or gradual change of the river, acquire prop-
erty between that of the pursuers, which reached to the middle of the alveus, and
the express boundary of the water of Tay ; and he rather thinks a river not navi-
gable is the stronger case against this, than the sea or a navigable river. The sta-
tute, no doubt, gives broad powers for its object. But those powers cannot be
extended beyond the object, or their terms, and the Lord Ordinary can see nothing
in them to authorize the appropriation by the Duke of such ground on the north
bank of the river, in compensation of other ground which he chose, no doubt with
able public views, but greatly for the benefit of his estate, to give up on the
south side. On the other hand, he is entitled to the fullest command of the bank
and the alveus, which the safety of the bridge may require.

The acquiescence of the pursuers may go so far as to bar any objection to the
ground made, or any claim for compensation on that account, and also all claim for
ground may have been gained by the use of the green hitherto ; but there is plainly
nothing to alter the rights of property otherwise. It may, however, be material as
to the modification of expenses. There is no evidence, at least, that there was any
intention of building on the ground.”

No. 263. poses, or for the making or altering roads for affording access to
 bridge, giving compensation to all such parties in the manner pre
 June 3, 1836. **Fisher v. Duke of Atholl's Trustees.** Finds, that in so far as the late Duke of Atholl, as trustee under
 statute, or his trustees acting under the same powers may, by the
 or others, have deposited, or authorized others to deposite soil, e
 other materials in the alveus opposite the property of the pursu
 may have occupied the ground thereby created for the purpose o
 ing or protecting the said bridge, or for facilitating the formation
 road for access thereto, or may find it necessary to continue the
 for such purposes, the pursuers are not entitled to complain of a
 operations; but finds, that there is no provision in the statute
 which the Duke of Atholl could acquire to himself, as an individ
 property of any such ground between the property of the pursu
 the water of the river Tay, whether in compensation of ground g
 by him on the south side of the river, or on any other account:
 therefore, that the ground brought into dispute in this action is
 to the absolute use and command of the statutory trustee or tru
 far as it is or may be necessary or useful for the protection, re
 preservation of the said bridge, or for any road of access thereto,
 it is also subject to all lawful uses for the fishings or ferriage of th
 but finds, that in other respects, and always subject to any such
 must be considered as part of the property of the pursuers: Fin
 the pursuers are not barred, by acquiescence or otherwise, from i
 in these processes of declarator and suspension: In the declarato
 decerns, and declares, in the terms above expressed, but no furth
 in the suspension, continues the interdict, so far as it may apply
 operations inconsistent with the rights of the pursuers as hereby d
 but recalls the same, so far as it may operate to any other effect
 the pursuers entitled to expenses, but subject to modification."

The Atholl Trustees reclaimed.

LORD JUSTICE-CLERK.—I can see no grounds for altering the Lord Or
 interlocutor, which is very carefully worded, and proceeds upon a fair cons
 of the Dunkeld Bridge Act. There is no room for the plea of acquiesce
 the limitations in the interlocutor, Mrs Fisher is not entitled to erect a
 on the ground in question, so as to interfere with the public uses of the

LORD GLENLEE.—I am of the same opinion. The interlocutor is c
 worded, so as to prevent the possibility of Mrs Fisher interfering with a
 which the Duke's representatives may have as statutory trustees.

LORD MEADOWBANK.—I agree. Had a question arisen between Mr
 and the Duke, as trustee under the Bridge Act, as to the making of this c
 ment, I should have said she had no right to prevent it. But now that it
 the property is in her.

THE COURT accordingly adhered, finding additional expenses.

ALEXANDER GIFFORD, S.S.C.—H. GRAHAM, W.S.—Agents.

MRS MARGARET STEWART, Advocate.—*More.*

MRS HELEN CROMARTY, Respondent.—*D. F. Hope—Handyside.*

THIS was a special question as to the state of possession of a certain me in the burgh of Kirkwall, originally entertained before the dean of Eld of that burgh, in which the Court, altering the Lord Ordinary's interlocutor, decided in favour of the respondent, with expenses since the date of the advocacy.

R. URQUHART, S.S.C.—PETER CROOKS, W.S.—Agents.

JOHN JOHNSTON, Pursuer.—*Sol.-Gen. Cuninghame.*

EDWARD HENRY, Defender.—*Wilson—A. McNeill.*

Title to Pursue—Bankrupt—Expenses.—Circumstances in which the Court repelled objection that a party was bound to find caution for expenses before wakening advocacy in which he was respondent.

JOHN JOHNSTON, residing in South Richmond Street, Edinburgh, June 1832, sued an action before the sheriff, against Edward Henry, residing in the Fishmarket Close, Edinburgh, for payment of a sum of £100, and upwards. In October, 1832, while the action was in dependence, Johnston was imprisoned for debt. He applied for the benefit of the act of grace, and in that application, he executed a disposition omnium bonorum, in favour of Taylor and Deseret, two of his creditors, for themselves, and as joint trustees for his whole other creditors. This deed was dated 14th December, 1832. On 15th December, Johnston obtained decree in the action against Henry. Henry brought an advocacy, which was allowed to fall asleep. In February, 1835, Johnston raised a summons of wakening, to which Henry objected that he was divested by the disposition omnium bonorum, of all title to pursue, and of all power to discharge the debt, if he got decree; and farther, that, even if his title could be sustained, he should find caution for expenses of process before being allowed to proceed. Johnston then produced letters from Taylor and Deseret, intimating that they "declined interfering in the process," and had no objection to its being carried on" by Johnston himself. It appeared that one of these persons who had been named joint-trustees, had never accepted, and declined having any thing to do with the trust-disposition omnium bonorum. Johnston also produced letters from a number of his former creditors, declaring that he was at liberty to carry on the action for his own behoof, and that they had no interest therein. They also stated that they had no longer any claims against him, and their let-

No. 265. ter imported that they had already executed an unstamped deed of cession in his favour.

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In these circumstances, Johnston contended, that he was entitled to insist without finding caution for expenses.

The Lord Ordinary, “in respect of the letters produced, repeated defences to the wakening; wakened the action accordingly, and appointed the same to be enrolled that it may be proceeded in.”

Henry reclaimed as to Johnston’s liability to find caution for expenses.

The LORD PRESIDENT at first expressed some doubt, as there did not appear to be sufficient evidence that all the creditors had signed the letters produced by Johnston, but

THE COURT, in the end, unanimously adhered, and awarded expenses since the Lord Ordinary’s interlocutor.

D. BROWN, Jun., W. S.—R. JOHNSTON, W.S.—Agents.

No. 266. EARL OF MORAY, Petitioner.—*Sol.-Gen. Cuninghame—Walter*
THOMAS MANSFIELD (Stuart’s Trustee), AND OTHERS, Respondents.
Rutherford—Moir.

Right in Security—Bankrupt.—At the date of a bankrupt’s sequestration, if a creditor held a security affecting two estates, the larger of which had been in the hands of the bankrupt recently before, and the purchaser had omitted to get the bankrupt discharged; the smaller estate was covered with postponed securities; the creditor paid the debt of the catholic creditor, and took a conveyance to his security on the larger estate; he thereafter discharged, so far as affecting the larger estate, but kept up the security on the smaller:—Held, that he could not rank on the price of the smaller estate for such proportion of the catholic security as rateably effected to the value of the smaller estate.

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JAMES STUART of Dunearn, W.S., was proprietor of the two estates of Cullelo and Hillside. In 1815 and 1816, he granted two bonds in security, each of them affecting both estates, for the sums of £1000 and £515, respectively.

In the bond for £1000 Mrs Banks was creditor; Fraser was creditor in the bond for £515. Stuart subsequently granted bonds, and dispositions in security, to the amount of £10,500, to Professor Fraser and others. These dispositions affected the lands of Hillside also. At the beginning of 1828, the Earl of Moray purchased from Stuart the estate of Cullelo, and paid up the full price for it, amounting to £33,437, 14s. 10d., without getting any discharge of the bonds of Fraser and Mrs Banks. In August, 1828, the estates of Stuart were sequestrated under the Bankrupt Act, and Thomas Mansfield, accountant in Edinburgh, was named trustee. Fraser and Mrs Banks afterwards applied to Lord Moray for payment of their bonds, which they received. His lordship, at the same time took a conveyance to the securities

which he executed a discharge and renunciation of them, so far as they affected Cullelo, but kept them up so far as they affected Hillside. The bonds of Hillside brought a price of only £1319, 2s., and Lord Moray, in right of the primary and catholic creditors, Fraser and Mrs Banks, claimed the whole price, to the exclusion of the secondary creditors. His lordship alleged, that he had paid up the price of Cullelo, without knowing that the above-mentioned burdens affected that estate, and that the creditors in them had compelled him to pay both of their debts.

The trustees of Professor Walker, who was now deceased, and the other secondary creditors, objected to his lordship's claim, that, at the date of the sequestration, he was just a personal creditor of Stuart for relief from the burdens of £1000 and £515, affecting Cullelo: that the authors of Lord Moray (Fraser and Mrs Banks), could not have arbitrarily ranked their burdens upon either of the estates of Cullelo or Hillside, at their pleasure, but were bound to rank on both estates pro rata of their respective values: that if Fraser and Banks had ranked, to any excess, upon one of the estates, they must have assigned to such estate a right of proportionate relief against the other estate: and that, after sequestration, Lord Moray could not acquire a right from Fraser and Banks greater, in any respect, directly or indirectly, than they themselves possessed, at least to the prejudice of postponed creditors. This would have been the case, even had Lord Moray been a catholic creditor, acquiring after sequestration the right of a secondary creditor; but still more clearly was it fixed by authority in the present case, where Lord Moray was a secondary or personal creditor, acquiring a catholic security after sequestration.¹

Lord Moray answered, that, had he been the holder of the catholic security originally, and had he afterwards bought Cullelo, and paid up the price, he would have been entitled, notwithstanding any subsequent sequestration, to restrict, at any time, his catholic security to Hillside alone; because a catholic creditor may make every bona fide use of his security, to provide for his own complete indemnity, and no subsequent secondary creditor can acquire a security except under that burden. But his lordship's actual position was not different in principle from the case thus supposed. But, besides, there were express authorities in favour of his claim, and these did not appear to rest upon any principle which would be affected by the circumstance of supervening bankruptcy.²

The trustee found "that the Earl of Moray is entitled to be ranked in right of the debts originally vested in Mr Peter Forest and Mrs Catherine Banks, with interest and expenses at 20th August, 1828, the date

¹ 2 Bell, 524, and Note, 525. 2 Ersk. 12, 66.

² 2 Ersk. 12, 66; Miln, Nov. 6, 1678 (3367); Scotland, Jan. 3, 1696 (3367); Presn. n, Feb. 22, 1715 (3376); Stewart, Jan. 11, 1814 (F.C.)

No. 266. of Mr Stuart's sequestration, for the sum of £1565, 2s. 5d., upon the price of Hillside, being £1319, 2s., after imputing to account of said debts a rateable proportion of the value of Cullelo, which amounts to £33,437, 14s. 10d. The trustee, therefore, finds, that, of the price of Hillside, the Earl of Moray falls to draw the sum of £59, 8s., reserving to his Lordship a right to rank as a personal creditor on Mr Stuart's sequestrated estate for the balance of his debt; and that the creditors, in right of the foresaid bonds of £10,500, are entitled to draw and rank *pari passu* on the balance of said price, being £1259, 14s., &c."

June 4, 1836.
Earl of Moray
Mansfield.

Lord Moray presented a petition and complaint, which was followed by answers, and the Lord Ordinary "Refused the desire of the petition; affirmed the judgment of the trustee complained of; dismissed the petition, and decerned; and found the petitioner liable in expenses."

Lord Moray reclaimed.

THE COURT, without calling on the respondent's counsel, unanimously adhered, and awarded additional expenses.

W. STEWART, W.S.—WALKER, RICHARDSON and MELVILLE, W.S.—Agents.

* "NOTE.—The reasons assigned by the trustee for his judgment appear to be sound and sufficient. The noble petitioner endeavours to give plausibility to the plea, by assuming, that, when he paid the price of Cullelo to Mr Stuart, he did so in the bona fide belief that there were no such securities affecting those lands. As mere matter of fact, this no doubt must be true; but, as matter of law, he is not entitled to the assumption. The securities being in the record, he was bound to know of them, and in this question must be taken to have known of them. The case, then, is this, that he purchased lands which stood burdened with these two debts,—that he rashly paid the price, throwing himself on Mr Stuart's personal responsibility,—that Mr Stuart became bankrupt, and after sequestration, the petitioner tries to better his position against the respondents as secondary creditors on Hillside, by paying and taking assignations of the two catholic securities affecting both Cullelo and Hillside. But can he do this? The creditors in these securities, as they stood at sequestration, could not have claimed their whole debts from Hillside, without assigning their securities, so as to give relief to that estate, *pro rata*, against Cullelo. Can the petitioner, as their assignee, be in a better situation, merely because incidentally he would thereby be relieved of the consequence of his having paid the price of Cullelo without retaining the sum corresponding to his proportion of these debts? The Lord Ordinary thinks that he cannot. If it were enough for the holder of such catholic securities, acquired by assignation after bankruptcy, to say that he is not bound to assign or to allow the rateable ranking, because he will have an advantage in not doing so, being proprietor of one of the estates, or having a separate security over it, it is evident, as well argued by the respondents, that, whichever party could first settle with the catholic creditors would thereby relieve the estate in which he was interested totally, and throw the burden on the other, without relief. It is impossible that this can be law, as it would certainly be neither justice nor common sense. Whether the cases referred to stand on sound principle or not, it is manifest that the case of a person standing before bankruptcy in the right of a catholic security over two estates, adjudging one of them for a separate debt, also before bankruptcy, is essentially different in principle from that on which the petitioner's argument must be raised."

WILLIAM SKIRVING COCKBURN, Pursuer.—*Keay—Whigham.*
 EWEN ALEXANDER CAMERON, Defender.—*D. F. Hope—Horn.*

Trust—Sasine—Sale.—A trust settlement conveyed heritage to trustees, and to their assignees; it was granted, to pay debts and provide the residue to the grantor's family; it contained powers of sale, with a declaration that the purchaser should have no concern with the conditions of the trust, and, from the terms of the deed, there could be no "assignees" contemplated, excepting purchasers; there was an obligation to infeft the trustees, or their assignees, and a procuratory of resignation for new infeftment "to the trustees, under the burdens, &c. of the trust, and to the assignees of the trustees, in due and competent form;" the precept of sasine was in these terms:—"And to the end my said trustees may be infeft in the lands, &c. I hereby desire and require you, and each of you, &c. that ye pass, &c. and give sasine, &c. to my said trustees, and to the assignees of my said trustees, of all and whole, &c.; but that, in trust always, for the uses, ends, and purposes, with the power, and under the burden, and conditions, and provisions herein before written:" the trustees sold lands, and, without making up a feudal title, conveyed this unexecuted precept to the purchaser who took infeftment under it:—held, that he had acquired a good feudal title, and that a party, subsequently purchasing from him, could not object to pay the price.

WILLIAM RAMSAY, of Preston, by trust disposition and settlement, in 1764, disposed his whole estate to trustees, "for the uses and purposes after specified, and with the powers hereinafter granted, and under the burdens, reservations, power, and faculty, and conditions and provisions hereinafter written, and to the assignees or disponees of the said accepting trustees or trustee, and to the heirs of such disponee, but excluding the heirs and executors of the said trustees." The purposes of the trust were, to pay the grantor's debts, and to convey the free residue of his estate to his only child, in liferent, and her issue in fee, but under the burden of a certain annuity to his widow. Among the powers granted to the trustees, was that of selling his heritage, and granting "dispositions or other writs necessary for such purchaser or purchasers, who shall be noways concerned with the application of the prices, nor burdened with any of the provisions or conditions before contained, but shall be obliged to pay the price to my said trustees or trustee foresaid." The deed contained an obligation to infeft "my trustees or trustee upon my own proper charges, and the assignees of my said trustees or trustee upon the proper charges of the said assignees." It also contained procuratory of resignation for new infeftment in favour of "my said trustees or trustee, for the uses, &c. and under the burdens, &c. before specified, and to the assignees of my said trustees or trustee, in due and competent form, in effairs." There was a clause of absolute warrandice, in favour of "the said trustees or trustee and their assignees." The precept of sasine was

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in these terms:—"And to the end my said trustees or trustee may be infeft in the foresaid lands and others, I hereby desire and require you, and each of you, &c., that upon sight hereof ye pass to the ground of the said several lands, and there give and deliver heritable state and sasine, real, actual, and corporal possession, to my said trustees, and failing all of them by death, or non-acceptance, but one, then to that one accepting and surviving, and to the assignees of my said trustees or trustee, of all and whole, &c.; but that in trust always for the uses, ends, and purposes, with the power and under the burden and conditions and provisions herein before written." There was no power granted to assume new trustees into the trust.

In 1776, Ramsay's trustees, acting under the settlement, sold part of the lands to William Duthie. They had not taken infeftment on the precept in their favour, and, in place of doing so, they assigned the trust disposition, &c., and clause of warrandice, &c., "together with the precutory of resignation and precept of sasine therein contained, and then still unexecuted, and whole other clauses and obligations thereof, so far as related to the subjects thereby disposed." Under the precept so assigned, Duthie took infeftment in 1777, the instrument of sasine narrating Ramsay's trust-disposition and precept, and the disposition and assignment by the trustees, and then bearing that sasine was given "after the form and tenor of the said two dispositions and precept of sasine contained in the disposition first narrated, in all points." By successive conveyances, without any other infeftment till 1818, the lands came into the person of William Skirving Cockburn, who, in 1835, sold them for £1360, to Ewen Alexander Cameron. The price was to bear interest from 20th August, 1835, and a sum of £11, 17s. was due by Cameron to Cockburn, in name of rent, as he had occupied the subjects, as a tenant, from Whitsunday to 20th August, at a rate of £42 per annum.

Cameron, on examining the titles, objected to pay the price, in respect that the progress was not good, and Cockburn raised an action for implement of the contract of sale, by paying the price, and also for damages; which was met by a counter action, at Cameron's instance, for implement of the contract, by giving a good title, and for damages. The actions were conjoined.

Cameron pleaded—

That no prescriptive possession had followed on any sasine subsequent to that in 1777, and that that sasine was, ex facie, a sasine without a warrant. The precept of sasine was, in gremio, qualified with the condition that infeftment was to be given, "but that in trust always for the uses," &c. No absolute or unqualified infeftment could possibly be given under that precept, and yet Duthie's instrument of sasine set forth that precept as the warrant of his infeftment in absolute property, which was inept.

Cockburn pleaded—

That, from the construction of the trust-settlement, power was given by the granter to assign the precept for absolute infeftment in favour of a purchaser.

The deed of settlement should be read, *applicando singula singulis*, and it would then appear that though the precept of infeftment, so far as regarded the trustees, was in trust only, yet it was a precept to give unqualified infeftment to any purchaser or assignee of the trustees.

But, separately, wherever there was a trust-disposition, with powers of sale, and a precept of trust infeftment was also added, it was competent for a trustee, who had exercised the power of sale, and who had not taken infeftment, to assign the trust precept to the purchaser, as a warrant for simple infeftment. The combined effect of the trust-disposition, the sale under it, and the trustee's disposition and assignation, was to form a good warrant to the notary to expedite a simple and unqualified infeftment under the precept.

The Lord Ordinary * “ in the action at the instance of William Skirving Cockburn, Found, That the defender, Ewen Alexander Cameron, is bound to implement the missives of sale, and to make payment to the pursuer of the sum of £1360 Sterling, with interest thereon, since the

* “ NOTE.—It is thought that there is no ground whatever for the objections which the purchaser has made to the progress of titles offered by the seller. By Mr Ramsay's settlement, dated in 1764, his whole heritable estate, including the subjects in question, is conveyed to trustees, and to the assignees or disponees of the trustees, and to the heirs of the disponees, but excluding the heirs and executors of the trustees. There is no power of assumption given to the trustees; but there is a power of sale and of granting dispositions to the purchasers, who, it is declared, shall noways be concerned with the application of the prices, or with any of the provisions or conditions of the settlement. Then follows a precept of sasine in favour of the trustees, and of the accepting and surviving trustee, and to the assignees of the said trustees or trustee. The assignees here contemplated must necessarily have been the persons to whom the heritable subjects were sold by the trustees, for they had no power to assign to any other parties, and the parties to whom they should assign were declared to have no concern with the application of the price, or the conditions of the trust. Even in the general case, it has been thought that a precept to infeft one in trust, may, when such trustee has power to sell, be assigned to the purchaser. See Bell's Principles, 3d edit. p. 236. The reason is plain, because it is an established rule, that a precept may be assigned *qualificatè*; and if the trustee himself has power to sell to one who is not to be bound by the conditions of the trust, he may assign the precept to the purchaser, under that quality expressed or implied. But, in addition to this, there is the specialty in the present case, that the precept is expressly granted to assignees; and as there could be no assignee but a purchaser, it must have been in the granter's view that the precept should be a good warrant of infeftment to that purchaser, exempted from the conditions of the trust.

“ The other objection, namely, that the sasine, which was a public one, had not been confirmed before the years of prescription, is palpably groundless, because confirmation, when there is no mid-impediment, operates retro, and it is not alleged that there is any such impediment here.”

No. 267. 20th day of August last; and also of the sum of £11, 17s. sterling, being the proportion of rent due by him, with interest thereon since the date of citation: And, in the action at the instance of the said Ewen Alexander Cameron, assoilzied the defender, the said William Skirving Cockburn, from the conclusions of the libel, and decerned: and found the said Ewen Alexander Cameron liable in the expenses of the conjoined actions."

Cameron reclaimed.

The Court did not call on counsel to support the judgment.*

LORD PRESIDENT.—The trust disposition was granted with powers of sale. It was provided that a purchaser should have nothing to do with the conditions of the trust. And the truster directed infestment to be given to his trustees or their disponees and assignees. There could be no assignees excepting purchasers, and they were to have no concern with the conditions of the trust; and under the assignation of the open precept, made by the trustees to a purchaser, I think the infestment was duly warranted, and was valid and habile. The reasoning in the note of the Lord Ordinary appears to me to be unanswerable where his Lordship states that "it is an established rule, that a precept may be assigned qualified; and if the trustee himself has power to sell to one who is not to be bound by the conditions of the trust, he may assign the precept to the purchaser under that quality expressed or implied. But, in addition to this, there is the speciality in the present case, that the precept is expressly granted to assignees; and as there could be no assignee but a purchaser, it must have been in the granter's view that the precept should be a good warrant of infestment to that purchaser, exempted from the conditions of the trust."

LORD BALGRAY intimated his decided opinion to be for adhering.

LORD MACKENZIE.—I do not think the question is altogether free from difficulties; but perhaps they are of a somewhat metaphysical nature, and, on the whole, the judgment under review is probably well founded.

THE COURT then adhered on the merits, but, in regard to expenses, their Lordships altered, and allowed them only since the date of the interlocutor of the Lord Ordinary.

DAVIDSON and SYME, W. S.—D. FISHER, S. S. C.—Agents.

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JOHN MACNEE, Advocate.—*Pyper*.

MRS DOW and JAMES BRIDGES, Respondents.

1st 7, 1836.

1st DIVISION.
Corehouse.
B.

Proof—Reference to Oath.—Sequel of the special case, decided June 13, 1835, and reported ante, XIII., 964, which see. The respondents being assoilzied from the claims of the advocator, he put in a reference to

* There was no written argument before the Court.

their oaths. They deponed négativé, and the Lord Ordinary again No
 ordered, and found the advocator liable in expenses; to which interlo- June
 for the Court adhered, and awarded additional expenses. Barclay
 Sharpe

D. M. BLACK, W. S.—J. GRAY, W. S.—J. BRIDGES, W. S.—Agents.

JOHN BARCLAY, Advocator.—*D. F. Hope—Miller.*
 MRS SHARPE and OTHERS, and their MANDATARY, Respondents.
 —*Robertson—Shand.* No

Police—Clause—Property.—Held, in construing the Edinburgh Police Acts, 3 Geo.
 . c. 78, and 2 Wil. IV. c. 87, that the provision in § 97 of the first statute remains
 force, forbidding the proprietor of a flat, to use, for the purposes of a water-
 set, any drain leading into the common sewer under the ground-floor of a com-
 a tenement, without the consent of the proprietor of the ground-floor.

MRS SHARPE and Others were proprietors of half of the upper flat, June
 tering from the common stair in the tenement No. 8, St David Street, 1st
 Edinburgh. David Tough and his wife were proprietors of the other Ld. C
 lf; and John Barclay was proprietor of all the lower flats, containing
 ops and other premises. Mrs Sharpe and others presented a petition
 the Dean of Guild, stating that Barclay had constructed a drain run-
 ing under the house from the back to the front, and had connected with
 it drain certain water-closets, erected in his own part of the tenement,
 d also in some adjoining buildings, which he had erected behind it;
 it David Tough had a water-closet in his half of the upper flat, which
 s also connected with the same drain; that the petitioners wished to
 t up a water-closet in their own half, without which they found it
 ould not readily let, and to connect the water-closet with the same drain,
 t that this was resisted by Barclay. They craved authority “to put
 water-closet in their flat, and connect it with the said drain, they pay-
 ; any fair proportion of the expense of the making of the said drain
 ich may seem just.”

Barclay refused to grant authority, and contended that without his con-
 it the operation could not be authorized. The question at issue be-
 een the parties depended on the construction of the police acts 3 Geo.
 . c. 78, and 2 Wil. IV. c. 87.

For the purpose of correcting the nuisance “of throwing out foul
 ter and other filth on the streets,” power was given, by 3 Geo. IV.,
 78, § 97, to the proprietor of a floor or flat to erect one “waste or
 l water pipe along the back wall of the tenement, on the outside, com-
 municating with the drain under ground, leading into the common sewer,
 ere there is such drain, and with power to make such drain, if there is
 : one already,” &c., on certain conditions, as to obtaining authority
 m the Dean of Guild, &c., and paying expenses, &c. It was provided

p. 269. in the following section (98) "that it shall not be lawful for the proprietors of floors or flats to make use, for the purposes of water-closets, or such like purposes, of any drain or communication into the common sewer, under the ground floor of the tenement, without the consent of the proprietor of the said ground floor." By the following section (99) power was given to carry up a service-pipe, for pure water, from the main water-pipe in the street, passing under ground through the lowest flat, on getting authority from the Dean of Guild, and paying expenses and damages, without requiring the consent of the owner of the lowest flat.

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pe.

By the subsequent police act, 2 Wil. IV. c. 87, entitled "an act for altering and amending certain acts for regulating the Police of the City of Edinburgh, and for other purposes relating thereto," it was narrated in the preamble "that the said acts should be altered, amended, and continued, and other powers and provisions granted for the more effectual maintenance and preservation of the police of the said city, and for the better watching, lighting, cleansing and paving the streets." And it was enacted that the statute 3 Geo. IV. c. 78, "excepting in so far as the same is hereby varied, altered, or repealed, and all and every the powers and provisions therein contained, shall be as good, valid, and effectual for carrying this act into execution, as if the same had been repeated and re-enacted in the body of this act."

By § 61 of the new act it was enacted, "in order to avoid the nuisance occasioned by the throwing out foul water and other filth upon the streets," that the proprietor of a floor or flat might "erect one soil or foul water pipe in the common staircase, or along the back wall of the tenement on the outside, communicating with the drain under ground leading into the common sewer," &c., with power as before to make such drain where none previously existed. This power was granted, under the same condition of obtaining authority from the Dean of Guild, and paying damages and expenses as in the former act. There was no section in this statute, nor any provisions, corresponding to the above-quoted section, 98, of the former statute, or its provisions. The section (62) immediately following that which is last above quoted, contained a provision for entitling the proprietor of a flat to take up pure water from the main waterpipe in the street, by a pipe brought up the common staircase, or along the back of the tenement on the outside, on the same conditions (as respected co-proprietors) with the corresponding section in the previous act, which was the 99th.

In reference to the terms of these acts, the petitioners pleaded, that the object of every police statute was to provide for the police and cleansing of the city, and it should be construed liberally towards effectuating that object; that by the last statute power was given (§ 61) to erect a soil or foul waterpipe, and connect it with the drain under ground, leading to the common sewer; that these words expressly described the

species of pipe which was used for water closets, and this meaning was further apparent, as the purpose of granting the power was to remove the nuisance "of throwing out foul water and other filth upon the street;" that the only condition requisite for erecting such pipe was the payment of damages, &c., and that the consent of a co-proprietor had not been rendered necessary, which omission must be held to have been made, *ex opposito*, in respect that every individual's right, in a common property, could be subjected to the restrictions necessary for the common behoof. They therefore contended, that unless there were such words in the former statute as cut off this right, they were entitled to exercise it under the new statute. But there were no such words, as the former statute was only held repeated in so far as not "varied, altered, or repealed," and the omission of such a condition as a co-proprietor's consent was a "variation" and "alteration" equally with a positive change; especially as it was in furtherance of the object of the statute.

Barclay answered, that the section (61) of the new act exactly corresponded, except in immaterial particulars, with the section (97) of the former act, both granting a power of erecting a pipe, in order to avoid a nuisance, which was described in the same terms in both statutes; that the "soil or foul water pipe" in the last statute was the same in effect as the "waste or foul water pipe" in the former act; that notwithstanding all the powers of § 61 were given by the former act (§ 97), it was therein provided that the petitioners should obtain the express consent of a co-proprietor for a water-closet pipe, and so important was this held, that one entire section (§ 98) of the statute was devoted to that special provision; that there was a manifest reason for requiring this, as the operation might cause a great nuisance, and injury to the proprietor of a lower flat of the tenement; that the previous statute was declared in the last act by a general provision, applying to the whole of it, to be re-enacted, unless in so far as altered or repealed; and that if the mere omission of a section was held to operate a repeal of it, the clause of re-enactment would have no meaning whatever. Holding, therefore, that § 98 remained in force, the consent of the respondent was essential to warrant the erection contemplated.

The Dean of Guild "remitted to the trades' members of Court to report whether there be any good objection to the proposed mode of carrying off the contents of the water-closet (for erecting which warrant is now moved) by means of a pipe running down the back wall of the tenement, and communicating with the present drain."

Under this remit a report was returned that "there was no good objection to carrying off the contents of the water-closet in question by means of a pipe running down the back wall of the tenement, and communicating with the present drain, in terms of the within sketch or plan."

Thereon the Dean of Guild "granted warrant to the petitioners, in

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terms of the prayer of their petition, and of said report and relative plan and section, to construct a water-closet in their house, and connect it with the drain, all at their own expense ; and found expenses due to the pursuers, subject to modification."

Among other reasons which were assigned for this judgment in a note by the assessor, it was stated that the permission in the first statute to erect a "waste or foul waterpipe," was changed in the new statute into a permission to "erect a soil or foul waterpipe," which words, viewed in connexion with the purpose of the provision, were construed as an alteration, including water-closet pipes.

Barclay brought an advocacy, in which the Lord Ordinary "altered the interlocutor of the Dean of Guild ; found that the respondents cannot connect their soil-pipe with the drain under the ground-floor of the advocator's house, without his consent ; refused the petition of the respondents, and decerned ; but found no expenses due." *

Mrs Sharpe and others reclaimed.

LORD MACKENZIE.—I have some doubt of the soundness of the judgment of the Lord Ordinary. It appears to me that the general clause in the last act, renewing the former, so far as not altered or repealed, is conceived in more limited terms than the Lord Ordinary has held. I think the provisions of the former act, which were renewed, are expressly declared to be "for carrying this act

* "NOTE.—The Lord Ordinary would have been glad to confirm the interlocutor of the Dean of Guild, because he thinks that the construction put upon the Act of Parliament in that interlocutor would tend to the convenience and comfort of the proprietors of houses in the situation of that of the respondents, and for the benefit of the inhabitants in general ; but he conceives that he is not entitled to do so, under the provisions in the Police Acts for the city of Edinburgh, referred to in the record. The 98th section of the 3d Geo. IV. c. 78, expressly prohibits such communications under the ground floor, without the consent of the proprietor of that floor. The 2d of Wm. IV. c. 87, re-enacts all the clauses of the 3d Geo. IV., which it does not repeal or alter, and there is no repeal or alteration of the 98th section of that statute. The attempt to show that there is a virtual repeal of the section by a comparison of the 97th section of the one act with the 61st section of the other, appears to the Lord Ordinary to have entirely failed. There is plainly no distinction between those two sections, except that the waste or foul waterpipe in the one is directed to be carried down the outside of the house, and in the other it is permitted within, that is in the common staircase. As for the alleged difference between a waste or foul waterpipe for carrying off 'foul water and other filth,' and a soil or foul waterpipe for the same purpose on which the learned assessors of the Dean of Guild rest the judgment, the Lord Ordinary thinks it cannot be maintained. Holding these two clauses substantially the same, and that an express exception is introduced with regard to the one in the former statute, and is re-enacted in the latter, he is of opinion that the greatest laxity that was ever sanctioned in the construction of a remedial statute or statute for the benefit of a community, would not justify the interlocutor under review.

"Considering, however, that the operation of the respondents would tend to prevent, rather than create a nuisance to the advocator's house, and that the respondents were fairly entitled to try the question, it is thought that this is not a case for expenses."

to execution." They are all declared as valid and effectual for carrying this act into execution, as if re-enacted. On attending to this limitation, arising from the special purpose for which the general re-enactment was made, I doubt very much whether the restraint on a co-proprietor's power to erect a water-closet pipe, remains under this act. Under the former act the erection of a waste or foul waterpipe did not require another co-proprietor's consent; the laying of the connecting drain under ground did not require it; it was only a certain limitation which was imposed on the use of such pipe, unless his consent was obtained. It was prohibited to be used for water-closets without consent. The fullest use which might have been made of such a pipe, for the police-purposes of the act, was placed under that restraint. But when the new act was passed, the same right to put up the pipe and construct a connecting drain, without the consent, was given; and there was no annexed limitation respecting the use of the pipe, for water-closets, as had formerly been inserted. In these circumstances I doubt extremely whether such prohibition can be held to be renewed, under the general re-enacting clause; because I do not think that the original provision (being just a limitation on the police-uses of the pipe in question), was one of those provisions necessary for the execution of the new act. And unless it belonged to that class, I do not see that it can fall under the re-enacting clause. Suppose that, under the first act, an exception or limitation of a different sort had occurred: suppose that the whole provisions of the act had applied generally to the city, but a distinct section was put into the act, exempting Charlotte Square, and that, in the new act, there was a general clause re-enacting all former provisions, so far as necessary for the execution of the new act, but that this new act altogether omitted the section which had originally exempted Charlotte Square. In such a case, I think it would be difficult to hold that that section was re-enacted under the general but qualified clause of re-enactment. On the contrary, it appears to me that the limitation of the first act, which exempted Charlotte Square from the scope of it, would be evacuated under the second act, and that the police provisions of the second act would apply to the whole city. For a similar reason, it appears to me, that, as full power was granted to erect a certain soil or foul waterpipe, and a connecting drain, for police purposes, and for removing the nuisance of foul water and other filth being thrown into the street; and as an exception or limitation on the full police-uses of such pipe was imposed by the first act, which is not repeated in the second, I doubt whether it can be held that such limitation is actually to be taken as re-enacted in virtue of the general but qualified re-enacting clause, already referred to. It was not one of the provisions requisite for carrying the new act into execution, and therefore I doubt if the re-enacting clause can reach it. I may add, that I am not at all influenced by the change in verbal expression which occurred in the new act, where the "waste or foul waterpipe" of the first act was expressed as "the soil or foul waterpipe" of the second. I assume these to be equivalent expressions; but still I doubt extremely, for the reasons I have just assigned, whether the interlocutor of the Lord Ordinary be well founded.

LORD BALGRAY.—I think the interlocutor of the Lord Ordinary should be adhered to. The restriction which was imposed by the statute 3 Geo. IV. c. 78, is extremely reasonable in itself, as the connexion of a water-closet pipe of one proprietor, with a drain passing under the lower flat of another proprietor, may

No. 269. be a very great nuisance. At common law, and independently of the statute, I think the restriction exists; and I hold that it was not the effect of the new act to repeal the entire section which imposed that wholesome restriction, in the old one. It was carefully provided that the old act should remain in force so far as not varied, altered, or repealed, and there is nothing in the new act to repeal or to vary the 98th section of the old act, which is not, indeed, in any way noticed in the new act at all.

LORD PRESIDENT.—I am of the same opinion. In the first act, a clear distinction was made between the right of a co-proprietor to bring up pure water from the main pipes of the Water Company in the street, without requiring the consent of any co-proprietor, and the right of connecting a foul water-pipe, if used for a water-closet, with any drain running under the flat of a co-proprietor, unless the consent of such proprietor was obtained. There was a strong reason for drawing that distinction, and as the new act continues and re-enacts the provisions of the first act, unless so far as varied, altered, or repealed, I hold that § 98 of the first act remains still in force. There is nothing expressly altering or repealing it, and I think it is expressly continued in force. I may add that I pronounce this judgment with regret, as I doubt whether it is expedient for the city, or for either of the individuals, that an operation, such as that which is desired by Mrs Sharpe and others, should be obstructed. But according to the view which I take of the law as it stands, it is the Legislature alone, and not a court of justice, which can apply a remedy.

LORD GILLIES was absent.

THE COURT accordingly adhered.

M. and J. LOTHIAN, S.S.C.—J. SHAND, W.S.—Agents.

No. 270. WILLIAM F. HOME and JOHN F. HOME, Pursuers.—*D. F. Hope—Rutherford—Milne.*

ALLAN PURVES and WILLIAM PURVES, Defenders.—*Keay—McNeill—Macallan.*

Stamp—Bill of Exchange—Process.—After a record had been closed and judgment pronounced by the Lord Ordinary, in an action of reduction of certain bills, a reclaiming note was presented, and the attention of the Court was then called to the circumstance that the bills were null under the stamp laws, as a new obligat had been added to them, after they were issued as completed instruments: held (1.) that it is pars judicis to enforce such objection, and that no party can prevent this by pleading that a record is closed, or that the cause is at an advanced stage; and (2.) that, in the circumstances of the case, it was competent (after remitting, however, to the Lord Ordinary, with power to open up the record) to declare the bills null and void without making up any record on the facts or pleas regarding the objection on the stamp laws.

No. 7, 1836. IN April 1832, William Purves raised an action before the sheriff of Berwickshire, against William F. Home of Paxton, and John F. Home of Wedderburn, for payment of a promissory-note for £300, and a bill for £644, both accepted by them in favour of Allan Purves, who had indorsed them to him. Before lodging defences, the Messrs Homes

AT DIVISION.
Cockburn.
D.

an action in the Court of Session, against both William and Allan Purves, to reduce the bills, and declare them null and void. The summons also contained conclusions of count and reckoning and repetition, which were directed against Allan Purves. The first reason of reduction was, the reason of style, that the bills "were not written on stamped paper, and were vitiated and erased in substantialibus." The other reasons were that the bills had been unduly and improperly elicited from them, &c.; that William Purves, who was the son of Allan Purves, was not a bona fide onerous indorsee, &c. After defences were lodged by William and John F. Homes, in the Sheriff Court process, referring to the reduction, that process was advocated ob contingentiam of the reduction, and was conjoined with it. In the Sheriff Court process, no defence was founded upon any allegation that the bills were struck at by the provisions of the stamp act. In the conjoined actions defences were lodged to the reduction, and a record was made up, in which nothing was stated in fact, or in law, in support of the reductive reason of style, or for setting aside the bills as null under the stamp laws.

The record was closed, the cause was debated, and a judgment was pronounced by the Lord Ordinary, dismissing the action, so far as pursued by William F. Home, on account of a repugnantia between the record and the summons, and also containing other findings. Both William and John F. Homes reclaimed, and, in the interim, put an additional note of pleas into process, purporting that the bills were null under the stamp laws, in respect that John F. Home had only signed as a co-acceptor long after the bills had been issued as completed instruments. In support of these pleas they referred to a passage in the defences for Allan Purves, which, they alleged, contained an admission of the fact; and they also founded on other evidence in process to that effect. Messrs Purves put in a counter note of additional pleas. When the reclaiming note of Messrs Homes came to be advised, and these circumstances were brought under the notice of the Court, their Lordships "before answer, recalled the interlocutor in hoc statu, and remitted to the Lord Ordinary with power to open the record if he shall see fit; and to dispose of the cause, and of all questions of expenses." Under this remit the Lord Ordinary pronounced this interlocutor:—"Finds that the two bills of which payment was sued for by William Purves in the inferior court, and which are now sought to be reduced by William Forman Home, Esq. and by John Forman Home, Esq., the pursuers of the process of reduction, having had the name of the said John Forman Home added to them after they had been issued as completed instruments, are void under the stamp acts; therefore assoilzies the said William Forman Home, and John Forman Home, from the conclusions of the action in the Sheriff Court, and decerns: Finds, that after this it is unnecessary and incompetent under this record to dispose of the conclusions of the process of reduction; and before answer as to expenses, which have been demanded

No. 270. by both parties, appoints the account, as claimed by each, to be lodged, and when lodged, remits both to the auditor to be taxed."*

18 7, 1836.

me v.

rves.

* "NOTE.—This case stands in a very particular situation.

"It began by an action before the sheriff of Berwickshire, at the instance of William Purves against Messrs Home, for payment of two bills. This process, after defences and replies, was advocated to this Court ob contingentiam, of an action of reduction of these bills, instituted by the Messrs Homes against William Purves and his father Allan. These two processes were conjoined.

"So far as the proceedings had got in the Sheriff Court, nothing whatever was stated about the bills being void under the stamp laws. In the conjoined reduction and advocacy, a very full record was closed, but still without any fact or plea being stated by the pursuer to the bill on the stamp laws. The summons contains the usual words of style, in its first reason of reduction, viz. that 'the said pretended promissory-notes or bills are not written on stamped paper, and are vitiated and erased in substantialibus.' But the pursuer's condescendence contains no averment to warrant or explain these words, and there is no plea applicable to them. So, assuming that the words of style include the case that has occurred of documents which are written on stamped paper, but which stamp was voided by a subsequent act, still this is a matter from which the pursuers depart, in their ultimate and technical exposition of their case.

"The record was closed on the 25th November, 1834. The case was then debated many days; avizandum was made on the 20th of February, 1835; on the 3d of March, 1835, the Lord Ordinary pronounced an interlocutor dismissing the action; and after all this, each of the pursuers, aware of the defect in their record in reference to the stamp acts, put into process a paper professing to be additional pleas directly and properly applicable to this point. But these additional pleas have never been received, nor indeed is the Lord Ordinary aware that any motion to get them received was ever made.

"But though the record be blank on this point, the fact, that after the bills had been issued with the name of William Forman Home, the name of John Forman Home was added by this last party, was introduced into the discussion, and the inference that the bills were thereby avoided, was drawn from it, though it was only lately that this view was brought prominently forward. When it was so brought forward, the Lord Ordinary, after hearing parties on it, was of opinion that the objection was sound. But he could not act on this opinion, as a judgment on any plea urged by the pursuers, but has been obliged to take the objection up ex parte judicis.

"He has therefore merely declared the bills void, and assoilzied the defenders. But he has thought it unnecessary and incompetent to proceed after this, to discuss the reduction. Because, though there be other reasons of reduction stated in the summons, the record quoad them, is so inconsistently constructed, that the action, under these reasons, cannot be sustained.

"On this last point, the Lord Ordinary refers to his former note of 3d March, 1835, which is printed on a reclaiming note of 9th April, 1835. The interlocutor which he then pronounced was recalled, and the case remitted to him, but without any instructions. For the reasons stated in that note, he continues most clearly of opinion, that there is such an utter repugnance between the summons and the condescendence, that if these be received as a right record, there cannot be a wrong one in Court hereafter. If any thing is to be done under that record, the Lord Ordinary thinks that it could only be by dismissing the action, in respect that the summons instead of being supported, is refuted, by the condescendence. But this could scarcely be done now, without interfering with the finding, that the bills are void; and, simply declaring this last fact, and thereby protecting the pursuers from the demand made against them in the Sheriff Court, for payment of these bills, gives them all the protection which, in the circumstances, they can competently ask."

Both parties reclaimed.

Under the note for William and Allan Purves, they contended, that, even if it was not too late to allow the plea to be taken up by the judge, still it was necessary to have this done in a regular form, and that a separate record should have been prepared and closed upon that especial point, which was now pressed as decisive of the cause. William and John F. Homes answered that a record was not necessary, because, *inter alia*, here was a passage in the defences of Allan Purves, which substantially admitted the fact, and neither William nor Allan Purves had yet denied it, though they were aware of its fatal bearing on their case.

Under the note for William and John F. Homes they contended that the Lord Ordinary's finding, that it was incompetent to dispose of the reductive conclusions under this record was premature, and should be recalled, *hoc statu*, as it might prejudice the question of expenses. To this qualified alteration, William and Allan Purves assented.

LORD BALGRAY.—I am satisfied, that, though the record had been closed, it was not too late for the Lord Ordinary to take up the objection on the stamp laws, and give full effect to it. I have known such an objection as that taken up for the first time in the House of Lords.

LORD MACKENZIE.—I think the interlocutor is substantially right in disposing of the objection on the stamp laws. My only doubt was whether the Lord Ordinary should not have decerned in terms of the reductive conclusions of the libel. The reason of style which is libelled, and the facts of the case, would seem to have warranted this. But perhaps this is immaterial, and at any rate, the pursuers of the reduction seem to be content, in this respect, with the findings they have got.

LORD PRESIDENT.—As the Lord Ordinary has found and declared the bills to be void, that decerniture may very well satisfy the pursuers of the reduction. Such a finding rescinds them effectually enough.

LORD GILLIES was absent.

THE COURT recalled, *hoc statu*, the finding that it was incompetent under the record to dispose of the reductive conclusions of the libel, and, *quoad ultra*, adhered.

SANG and ADAM, S.S.C.—AINSLIE, MACALLAN, and GRAHAM, W.S.—HORNE and ROSE, W.S.—Agents.

271. SIR ROBERT ABERCROMBY and OTHERS, Pursuers.—*Keay—Monteith—A. Dunlop.*

, 1836.

romby v.
magistrates of
burgh.

MAGISTRATES OF EDINBURGH, Defenders.—*D. F. Hope—Ivory.*

TRUSTEES FOR THE CREDITORS OF THE CITY OF EDINBURGH,
Defenders.—*D. F. Hope—Rutherford—Anderson.*

Title to Pursue—Church.—Question as to the title of proprietors and occupiers of houses in a city parish, and sitters in the parish church, to pursue a declarator that the magistrates of the city had no right to exact seat rents from proprietors and occupiers of houses within the parish, or generally from sitters in the church.

, 1836.

DIVISION.
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SIR ROBERT ABERCROMBY and others, setting themselves forth, some as resident proprietors of houses within St George's parish, Edinburgh, and others as occupiers of houses therein and of sittings in the parish church, raised action against the magistrates and the trustees for the city creditors under the 3 and 4 Will. IV. c. 122, concluding as follows:—
“ Therefore it ought and should be found and declared, by decree of our said Lords of Council and Session, that the defenders have no legal right, title, or authority to ask, crave, demand, exact, or levy from the pursuers, or the other heritors or parishioners of the said St George's parish, or from the other frequenters of, and sitters in the said St George's church, any sum or sums in name of duties or rents, for any part of the said parish church called St George's church, or for the pews or seats thereof: Or otherwise, it ought and should be found and declared, by decree foresaid, that the said defenders have no legal right, title, or authority, to ask, crave, demand, exact, or levy from the pursuers, or others foresaid, any sum or sums, in name of duties or rents, for any part of the said parish church, or for the pews or seats thereof, to a greater amount than may be required for defraying the necessary expenses of supporting and repairing the fabric of the said church, and providing for the decent celebration of divine worship, exclusive of the stipend of the minister thereof; or at least to a greater amount than may be necessary, along with the duties or rents levied from the whole other churches foresaid, to defray the expenses aforesaid, applicable to the whole of the said churches of the said city: And farther, it ought and should be found and declared, that the defenders are not entitled to levy such duties or rents for the purpose of increasing the general revenue or common good of the said city of Edinburgh, or of paying the debts of the said city, or its expenses, other than the expenses above specified: And the same being so found and declared, the said lord provost, magistrates, and council of the said city, as representing the community of the said city, and the said trustees for the creditors of the said city for their interest, and all others, ought and should be interdicted, prohibited, and discharged in all time coming, from asking, demanding, imposing, levying, or exacting duties

or rents for the seats in the said parish church called St George's church, either from the pursuers, or others foresaid, frequenting the said church, or at least, to a greater amount than the said expenses above mentioned."

Another action, containing the same conclusions, was at the same time raised as to the Tolbooth church, by parties similarly situated in that parish.

In regard to both actions the defenders insisted in the following preliminary defences:—

" 1. The pursuers, as individuals, and suing in their own right, have neither title nor interest to insist in the present action of declarator.

" 2. This is not a popular action. And even supposing that the pursuers had an interest to insist in it, in so far as they themselves individually had ground of complaint, the present summons must be dismissed, seeing that its conclusions are directed against the levying of seat-rents from all other heritors or parishioners in St George's parish, or from all other frequenters of or sitters in St George's church."

In answer it was pleaded that the pursuers had a clear and undoubted interest to put an end to the alleged encroachment on the rights and privileges which they sought to have ascertained and secured by this action, and as they could only establish their own individual exemption from the exaction of seat-rents through the general declaratory conclusions as to all parties in the same situation with them, they had a sufficient title to have that declared which was the medium wherethrough their own individual privileges were to be enforced.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: *—" The Lord Ordinary having heard parties' procurators on the

* " The objection to the title in this case appears to the Lord Ordinary to overlook the nature of a process of declarator. The parties' pursuers cannot possibly obtain any declarator of that which is assumed to be their own right, or the illegality of the exaction made against them, without of necessity declaring the rights of other parties. Their object is to fix a principle, and they have a right to ask that to be done, so far as they are able to establish it upon fact and argument. There may be other persons interested who are necessarily comprehended in the conclusions, and there may be persons so interested in some part of the conclusions who have not all the same grounds of title and interest which the pursuers individually have. But assuming the conclusions to be true in fact and law, which must here be the hypothesis, the pursuers have a plain individual interest to have every one of the points comprehended in the conclusions declared. Some are heritors, some members of the kirk-session and sitters in the church, some parishioners. But all are entitled to have it found, if that be law, that, whether as heritors, or as parishioners, or as members of session, or simply as sitters in the church, they are entitled so to occupy the church without paying rent. It signifies nothing what the merits of these conclusions may be. Some or all of them may be untenable, or even absurd. Still that is nothing to the question. Just assume, for example, that it is the law that all the frequenters or sitters in such a church are entitled to sit free (which is taken as the strongest case), surely some one must be entitled to have that declared, and as he cannot get it declared as a special privilege to him-

No. 271. preliminary defence, that the pursuers have no title to maintain the conclusions of the summons, repels the said preliminary defence, reserving all questions as to the extent to which the pursuers may be entitled to decree under the said conclusions, in case it shall be found that they are entitled to decree of declarator to any extent whatever."

1877, 1836.
Cromby v.
Magistrates of
Edinburgh.

The defenders reclaimed, and at the bar offered to consent to a reservation of the preliminary defences. This offer being acceded to by the pursuers without discussion,

THE COURT of consent recalled the interlocutor of the Lord Ordinary, and remitted to reserve the question of title.

JOS. LIDDLE, S.S.C.—PAT. IRVINE, W.S.—GRAHAM and ANDERSON, W.S.—Agents

self, he can only ask it to be declared as the general law of the case for others as well as himself. But if so, does it lessen his title to insist to that effect, that he is also an heritor, or a parishioner, or a member of session? He is entitled to stand on all his rights, and his title as a sitter or frequenter of the church among the rest, if he can make out that, as such, he has the right claimed, and that is the *de quo quæritur* on the merits of that part of the conclusion. The plea, therefore, is evidently an argument on the merits, and not an objection to the title.

"The cases in regard to the rights of Burgesses in a Common, the case of the unfreemen Fleshers, Cowan, Feb. 22, 1828, and the case of the Heritors of Dunbar against the Magistrates, June 2, 1831, appear to the Lord Ordinary to be very applicable to this question of title. In all these cases, the point of right required to be declared necessarily embraced the rights and interests of others as well as of the pursuers. But that could not prevent the claim to have it so declared if it were law. What might be the effect of such a decree of declarator as to individual cases, is not the question. But the argument of the defenders necessarily leads to this, that the question could not be tried by declarator at all, however just the conclusion might be; because no number of persons could state themselves to be all the possible frequenters or sitters of a church.

"The Lord Ordinary alluded to the case of Sir James Colquhoun and Others, against the Magistrates of Edinburgh, as to the water-duty. He has found the memorials in that case, which occurred in 1802, and he thinks that it is strongly applicable so far as the mere implication of an undisputed title will go. Sir James Colquhoun and eight other gentlemen insisted in a suspension and interdict (which is much stronger than a declarator) as Members of a Committee of a General Meeting of Inhabitants, 'for themselves and their said constituents;' and they demanded an interdict prohibiting the Magistrates 'from levying any part of the said additional assessment from the inhabitants.' The case was in some way settled, and never came to a judgment; but in a very full and well-argued memorial for the Magistrates, written by the present Lord President, the Lord Ordinary has not observed any such plea as a want of title to discuss the question.

"The present discussion has no connexion with the merits of the case, or ought to have none. And it must not be imagined that any of the pleas of the defenders against the soundness of the conclusions of the summons, or any parts of them, are in the least prejudged by this interlocutor, repelling the objection to the title as a preliminary defence."

SIR DAVID KINLOCH, Baronet, Pursuer.—*Keay*.
 THOMAS MANSFIELD (Rennie's Trustee), Defender.—*Rutherford*
 —*Whigham*.

Lease—Proof—Process.—1. An agricultural lease for nineteen years contained a stipulation that in the event of the bankruptcy of the tenant, he should have no power to continue his possession directly or indirectly for behoof of his creditors; the tenant having become bankrupt in the third year of the lease, and his creditors having given up the lease at the first term thereafter, though the landlord was desirous that they should continue the possession till the expiry of the lease, and the landlord having let the farm of new at a reduced rent;—Held that the stipulation in question was in favour of the landlord, who might avail himself of it or not at his option, and that he had a claim of damages against the estate for the loss arising on the years to run of the original lease. 2. Evidence which held insufficient to prove that the landlord had made his election to act upon the above stipulation, as importing a termination of the lease on the tenant's bankruptcy. 3. The Lord Ordinary, in remitting a cause for trial by Jury on a certain point, having in his interlocutor expressly found that the evidence in process in regard to that point, founded on by one of the parties, was not sufficient per se to prove the case;—Held, that such finding was not liable to objection.

By tack, dated November, 1826, the pursuer, Sir David Kinloch of Junco Silmerton, let to the late John Rennie of Phantassie, but expressly excluding assignees and subtenants, the lands of Markle and others for nineteen years from the separation of crop 1826 from the ground, as to the arable lands, and from Whitsunday, 1826, as to the houses and grass lands. The tack contained the following clause:—"It is hereby specially declared, in terms of the other leases on this estate, that in case of the bankruptcy of the tenant, his creditors shall have no power under the present lease to appoint a manager, or in any manner or way to interfere with the subjects hereby let, or for the tenant himself to continue his possession directly or indirectly for behoof of his creditors."

Rennie became bankrupt in August, 1829, whereupon the landlord sequestrated the crop and stocking on the farm for his arrears and in security for the rent of the current year. Thereafter Rennie's estate was sequestrated under the Bankrupt Act, and a trustee appointed. On the 3d September, at a meeting of the creditors, it was formally resolved, that the lease of the lands of Markle should be abandoned, and an arrangement made with the landlord; and, on the 25th, Sir David proposed, as an inducement to them to give him certain advantages in the manner of carrying the resolution into effect, that, if they should agree to his suggestions, "he will give up his claim to rank for any deficiency of the rent he may get from a new tenant during the currency of the present lease, beyond what Mr Rennie is obliged for." The proposal of an arrangement with the landlord and the relative communings produced no result.

No. 272.
 —
 ne 7, 1836.
 Kinloch v.
 Ainsfield.

Thereafter, under instructions from the creditors, the trustee presented a petition to the Sheriff of Haddington, craving a warrant, in case the lease having terminated by Rennie's bankruptcy, to sell the crop and stocking on the farm. The application having been granted by Sir David Kinloch, the Sheriff, holding, with reference to the petition, that the meaning of the clause as to the tenant's bankruptcy was that the bankrupt or his creditors should not be entitled to enter on another year's possession of the farm after the term of bankruptcy, but bound to continue on the farm till the close of the current year's lease, found that the possession of the bankrupt under the lease did terminate till Whitsunday, 1830, as to the grass lands, and the separation of the crop of that year from the ground, as to the arable lands, and granted the desire of the petition. The trustee having brought an advocate to this process, and a relative action of declarator, the Court, on 28th March 1831, concurring with the Sheriff, remitted simpliciter in the advocate and assoilzied in the declarator.¹

During these proceedings, a judicial manager was appointed sheriff, at the instance of the landlord, to superintend the cultivation of the farm. Sir David also lodged a minute with the sheriff, showing the finding above-mentioned, to the following effect:—"That, from what had passed in the course of these proceedings, it may be presumed that the trustee does not intend to continue the occupation of the farm for another year, after the regular terms of removal fixed by the lease above stated, and in that event the present crop 1830 is to be considered as the waygoing crop. That by the lease it is declared, that the landlord or entering tenant shall have power to sow grass seeds on such of the lands of the waygoing crop as had been summer fallow, together with the green crop in the preceding year, which the tenant shall harrow in, in a proper manner, and shall preserve from the pasturage of his cattle after the last crop has been reaped, for which privilege the tenant shall be paid at the rate of 8s. for each acre, imperial measure, of the land so sown off; as in the event, therefore, of the trustee not continuing the possession of the farm after the terms already mentioned, the landlord is entitled to sow grass seeds with crop 1830, in terms of the lease, and now is the proper time for doing so, it is craved that your Lords should appoint the judicial manager to receive, sow, and harrow in grass along with the present crop, in terms of the clause in the lease, and that the management of the farm may be put as nearly in the same state as possible, as it would have been had the lease come to its natural term; and in case the trustee shall state any objection to this demand, it is craved that he may be found liable in expenses."

The sheriff granted this application, and the judicial manager

¹ See Bruce v. Kinloch, ante, IX. 831.

cultivated the lands, and sowed and harrowed in the grass seeds, No. 2
 in conformity with the provision applicable to the last year of the lease.
 On Sunday, 1830, and the separation of that year's crop from the June 7, 1
 lands, Sir David took possession of the whole houses and lands, and Kinloch v
 and subsequently relet the farm at a reduced rent, making no intimation to Mansfield
 to the trustee of the farm having been mismanaged, or that he had any claim
 or damage on that account. Thereafter the trustee brought an action
 against Sir David, libelling on the provisions of the lease, and concluding
 that a certain balance alleged to be due to him under the stipulations of
 the lease. The Lord Ordinary (Jeffrey), on the 20th November, 1834,
 held, that the trustee "in the circumstances of this case, is entitled to
 the same claims upon the landlord as if the year 1829 had been the
 last year of the lease, and the crop 1830 the awaygoing crop." This
 judgment was allowed to become final.

In this state of matters, Sir David applied to Mr Mansfield, the trustee,
 to continue possession of the farm, as in place of the bankrupt, till the
 expiration of the lease in 1845, and, upon the refusal of the trustee to
 do so, raised action against him, setting forth the provisions of the tack,
 the bankruptcy of Rennie, the entry into possession by the trustee, and
 the subsequent refusal to keep on the lease after 1830, till its expiry in 1845,
 and by Rennie's not implementing the obligations incurred by
 Sir David suffered great loss and damage, and concluding for
 damages, and also the conventional penalty of £1000, on account of Ren-
 nie's failure to fulfil the obligations of the lease.

In defence against the action it was pleaded :—

As the contract of lease contained a stipulation that it should termi-
 nate in the event of the tenant's becoming bankrupt, the occurrence of
 that event does not give rise to a claim of damages to the landlord for
 continuing on the subsequent years of the lease through the creditors'
 refusal to continue the possession till 1845; more especially as the land-
 lord himself used the remedy so provided, and insisted on the creditors
 to take the crop 1830 as the awaygoing crop.

Rennie's creditors not being entitled to continue in the lease, if
 they had so chosen, could not, on principles of equal justice, be obliged
 to do so, and consequently are not liable in damages for not having done

Sir David is barred, by the communings which took place after Ren-
 nie's sequestration was awarded, by his judicial statements in the pro-
 ceedings before the sheriff of Haddington, importing an acknowledgment
 that he was acting upon the stipulation referred to, and by the judgment
 of Lord Jeffrey in 1834, from maintaining that the lease did not termi-
 nate in 1830.

It was answered for Sir David Kinloch :—

That a clause providing for the termination of the lease in the event of the

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tenant's bankruptcy was introduced for the benefit of the landlord, and was a remedy for which he was entitled to stipulate, just as if he had stipulated for a break in his own favour on the bankruptcy of the tenant; the power to deprive the tenant or his creditors of the lease is therefore a privilege he has a right to waive, but which if he do not, and the creditors notwithstanding insist upon throwing up the lease before the end of the term, they become liable in damages for the loss thence arising to the landlord on each of the remaining years of the term. The proceedings at and subsequent to the bankruptcy imply no resolution or intention on the part of the landlord to relieve the creditors of their obligation to continue the bankrupt's possession.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : *—" Finds, Imo, That the clause in the lease to John

* " The Lord Ordinary was very much disposed to send this case at once to the jury, and without any preliminary findings; but the defenders insisted that the clause in the lease on which they relied completely excluded the whole action, and as the pursuer also rather seemed inclined to have judgment on that point, the result has been this interlocutor. The Lord Ordinary, after hearing the parties very fully, had no difficulty in repelling the defence referred to, to the extent of the preceding findings. His only doubt was, whether it should not be repelled altogether; as, upon the evidence already in process (and there is really no distinct promise of any more), he thinks it abundantly clear that the possession was abandoned by the creditors before it was resumed by the landlord, and that the lease came to its practical termination, not by his excluding the defenders, but by their spontaneously repudiating all farther concern with the subject.

" The proofs of this are manifold, 1st, The first resolution the creditors came to (23d September, 1829) was, ' that the lease should be abandoned; ' the landlord having as yet done nothing but sequester for his arrears, and in security for the rent of the current year; a step by which he distinctly recognised the lease as still in operation, and certainly did not propose to extinguish it. 2d, In his very first communication with the creditors (25th September), two days after their solemn resolution to abandon, he proposes, as an inducement to them, to give them certain advantages, in the manner of carrying the resolution into effect, that if they agree to his suggestions, ' he will give up his claim to rank for any deficiency of the rent he may get from a new tenant, during the currency of the present lease, beyond what Mr Rennie is obliged for; ' which the Lord Ordinary takes to be a distinct enough intimation that he would not give up his claim, if they abandoned (as they have done) without complying with his conditions. 3d, So far from the creditors wishing to retain the possession, and the landlord seeking to remove them, they actually applied for judicial authority to dispossess the farm, and leave it in the middle of a term; and were only compelled to remain till the end of the year, by a final judgment of this Court, obtained at the instance of the landlord. 4th, It is matter of notoriety, and is not denied in this case by the creditors, that the farm was a losing concern, and that they would never have thought of retaining it, or adopting the lease, although its terms had been such as to enable them to have done this, independent of the consent of the landlord.

" Now, against all these decisive indications of the true state of the transaction, the defenders have only to state, 1st, That the landlord was bound to have made some formal and explicit intimation to them, that he dispensed with the clause of exclusion, and required them to continue the possession; and, having omitted this, has no right to say that they abandoned a lease to which they could have no right but by such a dispensation from him. To the Lord Ordinary it ap-

annie, by which it was stipulated, that, in the event of his bankruptcy, N
 should neither be competent to his creditors to possess the farm by a June
 anager, nor for the said John Rennie himself to continue the posses- Kin
 in for their behoof, must be considered as a clause introduced for the Man
 benefit of the landlord alone, and with which he was accordingly entitled
 dispense at his pleasure, and that, if he did so dispense with it, and
 made it sufficiently known to the creditors that he was willing or de-
 rous that they, or the bankrupt on their account, should still continue
 in possession, the tenor of the said clause, or its existence in the written
 lease, could give them no warrant for relinquishing or deserting the said
 possession, or exempt them from such claims of damages, at the instance
 of the landlord, as might have been competent to him for such relinquish-
 ment or desertion, if the lease had contained no such clause or stipula-

shows that no formal intimation of this kind was necessary, since the creditors
 began by abandoning; and the whole conduct of both parties demonstrated what
 were mutually their wishes, interests, and intentions. But he thinks that the com-
 munication of 25th September, already referred to, was a direct intimation. 2dly,
 The defenders say, that, by insisting on dealing with them, during the year of
 their compulsory retention of this farm, as if it had been the year of its natural or
 conventional termination, and consequently taking benefit to himself, and putting
 advantages on them which would not have otherwise arisen, the landlord (though
 may be unintentionally) has actually brought all its obligations to a close, and
 can no longer claim damages for the alleged violation or non-implement of these
 obligations. The Lord Ordinary has a strong impression that this ingenious view
 can scarcely be supported. But it is more plausible than the preceding; and he
 is glad that he can, without impropriety, leave the defenders to make what they
 can of it before a jury.

“ Another more subtle notion was suggested, derived apparently from the ana-
 logy of certain modern doctrines in the law of entail, viz. that as the landlord had
 stipulated one specific remedy for himself, in the event of the tenant's bankruptcy,
 he must confine himself to that, and is not entitled to betake himself to any
 other. If the Lord Ordinary is right in thinking that he could renounce and dis-
 pense with the special provision introduced by his own act, it will not be easy to
 maintain this proposition.

“ The questions which he has decided were prejudicial questions of pure law,
 as to the construction of the lease, and as to what was or was not *res judicata* by
 the former interlocutors; and as they would have settled the whole case, if de-
 cided in favour of the defenders, it seemed, on the whole, to be expedient that
 they should be separately determined, before any other part of the case was gone
 into. The subordinate questions, however, which have been raised upon the clause
 about bankruptcy, are all involved in matter of fact, and may possibly be farther
 elucidated by evidence to be brought forward at the trial; at all events, as in the
 event of the defence founded on that clause being repelled in toto, it would plainly
 be necessary to go to a jury with the question of damages, it appeared to the Lord
 Ordinary not to be advisable (especially with the impression he has as to the pro-
 bable fate of what remains of that defence), to exhaust that branch of the cause
 also, before sending the whole merits of the case, which depended upon facts, for
 final adjudication. It is a hard case, undoubtedly, for the creditors; and it is
 partly because his own impression is against them that he rather wishes to give
 them the benefit of another judgment, when the whole facts are certainly esta-
 blished.”

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tion: Finds, 2do, That it is not *res judicata*, either by the judgment of the Court, of the 28th of June, 1831, or by the interlocutor of the Lord Ordinary (now final) of 20th November, 1834, that the landlord had made his election to enforce and act upon the clause and stipulation referred to; and that neither his acquiescence in, and adoption of the judgments, nor the tenor of his judicial statements in the proceedings which led to them, are sufficient per se to prove that he had made such election, and still less that the creditors were in any degree induced to abandon or relinquish the lease, by any belief or opinion that he had elected: And therefore, and in respect that the averments of the parties upon this point of the case are contradictory, and cannot be satisfactorily disposed of on the documents and admissions in process; and also, in respect that the existence and amount of the damages which may be due, if it shall ultimately appear that the defenders did truly desert and relinquish the possession unwarrantably, can only be properly ascertained by the verdict of a jury, Repels the defences maintained on the effect of the clause in the lease herein referred to, in so far as they are at variance with the preceding findings, or are alleged otherwise to bar or exclude the whole claims and action of the pursuer, reserving to the defenders the full benefit of the said defences quoad ultra, when the whole case shall come to be decided on its merits; and remits the cause according to the roll of jury causes."

The trustee reclaimed, and, in addition to his argument on the clause as to the tenant's bankruptcy, maintained, that the second finding of the Lord Ordinary ought to be altered, in so far as his Lordship prejudged the point which he then remitted for jury trial, by finding that the evidence in regard to that point was "not sufficient."

THE COURT, holding that the clause in question implied a stipulation of a right to a break in favour of the landlord, in a certain event, which he might waive at pleasure, and that, under the second finding, parties were not precluded from founding on other evidence before a jury, in addition to what the Lord Ordinary had pronounced to be not sufficient per se, adhered.

J. and A. SMITH, W.S.—THOS. JOHNSTONE, S.S.C.—Agents.

JOHN WHYTE, Pursuer.—*Rutherford*—*G. G. Bell*.

JAMES VALLANCE, Defender.—*Neaves*.

Process—Proof—Sale—Contract.—1. Circumstances in which the Court assoilzied the defender, in respect that the proof which had been adduced or offered by the pursuer went to instruct a different ground of action from that which was libelled in the summons, and stated on the record. 2. Question as to the power, or the judicial expediency, of allowing new proof to be led, in a reduction of a Sheriff's decree, pronounced on a proof, in a cause above the value of £40; especially where the sole reason of reduction libelled (besides the reasons of style) was, that the Sheriff's decree "was erroneous, and not warranted by the record or proof" before him.

JOHN WHYTE, farmer, raised an action of damages before the Sheriff of Lanarkshire, against James Vallance, grain-dealer, stating that he had ordered four bolls of early seed-corn, called Early Blanesly Oats, from Vallance; that Vallance had sold him late seed of the Blanesly kind, and had sold it as being the early kind, and accordingly had marked "Early Blanesly" on the bags in which he sent it home; that the pursuer had sown it as an early seed, and had thereby lost more than half of his proper crop, &c. He concluded for £50, more or less, of damages.

Vallance pleaded in defence, that there was only one kind of Blanesly oats, which many farmers called Early Blanesly, because, if properly treated, it would yield a good early crop; that he had complied with Whyte's order for seed, as far as it was possible to comply with it, by sending good seed-corn of the Blanesly kind; and that he had not undertaken any thing farther.

A record was made up, in which Whyte continued to lay the foundation of his claim upon the allegation that there were two kinds of Blanesly oats, one early and the other late; and that Vallance had sold him the late seed, in place of the early. A proof was allowed, which proved that Vallance had sold the oats as "Early Blanesly," and marked this on the bags containing the oats; but the proof, on the whole, supported the allegations of Vallance, in reference to there being but one sort of Blanesly oats. The Sheriff "Found, that there is only one kind of Blanesly oats; and, therefore, that the pursuer having failed to establish the grounds on which the action is laid, there is no necessity for entering into the merits of the case; dismissed the action; and found the defender entitled to expenses."

Whyte raised a reduction of this decree. The only reason of reduction, excepting those of style, was, that the grounds on which the action had been dismissed by the Sheriff "were erroneous, and were not warranted by the record or proof in said action." A record was made up in the reduction, in which Whyte renewed his averments, that there were

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In the course of the discussion, Vallance, besides objecting to the proof in the Inferior Court, as at variance with the record, and defeating the chief ground of action, as it established that there was but one kind of Blanesly oats ; also objected to it, *inter alia*, in respect that it was quite insufficient to show that the seed bought from him had all been sown in the field where the late crop occurred ; or that it was sown at the proper season ; or in soil duly prepared, &c. He therefore contended, that, on a proof so insufficient, the Sheriff could have pronounced only an interlocutor *assoilzieing*, and that, in a reduction of his decree, especially in reference to the only reason of reduction libelled, it was impossible to let in new proof. In this case, such new proof would also lead to very anomalous results. The cause, though above £40 in value, had not been advocated under 6 Geo. IV., c. 120, § 40, where a proof was allowed, and consequently any judgment of this Court, in so far as it found or declared the several facts established by the proof, in the Sheriff Court, did not admit of being reviewed in the House of Lords ; whereas, the judgment on any farther proof which might be allowed, would not be exempt from such review, so that the cause would be brought into an inconvenient and incongruous position.

Whyte replied, that though he had alleged there were two kinds of Blanesly oats, and had adduced a *talis qualis* proof of that averment, it was enough for him that he had ordered an early seed corn, and had received what Vallance held out as early seed, when, in truth, it was not of that description. And, in order to establish this plea, or, in general, to support his action, he was entitled to adduce farther proof, and supply the deficiencies of his proof in the Inferior Court, in respect of the *inopere peritorum*, there ; at least, on paying reasonable expenses. And such proof would lead to no incongruity, as parties were not in an advocacy but in a reduction, and the Court could quash the whole previous proof if they saw cause. But even if they did not, and if their findings on the import of the Sheriff Court proof were as final as in an advocacy, that finality was only equivalent to the finality of a jury's verdict, for it extended only to the facts thereby found and declared ; and, therefore, a proof by jury-trial in this cause would lead to no incongruity, as it would establish any requisite facts as finally as the interlocutor of the Court could do under 6 Geo. IV., c. 120, § 40.

The Lord Ordinary found * “ that the pursuer bought, and the defender

* “ NOTE.—The pursuer wished to be allowed to adduce farther evidence either on commission or before a jury. The Lord Ordinary has not complied with this, because, having chosen to go to proof, in a case above £40, before the Sheriff

old the oats in question, as Early Blanesly oats ; found it established by No
 is proof, that though the words late or early may be occasionally applied June
 to this grain, there is no difference as to real lateness or earliness in dif- Whyt
 ferent sorts, but only one kind of it ; found that the action was not raised Vallan
 in the averment, that the defender misled the pursuer to purchase a pe-
 culiar sort of Blanesly oats, which had no existence, but on the state-
 ment, throughout every part of the record, that there are two kinds of
 this article—the one distinguished, not merely by being termed late and
 the other early, but by each truly possessing these qualities ; and that
 the defender, instead of implementing his bargain by delivering the
 early, violated it by delivering the late ; found that the claim founded on
 this statement not being supported by the fact established by the evi-
 dence, it was, and is, unnecessary and incompetent to proceed to discuss
 the other facts from which a right to damages is inferred : Therefore,
 sustained the first defence, as set forth in the defences and in the defend-
 er's first plea ; assolizied the defender, and decerned ; and found the pur-
 suer liable in expenses."

LORD MACKENZIE.—If I was obliged to decide the cause as it stands, I should
 not feel warranted in altering the interlocutor ; but the pursuer offers farther
 proof, and I do not think he is to be precluded from this, merely because a proof
 was led in the Inferior Court. It might be proper to annex the condition of his
 paying expenses, but, if that equitable condition was complied with, I should
 generally incline to let a party enlarge his proof here, if he desired it, and if it
 appeared that, owing to the inopia peritorum, the proof had been prematurely
 introduced in the Inferior Court. But if it be the object of the pursuer's pro-
 posed proof to show, that, though there be but one kind of Blanesly oats, still the
 defender is liable, on account of having falsely represented that they were an early
 kind, I think he has made up a record in this Court which opposes a very serious
 obstacle to this. He has deliberately averred that there are two kinds of Bla-
 nesly oats, an early and a late kind ; that these sell at different prices in the
 market, and that the late oats, which are the cheaper kind, were paid on him
 for the early kind. A farther proof of these facts I should think competent ; but
 cannot allow the pursuer to get into a proof of other facts, which are not con-
 sistent with the averments he has put on record. And, on the whole, unless he
 means to undertake to prove these, I think the Lord Ordinary's interlocutor
 should remain as it is.

LORD PRESIDENT.—I am for adhering to the Lord Ordinary's judgment.
 The power of sending issues to be tried by a jury, referred to in the 6 Geo. IV.,
 1830, § 40, relates, I apprehend, to the case of a process of review by advoca-

nothing has been stated to warrant his being indulged in a second trial. On the
 merits, he has mistaken his remedy, if the proof be held to establish that there is
 only one sort of Blanesly oats. His action should have been for redress, for being
 induced to purchase or to take an article which did not exist. But his case is, that
 the article he bought did exist, but that he did not get it."

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tion. But we are here in a reduction. It is libelled that the Sheriff's judgment was not warranted by the record or proof in the action before him. I sustain that reason of reduction, for I hold that the Sheriff's judgment was warranted by the proof and the record; and, as to letting a party into new here, so as turn this into a new cause, I think we should do great injustice to sheriffs, if we reviewed and reduced their judgments on any such principle. This pursuer may be able to libel a relevant ground of action, on the ground of fraud on the part of the defender, in imposing an article upon him as early which was not early seed; but, in order to raise that question, the attempt must be made under a different summons and record from this.

LORD BALGRAY.—I am of the same opinion.

LORD M'KENZIE.—I only wish to observe that I am not, at present, prepared to assent to the opinion that the proof by jury trial, referred to in the first part of the 40th section of 6 Geo. IV., c. 120, is not as competent to us, as reviewing the sentence of an Inferior Judge, by reduction, as in reviewing an advocacy. The words of the statute are general, that this Court, except in Consistorial causes, "shall, in reviewing the sentences of Inferior Judges, have power to send to the Jury Court such issue, to be tried by jury, as to them shall seem necessary for ascertaining facts which may not have been proved to satisfaction, by the evidence already taken," &c.

LORD GILLIES was absent.

THE COURT adhered, and awarded additional expenses.

J. MURDOCH, S.S.C.—CAMIBELL and M'DOWALL, W.S.—Agents.

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JOHN FRAME, SON, and COMPANY, Pursuers.—*D. F. Hope*—*Jur.*
JAMES CAMPBELL, Defender.—*M'Neill*—*Moir*.

Agent and Client—Reparation.—A country agent was employed by a manufacturing company to prepare petitions at their instance to the Justices of Peace, against apprentices, for having deserted their work and other misconduct; the agent accordingly prepared and presented petitions, founded on the 4 Geo. IV., c. 34, libelling the third section, instead of the first which related to apprentices; the situation of those complained of; the apprentices were convicted and imprisoned but subsequently liberated by the Court of Justiciary, in respect of the wrongs having been founded on, and they thereafter sued the manufacturers for damages and expenses;—Held that, as the terms of the act were clear, the agent was not in relief, although there was no established course of practice under the act, and although neither the opposite agents in the inferior court, nor the sheriff or stipendiary magistrate of the county considered the petitions to have been erroneously libelled.

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By the 1st section of 4 Geo IV. c. 34, entitled "An act to amend the powers of Justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others," enacted, "That it shall and may be lawful not only for any master or mistress, but also for his or her steward, manager, or agent, to make

an oath against any apprentice within the meaning of the said No. 274
 ited acts (viz. 20 Geo. II., c. 19, and 6 Geo. III., c. 25), to any ^{June 9, 183}
 the peace of the county or place where such apprentice shall be ^{Frame v.}
 of or for any misdemeanour, misconduct, or ill-behaviour of ^{Campbell.}
 apprentice; or if such apprentice shall have absconded, it shall
 for any justice of the peace of the county or place where such
 shall be found, or where such apprentice shall have been em-
 d any such justice is hereby empowered, upon complaint there-
 upon oath by such master, mistress, steward, manager, or agent,
 the said justice is hereby empowered to administer, to issue
 t for apprehending every such apprentice: And further, that
 lawful for any such justice to hear and determine the same
 and to punish the offender by abating the whole or any part
 er wages, or otherwise by commitment to the house of correc-
 to remain and be held to hard labour for a reasonable time
 ing three months."

3d section of the statute it is enacted,—“ That if any servant
 ry, or any artificer, calico printer, handicraftsman, miner, col-
 an, pitman, glassman, potter, labourer, or other person, shall
 ith any person or persons whomsoever, to serve him, her, or
 ay time or times whatsoever, or in any other manner, and shall
 nto or commence his or her service according to his or her con-
 contract being in writing and signed by the contracting par-
 ving entered into such service, shall absent himself or herself
 her service before the term of his or her contract, whether
 ct shall be in writing or not in writing, shall be completed,
 to fulfil the same, or be guilty of any other misconduct or mis-
 in the execution thereof, or otherwise respecting the same,
 every such case it shall and may be lawful for any such jus-
 peace of the county or place where such servant in husbandry,
 lico-printer, handicraftsman, miner, collier, keelman, pitman,
 otter, labourer, or other person, shall have so contracted, or
 ed, or be found; and such justice is hereby authorized and
 , upon complaint thereof made upon oath to him by the per-
 ons, or any of them, with whom such servant in husbandry,
 lico-printer, handicraftsman, miner, collier, keelman, pitman,
 otter, labourer, or other person, shall have so contracted, or
 or their steward, manager or agent, which oath such justice
 mpowered to administer, to issue his warrant for the appre-
 ery such servant in husbandry, artificer, calico-printer, handi-
 miner, collier, keelman, pitman, glassman, potter, labourer, or
 n, and to examine into the nature of the complaint; and if it
 : to such justice that any such servant in husbandry, artificer,
 er, handicraftsman, miner, collier, keelman, pitman, glassman,
 urer, or other person, shall not have fulfilled such contract,

No. 274. or hath been guilty of any other misconduct or misdemeanour, as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages, for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis."

The defender, Campbell, writer in Johnstone, was employed by the pursuers, Frame and Company, calico-printers at Locherbank, to prepare petitions at their instance to the Justices of the Peace for Renfrewshire, against Hunter and Gilmour, apprentices belonging to their manufactory, for having deserted their work and other misconduct. Campbell accepted the employment, and prepared and presented to the justices two petitions, specially libelling on the 3d section of the above statute, against Hunter and Gilmour, who, after various procedure, were, in August, 1833, convicted and committed to the house of correction. In the course of these proceedings, no objection to the petitions, as founded on a wrong section of the statute, was stated by the agents who attended on behalf of the apprentices. Bills of suspension and liberation were, however, presented to the Court of Justiciary, and their lordships, holding the petitions to have been founded on a section of the statute which did not apply to apprentices, quashed the convictions, and ordered the apprentices to be liberated, finding Frame and Company liable in expenses.

In November of the same year, Messrs Hart and Hodge, writers in Paisley, were employed by Frame and Co. to present petitions against certain other apprentices, which were drawn in similar terms and libelled on the same section of the act as those against Gilmour and Hunter. An objection having been taken that a wrong clause of the statute had been founded on, and that the complaints ought to have been laid on the first section, the Sheriff-Substitute of Renfrew, acting as a Justice of Peace, delivered to the Clerk of the Peace, with reference to this objection, the following opinion:—"As to the second objection, I should not be disposed to sustain it at any rate, considering that the provisions of the 3d section are of general application; but any doubt on that score seems removed by the subsequent statute 10 Geo. IV., c. 52, which has the effect of making all the provisions of the act founded on applicable to apprentices."

Thereafter, actions of damages on account of these proceedings were raised by Hunter and Gilmour against Frame and Company, who, after having intimated the actions to Campbell, agreed to pay to each of them

parties £25 of damages, and their taxed expenses, this payment being made without prejudice to any right of relief against Campbell.

Frame and Company then brought actions of relief against Campbell, in defence against which it was maintained, inter alia, that, assuming the 3d section of the act to have been erroneously libelled on, Campbell, on consideration of the act, had reasonable grounds for proceeding as he had done, it being thought doubtful whether the 1st section was intended to apply to apprentices in Scotland, or to apprentices in the situation of Hunter and Gilmour, inasmuch as the class of apprentices to which it related was the same to which the previous acts of 20 Geo. II. and 6 Geo. III. referred, viz. apprentices put out by the parish, or those for whom a premium not exceeding £5 had been paid; and as it appeared to Campbell, as well as the various other law-agents employed on behalf of the masters in the county of Renfrew, that, at all events, the 3d section must be applicable to the case of Gilmour, who had "contracted to serve" with Messrs Frame, and was a "calico-printer," keeping in view at the same time the act 10 Geo. IV. c. 52, which seemed to remove all doubt upon this subject: that, in the circumstances of the case, no claim of relief could lie against the defender, who had acted according to the common understanding and practice of the district, and whose view of the sections of the statute was sanctioned by that of the Justices and of the Sheriff-Substitute.

The parties agreed upon a special case, embracing the facts in substance as above narrated, upon which the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—* "Finds that the defen-

* "It is certainly with regret, and not without some hesitation, that the Lord Ordinary gives this judgment. Where there is no suspicion of fraud, or reckless disregard of the client's interest, cases of this kind are always distressing. But on attending to the whole circumstances, he has not found it possible to come to any other conclusion.

"In the first place, he must say, that he thinks the blunder, in libelling on the third section of the statute, instead of the first, was a very palpable and gross blunder. The one section dealt professedly with apprentices, and with them only: the other with servants, and other persons hired or engaged to work on special contracts; and being almost identical with the former in the substance of its enactments, could not be supposed also to relate to apprentices, without imputing to the Legislature the most absurd and preposterous repetition. But the whole style and substance of the two sections points out the distinction, in the clearest and plainest manner. The section about apprentices gives its remedies to the masters or mistresses of such apprentices, and uses this, and no other phraseology throughout. But the section about servants and persons employed to work, never once uses these expressions, and gives its remedies only to 'the person or persons with whom such servant, &c. may have contracted,' &c.; and in the fourth section, which contains regulations common to both classes, the distinction is still most seriously and carefully preserved, that section setting forth, that as such masters, mistresses, or employers, may sometimes reside at a distance, by which the said apprentices or servants, artificers, &c. may be put to inconvenience in recovering their wages, certain facilities should be provided, &c. But the very substance of the third section might have shown any attentive (even though unprofessional)

No. 274. der is bound to relieve the pursuers of the damages and expenses to which they have been, or may be subjected, in consequence of the illegal and
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 Campbell.

reader, that it could not relate to apprentices, since it speaks exclusively of persons whose only contract with their employers is a contract to work for hire, and who are contemplated as persons sui juris, and completely capable of binding themselves by such a contract. Now, the contract with an apprentice, though it may include a contract to work for hire, is primarily a contract to teach and to learn a certain trade or handicraft; and, being generally entered into with persons under age, is almost invariably concluded, not only with them, but with their parents, or other guardians, expressly taking burden for them, as is the case with the indentures referred to, and produced with the original petitions by the defender; and yet libelling only on the third section relating to independent contractors, not with a master or mistress, but with an employer for him.

“ In these circumstances, it is quite idle in the defender to say, that the first section related only to apprentices of a particular description, and that he, conceiving that the third was intended to reach all descriptions, was therefore induced to select it, as the safest for his purpose. In the first place, it is manifest, that the apprentices excluded from the operation of the first section, were not intended to be affected by the statute at all, as belonging, like apprentices to surgeons, attorneys, &c., to a higher class of persons, for whose misconduct it was not thought necessary to provide such summary remedies. But, second, whoever might be without the provisions of the first section, the defender could not possibly doubt that the persons he was to prosecute were within it. It extended, in express terms, to all who had not paid an apprentice fee of £25 or upwards. But, first, it is matter of notoriety to every one in Paisley, that no such fee was ever paid in the trade of calico-printing; and, second, the defender had the indentures before him, which showed there was no such fee.

“ But, strong as this ground is, the Lord Ordinary would have had great difficulty in subjecting the defender on it alone, considering the apparent novelty of the proceeding, the acquiescence not only of the Justices, but of the legal advisers of the apprentices, and, above all, the deliberate opinion of the respectable Sheriff-substitute (given, no doubt, after the defender was committed to the course he had taken) in favour of all that had been done. The sanction of still higher opinions proved insufficient, indeed, to protect a law agent from the consequences of professional error, in the cases of Mathie, 17th May, 1826, and Stevenson, 6th July, 1827. But still the Lord Ordinary could not have perfectly satisfied himself with a judgment resting merely on his own conviction, that a great, and, in his view, an inconceivable blunder had been committed. He thinks it right to state, therefore, that he has proceeded chiefly on a different view, a view very nearly corresponding with that on which Lord Lyndhurst appears to have placed his judgment, in affirming the interlocutor of this Court, in the case of Stevenson, already referred to. He there said, that if the agent had been necessarily constrained to grapple with a nice and difficult point of law or practice, he might not have been answerable for the consequences; but that the case was very different, when it appeared that he had a safe and plain course before him, which he chose to desert, in order to embark on a doubtful one; and that, if he needlessly raised a nice question, when he might have avoided it, he must answer the consequences of resolving it wrong. Now, in this case, if the defender really was at a loss which of the two sections to proceed on, was it not open to him to proceed upon both? If he actually believed that apprentices (though not once mentioned) were, or might be, included in the third section, and that it was only a repetition, in more comprehensive terms, of the first, why not make sure of reaching the parties accused, by referring to both conjunctly, as merely explicatory and supplementary of each other? Or, if he was aware that both could not be intended for the same classes of persons, and was doubtful under which his parties were included, what was to hinder him from founding upon both alternatively, and seeking a conviction upon the same state of facts against them, as certainly comprehended under the one or the other descrip-

incompetent proceedings which he instituted and carried on in their names, against the apprentices named in the libel; the illegality and incompetency of the said proceedings having been wholly occasioned by the negligence or want of professional skill of the said defender, while acting in the employment of the pursuers; and repels the defences, and decrees accordingly: But before answer as to the specific sum for which decretum execution should pass against the said defender, appoints the cause to be enrolled, that parties may be farther heard."

Campbell reclaimed, and pleaded, in addition to what he had formerly advanced, admitting that the application to the Justices to have been made in the wrong section, the mistake is not of such a nature as to render the professional man who so framed the petitions liable in damages, especially as the proceedings took place in the country, where skill is not so much to be looked for.¹ The terms master and mistress, on the use of which the Lord Ordinary founds an argument, are applied in the acts of which the 4 Geo IV. c. 34 is an amendment, equally as in relation to apprentices and to servants: it does not follow, according to his lordship's view, that though a man is sui juris he may not bind himself as an apprentice,

tion? There is no doubt, it is humbly conceived, that a libel, in either of these forms, would have been perfectly relevant, and a conviction obtained under either, liable to no objection. If the last, or alternative form was adopted, it would probably have been necessary for the Court to decide under which section the parties were to be held as arraigned; and if they, with both before them, should have fallen into the alleged error of the defender (which it is not easy to imagine), it is no doubt possible that the consequences might have been the same to the pursuers. But the defender would, at all events, have been saved from responsibility, and been entitled to say, what he cannot now say, that in a matter of supposed difficulty, he had run upon no needless risks, but followed a course perfectly unexceptionable and safe for all parties. Nay, if this very plain statute had appeared to him absolutely inextricable and obscure in all its sections, there was still a plain and a safe way by which he might have escaped all possible embarrassment. It is settled by the special case, that he had no instructions to proceed upon that statute at all. His employment was quite general, 'to prepare petitions to the Justices against certain apprentices who had deserted their work, and otherwise misconducted themselves.' Now, by the original acts of 1617 and 1661, as interpreted by immemorial usage, the Justices had undoubted power of enforcing all such contracts, without the aid of any recent enactment; and the defender might have discharged himself of the task he had undertaken, without referring to the 4th of Geo. IV. at all. In this view, it appears to the Lord Ordinary, that he stands very much in the situation of Stevenson in the question with Rowand; and that, even supposing that there could have been any material difficulty in fixing upon the proper section, it was a difficulty which the defender created by his own act, and met consequently at his own peril, there being a plain and safe course open to him, by which, without injury to any one, all peril might have been avoided. No man of common judgment, professional or unprofessional, can be listened to, who would say that, after reading the statute, he thought there was no sort of risk or difficulty in entirely passing over, or neglecting the first section—or, if there was a plain or palpable difficulty, the defender must be answerable for the consequences of not taking a plain way to avoid it."

¹ *Megget v. Thomson*, Feb. 2, 1827 (ante, V. 275, N. E. 256); *Godfroy v. Dalton*, 1880 (Bingham, VI. 460).

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and the distinction taken between apprentices and other workmen is not well-founded: the principle on which an agent in such cases as this has been held to be liable is that, without sufficient reason, he has departed from the ordinary and beaten track;¹ but here, as the practice was new under the statute, there was no established track to pursue; and therefore there could be no deviation: nor was the course he should have followed so very plain and distinct, for the Lord Ordinary holds that, besides the right and the wrong way, there were other two ways which he might have taken, either by founding on both the 1st and 3d sections alternatively, which would have led to great difficulties, or by having recourse to the powers of the justices under the acts 1617, c. 8, and 1661, c. 38.

The pursuers answered, in support of the interlocutor,—

The nature of the case is to be looked to in which Campbell has been found liable; it regarded a proceeding which involved the punishment of summary imprisonment to the party against whom it was directed, and which, therefore, if the agent failed to perform his duty, would inevitably found a claim of damages against his employer. The case of an action for relief of such damages is a stronger case against the agent than if it had been merely a claim for reimbursement on account of the employer being deprived of some pecuniary benefit which otherwise he might have obtained; and in this, as in other cases of agents' responsibility, regard is especially to be had to the risk which the employer runs if any irregularity is committed. The employment in question was quite within the sphere of an agent practising in the inferior courts; and it is of no avail to say that the 3d section of the act might possibly include such and such classes of workmen, but what was contained in the section not founded on must be looked to, and it obviously refers to apprentices of the same description as Gilmour and Hunter.

LORD JUSTICE-CLERK.—This is a hard case for the agent, but I cannot find any principle to warrant me in dissenting from the Lord Ordinary's interlocutor, though I shall not say that I adopt all the reasonings in the note. There is no case exactly in point; but the principle to be deduced from the decisions as to the responsibility of agents seems to be, that when a practitioner in an inferior court undertakes to conduct some ordinary business committed to him, he is bound to possess an ordinary degree of skill, such as is required for the due conduct of such business. Campbell was employed by the pursuers, as stated in the special case, to prepare petitions to the justices against two of their apprentices. They were not bound to tell him particularly what steps to take. He chose to go to the statute of 4 Geo. IV., and adopt this procedure; but he ought to have looked to the terms in which its sections were conceived. Although he was employed in a question between master and apprentice, and although the first section applies exactly to the conduct of apprentices in the situation of Gilmour and

¹ Rowand v. Stevenson, July 14, 1830 (4 W. and S., 182).

unter, he goes notwithstanding to the 3d section, which has reference to a different matter altogether. It is not necessary to make a distinction between an action for relief of damages and any other action against an agent. This is just the case of a party involved in expenses in consequence of the conduct of an agent he has employed. As to the blunder being sanctioned by the sheriff-substitute's opinion, we have always a great respect for Mr Campbell's opinions, which are generally sound, but that cannot alter the case. I think, then, that the agent is liable on the principle of the responsibility of professional persons for skill. Had this been a very nice point, as to which the agent had gone wrong, as in *Godfroy v. Daln,*¹ I might have held him not liable; but the case is otherwise, when the statute is so clear, and he chooses rashly to found on a wrong section; this not being a question of nice construction, on which it was difficult to have light thrown.

LORD GLENLEE.—I am of the same opinion.

LORD MEADOWBANK.—I agree. The practitioners in the courts of this country have a monopoly bestowed on them, and they are in consequence bound to furnish such professional skill as to warrant the lieges that they are safe in employing them. When an agent is employed, and warrants his competency to conduct business, he makes himself responsible for the manner in which it is done. The defender, by undertaking this employment, held out a warranty that he would do what would not lead his employer into difficulty and danger. If he had doubted, he might have said, I cannot warrant you; but he proceeded suo periculo. We have nothing to do with what the defender might have done, but only with what he did; and the question is, whether his proceeding on the third section of the statute, inferred such culpa lata or extreme negligence as to make him liable? Looking to the statute alone, and even to the marginal reference, which directed him right, no one, holding himself out as a practitioner could reasonably doubt as to the proper clause, and I cannot acquit him of such negligence.

LORD MEDWYN.—The case is already decided by the opinions delivered, but I must say that I have some difficulty. I am aware that persons in the defender's situation have a monopoly, but I cannot admit that this monopoly makes them responsible for every error they may fall into. There must be not only an error, but a very gross and palpable blunder. It does not follow that, in every case where damages for wrongous imprisonment are given, the agent will be liable; he is certainly bound to have the peritia artis, but there must have been grossa negligentia. This is the principle of our law as well as of the English. The decided cases on this head have all related to matters of conveyancing or the want of diligence, as to which there was a well-known course of practice. In the present instance I cannot discover that gross negligence which it is asserted there was. The act 4 Geo. IV. is a recent statute. The first section does not apply to all apprentices, but only to that particular class within the meaning "of the above recited acts." When I see that the opposite agents and the sheriff-substitute of Renfrew, one of the ablest men in that class of judges I am acquainted with, have neither of them discovered the error, it appears that the act was not clear to them. I should have great hesitation in holding that the powers conferred on justices by the acts 1617 and 1661 would have been sufficient in this case. The case of Grant against Maclean was different from this. With refe-

¹ Supra.

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—
rence to the law laid down by Lord Lyndhurst in *Stevenson and Rowand*, I am not satisfied that there was here such a clear and beaten course which the defender might have followed, so as to justify us in finding him liable.

THE COURT accordingly, by a majority, adhered, finding additional expenses.*

CAMPBELL and M'DOWALL, S.S.C.—C. F. DAVIDSON, W.S.—Agents.

No. 275. MAGISTRATES and COUNCIL of EDINBURGH, Pursuers.—*D. F. Hope*
—*Marshall*.

ALEXANDER SCOT, Defender.—*Sol.-Gen. Cunningham*—*Keay*.

Harbour—Property—Public Right.—1. Held that the royal charters in favour of the City of Edinburgh confer a good right to levy harbour, &c. dues, on all vessels and goods loaded and unloaded from and upon the shore of the Frith of Forth between St Nicholas' Chapel and Wardie Brow, or at least from or upon any part of the shore opposite to a certain property at Trinity or Trinity Bay, as freely and to the same extent, and as fully, as, by virtue of their royal charters, they are entitled to do at the Port of Leith; and that the owner of this property had no right to occupy the shore for making piers, or similar purposes, or for loading and unloading goods, &c., without paying the harbour, &c. dues to the City, exigible under its charters; and his petition granted against his making any erection, so as to interfere with the rights vested in the City. 2. Question, whether, if there had been a second crown-grant of harbour, in the immediate vicinity of a prior crown-grant, on the faith of which a port had been erected, the prior grantee could restrain the second grantee from exercising his right in respect of its being an unwarrantable encroachment on his prior right.

* FRAME AND COMPANY, Pursuers.—*D. F. Hope*—*Ivory*.
HART AND HODGE, Defenders.—*Robertson*—*Shaw*.

THE Court, on the same day, adhered to an interlocutor of the Lord Ordinary in a similar action at the instance of Frame and Company against Hart and Hodge, writers in Paisley, finding the defenders liable. The sole distinction between the two cases is stated by his Lordship in the following note appended to the interlocutor: "The grounds of this judgment are substantially the same as explained in a note to an interlocutor of this date, in the action by the same parties against James Campbell. The only difference between the cases is, that Campbell says he deliberately considered the statutes, and came to the conclusion on which he acted after using all possible diligence to be right; while the present defenders say they did not deliberate at all; but, having been employed after Campbell's petition had been received and acted upon, merely followed that precedent, and judged of the propriety by its success. Of the two, the Lord Ordinary rather thinks this defence the worst. Even communis error, and a long course of local irregularity has been found to afford no protection to one qui spondet peritiam artis. But there had been nothing like a course of practice, or any series of precedents, which had received the tacit sanction of the proper authorities. The defenders were in no way bound to submit their judgment to Campbell's, and had no right to deprive their employers of the benefit of their own skill and sagacity, by leaning implicitly on his example. If the blind will follow the blind, they must both lie in the same ditch."

ROBERT THE BRUCE, in 1329, granted, by charter, “burgensibus No
rgi nostri de Edenburgh predictum Burgum nostrum de Edenburgh
ia cum portu de Leith, molendinis, et ceteris pertinentiis suis.” After June
veral charters from other kings of Scotland, containing the harbour and Magin
ads of Leith, James IV., who had built a port and dock-yard at New- Edinb
aven, to the west of Leith, granted to them by charter, in 1510, “To June
um portum nostrum novum, nuncupat. le New Havin, cum bondis eius- 1st
em, per nos, in maris litore, nuper factum et constructum, inter capel- Ld. R
um sancti Nicholai ex parte boreali villæ de Leith, et terras de Werdy
brow; Cum omnibus predicti portus pecuniis, viz. havin siluer et profi-
uis eiusdem, sibi et portui suo de Leith annexandis et applicandis; Cum
omuni et libero passagio eundi ad prefatum novum portum, et redeundi
eodem, omni tempore et per omnes vias omniaque passagia quæ ducunt
eundem portum; Cum libertate et spatio ad edificandum et prolongan-
um municionem viz. le pere et bulwerk eiusdem portus, Ac mercancias
bona sua in nauibus apud dictum portum oneranda, et exoneranda, su-
ter terram locandi et ponendi anchorasque et funes in litore figendi, a
xum maris eiusdem portus vsque ad frontem anteriorem domorum de le
buth Raw, viz. quæ, ex parte australi transitus villæ dicti noui portus,
dificantur, Et sicut se, ante sinum eiusdem, in longum extendunt: Ac
um omnibus aliis privilegiis dicti noui portus, ac simili modo et adeo li-
ere In omnibus, et per omnia, sicut ipsi, de portu suo de Leith et liber-
te eiusdem, liberius infeodantur, et eundem possident.”

James VI., by a charter commonly called the Golden Charter, in 1603,
confirmed preceding grants, and bestowed an extensive jurisdiction, which
reached northward to “the myd-water of Forth.”

The grant, in the form of a novodamus, contained the whole port,
aven, and harbour of Leith, together with the roadstead, &c., and all
privileges, customs, haven silver, anchorages, dock silver, shore silver,
&c., and also “totum et integrum antedictum novum portum, nuncupa-
um the hevin and harbrie of Newhevin, ac stationem et radam ejusdem,
um terris cuniculariis vulgo lie lynkis, domibus, edificiis, terris, et
ondis, et suis pertinentiis, jacen. super littus maris, ex australi latere
quæ de Forth, a capella Sancti Nicholai ex boreali latere villæ de Leyth,
que ad terras nuncupatas Weirdybrow et in longitudine ad arabiles
rras,” &c.; “cum omnibus privilegiis, portuum pecuniis vulgo lie hevin
ilver, schoir silver, anchoragiis et lie doksilver, golden penneis, imposi-
tionibus, custumis, &c., ipsis eorumque portui antedicto de Leith, annex-
andis et applicandis; ac cum communi et libero passagio eundi et rede-
undi, ad, et, ab dicto nostro burgo de Edinburgh, ad prefatum novum
ortum, et ad predictas terras cunicularias et bondas earundem, per omnes
as,” &c.; “ac cum eorum curribus, bonis et marcimoniis, quæ conti-
nunt onerari seu exonerari, apud predictum novum portum, vulgo lie
Newhevyn, vehere et transportare, ad et ab eodem, competentis latitudinis
t longitudinis ad hoc necessare cum libertate et spatio edificandi et am-

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plificandi piram et propugnaculum vulgo the peir and bulwark of portus, ac mercantias et bona sua in navibus, cymbis seu aliis vasis dictum portum oneranda et exoneranda, super terram locandi stipulasque anchorasque rudentes, funes et ligamina, in maris litore et litoris fluxu maris antedicti portus et terrarum cuniculariarum, usque a tem anteriorem domorum de lie southraw, quæ, ex parte australi, tillæ de Newhevyn, edificantur, et sicut se ante, et ad sinum ejus longum extendant, figendi; Ac cum omnibus aliis privilegiis a novi portus, ac simili modo et adeo libere in omnibus et per omnia ipsi de porta suo de Leyth, custumis, libertatibus et pertinentiis superius recitatis liberius infeodantur," &c. The charter contained a clause of union, uniting "omnes et singulas predictas latus, &c., &c., portus vulgo lie poirtis and hevynis de Leyth et Newhevis stationes, propugnacula, vulgo raidis, peiris, schoirris, bulwarkis, vias, &c, in unum liberum bargum regale, tenementum et drian."

Charles I., in 1636, by a charter, proceeding on a partial renunciation of jurisdiction, by the city of Edinburgh, granted, "totam et dictam villam et terras de Newhevin et bondas ejusdem, inter St. Andrew's Chapell et Wairdiebrow, cum portu, aestuario, receptaculo et ad eam, lie raid, cum lie Linkis, domibus, edificiis, terris, bondis et ceteris ejusmodi, cum universis privilegiis, libertatibus, et custumis ejusdem, lie hevyn silver, schoir silver, anchoragiis, &c., cum passage adeo libere, sicuti eadem possidentur et possessi fuerint, ultra memoriam, per dictos præpositum et ballivos et eorum predecessores. This charter also contained a clause of union as before. Under the grants, the Magistrates of Edinburgh constantly levied harbour and shore dues, &c., at the neighbouring ports of Leith and Newhaven. Immense sums were expended in the improvement of the Port of Leith to which that of Newhaven was subordinate. Various acts of Parliament were passed, at intervals, recognising the right, and the power of the Magistrates of Edinburgh to levy dues at these ports. In 1728 Geo. III., c. 58, § 25, it was set forth that they "have the immemorial use and possession of levying from every free vessel each ton of goods, either imported into Leith or Newhaven, or on his own account or risk, threepence one-third Sterling of dues," &c. The statute also narrated that the Magistrates had the practice of publishing tables of abated dues "for the encouragement of the trade of the port of Leith and Newhaven." The Magistrates also were in the habit of letting out the Links of Newhaven to various tenants, but the sea gradually encroached on the links and washed away great part of them, and flowed over such part at low tide.

The Magistrates exercised also the right of letting the oystering in the Frith of Forth, ex adverso, of a certain tract of land

the shore, and, this right being disputed in the High Court of Admiralty, No
 for the Fishermen of Prestonpans, that Court, on March 2, 1792, gave June
 a decree, declaring certain boundaries of the Firth, which indicated the Magi
 extent of the oyster fisheries of the City. The western boundary Edin
 reached as far as the Wardie-brow or burn. Scot.

Besides the harbour at Leith, there is also a stone-pier at Newhaven, a modern erection, to which the ferry steam-boats on the Forth ply, and the Magistrates have always exercised the same right of levying dues from vessels using that pier as from vessels coming into Leith.

In 1820, a petition was presented by the London, Leith, Edinburgh, and Glasgow Shipping Company, to the Magistrates, stating that Alexander Scot, W.S., proprietor of the lands of Trinity and Christianbank (which lie southward of the sea), was to grant them "the feu-right of a part of his property, with the use of the beach opposite hereto," for the purpose of erecting a "pier" to land passengers from steam-boats at all times of the tide. The petition exhibited a sketch of the proposed pier, and craved the permission of the Magistrates to erect it. The petition was granted, but under a reservation "of all rights competent to the community as proprietors of the Port of Leith, and its dependencies."

This Company did not proceed with any pier, but, in 1821, Scot granted a charter to the Trustees of the Trinity Pier Company, of whom he himself was one, by which he granted a piece of ground, forty-x feet long and seventy feet broad, south from the sea-wall, to build a pier or chain-bridge for embarking passengers and luggage on board of the Company's steam-boats, &c., "together with that part of the sea-wall, and of the sea-shore, or beach, in front of the said ground, to the extent of seventy feet in breadth from the said sea-wall, outwards, so far as the said Company may think proper to extend the said chain-bridge, in so far only as I have right to the sea-shore." The obligation to infest, and the precept of sasine, contained the same qualifying words, "so far as I have right to the sea-shore." A chain-pier was erected by the Trinity Pier Company, and the steam vessels for whose use it was intended, landed their passengers there. In regard to one of these vessels, named the Morning Star, a process was entered into between the owners and the Magistrates' Collector of Port and Shore-dues, &c., involving the questions—Whether the vessel was liable for the dues demanded, or for any dues at all, as the pier was built at the Company's own expense, and was not the pier or port of Newhaven, though in the near vicinity of it? The Magistrates contended that it was within the precincts of the port, which extended from St Nicholas' Chapel to Warin Brow, and, on May 16, 1827, they obtained a judgment,¹ "that the

¹ Ante, V., 665.

No. 275. chain pier at Trinity is within the limits of the port at Newhaven and subjecting the vessel in certain dues accordingly. In a question as to another steam-boat, which had landed passengers on a temporary slip near the chain-pier, during the time that the erection of that pier was proceeding, a judgment of the same import was pronounced at the same time.¹ These two steam-boats belonged to separate companies, and, in each instance, the Manager of the Company was also one of the Trustees of the Trinity Pier Company. But the Trustees of that Company, as such, nor Scot, were parties to the processes.

In consequence of the alleged deficiency of accommodation for shipping at the harbour of Leith, two plans were proposed for establishing a pier and harbour higher up the Firth of Forth, and to the north of Leith and Newhaven. One of these was projected by Scot, on his lands of Christian Bank and Trinity, which lie near Newhaven; the other was projected by the Duke of Buccleuch, on his lands of Portobello, which lie a short distance farther west. Scot, and the proprietors of the Trinity Harbour, having presented a bill to Parliament containing the requisite powers to erect and maintain a harbour and to levy dues, the Magistrates raised an action of declarator, reciting the provisions in their royal charters, and their use and wont of levying dues, concluding to have it declared, 1st, That they had a right to levy dues on all vessels and goods of every description, loaded and unloaded, from or upon the shore of the Firth of Forth, between St Nicholas' Chapel and Wardie Brow aforesaid, at least from or upon any part of the said shore opposite or adjacent to the property at Trinity or Trinity Bay, belonging to the said Alexander Scot, as fully, freely, and to the same extent, as they are in virtue of the foresaid royal charters entitled to do at the port of Leith. 2d, That the shore adjoining the said property of the said Alexander Scot is part of the links conveyed by the foresaid royal charters, and is reserved exclusively to the community of Edinburgh. 3d, That the said Alexander Scot has no right of free port or of harbour, or any privilege or right whatever, connected with the sea-shore within the bounds mentioned. 4th, That the property of the said Alexander Scot does not extend to, and is not bounded by, the sea or sea-shore, and he has no right to use and occupy the said shore, adjoining his said lands, for any purposes whatever, whether of landing goods, making piers, or other purposes. 5th, That neither the said Alexander Scot, nor any person deriving right from him, was entitled to erect a harbour, &c., load or unload goods, &c., without the pursuers' consent, and paying the shore dues &c. exigible by them. And, 6th, That any such attempt by Scot

¹ Ante, V. 668.

an invasion of the public right of port and harbour established at Leith and Newhaven, whether the said shore adjoining to the said lands of Trinity is within the bounds within which the dues belonging to the pursuers can be levied or not: And on its being so found, that the said Alexander Scot, and all others deriving right of, from, or through him, ought and should be interdicted and prohibited from erecting, building or establishing a harbour, pier, or dock, or other building or erection, so as to interfere with, or encroach on, the said rights vested in the community of Edinburgh, or the pursuers representing them as aforesaid.

In support of his defences against this action, Scot alleged that the pursuers had never levied harbour dues on goods loaded or unloaded on the shore opposite to his property; at least if they had done so, it was without his knowledge, and without any right or title; and that his lands of Trinity were bounded on the north by the sea, and that he and his predecessors had erected and maintained a sea-wall or bulwark at great expense, for the protection of their property against encroachments from the sea. More particularly he stated, in reference to the sea-boundary, that the lands of Trinity had formerly belonged to the Kirk-session of South Leith, and that, in a royal charter, dated in 1614, containing two acres of these lands, they were described as reaching, on the north, “ad fluxum maris.” He did not, however, instruct any connexion between this title and his lands.

Scot did not produce his own titles, but, in the extracts which he quoted, his lands were described as bounded by “the high-road from Cramond to Newhaven on the north.” In explanation of this boundary being set forth in place of the sea, Scot stated that the road-trustees had, at an early period, acquired or taken possession of part of the lands of Trinity, and carried a road over them, along the coast, for the use of the public; and that this was the road above-described as the northern boundary of his lands. He also alleged that the sea, above forty years ago, washed away the road, and flowed over it, so that no intervening right of any kind was left between him and the sea; and farther, that by an onerous transaction and contract, in 1829, with the Cramond Road Trustees, he had acquired from them any right which was in them to the old tract of road, which was now submerged. This contract narrated that Scot had constructed a sea-bulwark at his own expense, and it contained various reservations of exclusive rights in his favour, in connexion with the use of the beach, besides conferring certain privileges on the trustees, inter alia, as to the using of stone and other materials on the sea-shore for erecting a parapet-wall along the bulwark. It also reserved power to Scot to make a new pier or harbour, or to enlarge the chain-pier, without requiring any consent from the trustees. The pursuers were no parties to this contract.

Scot farther made the following averments on record:—That he had had, from time immemorial, every possession of the shore along his pro-

No. 275. perty of which the subject was capable; such as allowing the fishermen, who were feuars of the pursuers, to land their boats on that part of the beach without the pursuers' consent; controlling the re-delivery of drifted boats; taking sea-ware, &c. from the shore, and prohibiting the pursuers' feuars from doing so; erecting bath-houses, laying the beach with pipes to low-water mark, letting the beach for bathing, excluding the public from it, &c.; that it was in virtue of his charter that the chain-pier was erected, and that the Chain-Pier Company alone levied dues on vessels or goods at the chain-pier, and not the pursuers; and that the stone pier erected by the Fife and Mid-Lothian Ferry Trustees which lay eastward of his lands, was built on the western boundary of the old pier at Newhaven, which old pier alone had been used for all vessels and goods prior to the recent erection of the stone pier.

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Scot also averred that he and his tenants had a prescriptive use of importing articles for their own consumption.

He also alleged, on the record, that his property of Trinity and the adjacent shore "never formed a part of the harbour of Leith, or of the Port of Newhaven;" but it was held, by the Court, that he had not made any serious and relevant averment, sufficient to raise an issue whether his property was not within the limits or precincts of the Port of Newhaven, as averred by the pursuers.

Scot pleaded in defence, that the pursuers never possessed any right of harbour over the shore, ex adverso, of his lands, or at least had lost it by dereliction, and that he was as fully at liberty to present a harbour-bill to Parliament, without reference to the pursuers' charters, as any proprietor on the coast of the Forth. At all events, he had a right of erecting piers on the shore for the accommodation of himself and his tenants, with which the pursuers had no right to interfere.

The pursuers denied all the averments of Scot, so far as inconsistent with their own allegations, and, in general, they denied that he had had any use of the shore except for such purposes as bathing, &c., taking of sea-weed, &c., which were quite different from any thing connected with his having a right of harbour in himself, or interfering in the least degree with the full grant of harbour in their favour. They also denied that his grounds reached northward as far as the sea, and contended they were still bounded, as stated in the extract from his titles, by the high-road along the coast, leading to Cramond. The pursuers were unaffected by the contract with the road-trustees, to which they were no parties, and they alleged that the chain-pier had always been undertaken by them to be erected under a permission obtained from themselves, in reference to the application in 1820, above-quoted.

The Lord Ordinary ordered Cases.

Pleaded by the Magistrates—

1. They had full right from the King, who alone could bestow it, to

levy harbour, shore, and other dues, on vessels and goods loaded or unloaded at the port, or within the precincts of the port of Newhaven, as freely as at the harbour of Leith. Their charter extended the precincts of the port from St Nicholas' Chapel on the east to Wardie Brow on the west, and would bear no narrower construction. The defender's lands were within these precincts, and he had made no relevant averment of their being anywhere else.¹

2. The defender's property was not even bounded by the sea, but had links, or the remains of links, belonging to the pursuers, interponed between it and the sea; and even though partially submerged, the property in these links remained in the pursuers.² But the defender's ground was described, in the extract from his own titles, as bounded by the highway to Cramond. The import of the contract with the road-trustees was not admitted to be what the defender alleged; and it could not affect the pursuers, who were no parties to it. But even though the defender were assumed to be in the situation of a proprietor, bounded by the sea, yet, as he had no royal grant of harbour, he had as little title to compete with the pursuers as any other proprietor, along the line of coast which was contained within the precincts of their port, who had no title unless they could plead dereliction against the pursuers; and as the ports of Newhaven and Leith were, by a clause of union, erected into one burgh-royal along with the town of Edinburgh, and dues had been always levied at these ports, there could be no dereliction as to any spot within the port-precincts, unless an adverse prescriptive usage, at such spot, was proved to have been carried on in defiance of the pursuers' right.

3. The defender had not averred any usage of a relevant kind, or any thing beyond such rights as might belong to any proprietor, bounded by the sea, without giving him a higher privilege. At least, if any thing farther was averred, it merely related to a limited usage as to himself and his tenants, which did not interfere with the main conclusions of the action.

4. The previous decisions in the cases with the two steam-boats, and also with the oyster-fishers, though the defender was no party to them, went to support the usage, and to defeat the plea of dereliction.

5. Even if the defender's lands had not been within the precincts, yet, being in the close vicinity of the port of Newhaven, a royal grant of harbour in the defender's favour would have been unavailing, as being in prejudice of the prior grant to the pursuers. And this principle would

¹ 1 Blackst. Comm. 263; 2 Ersk. 6, 17; Hargreave's Tracts, pp. 46, 33, and 60.

² Hargreave's Tracts, p. 15.

defender.

Pleaded by Scot---

1. He had denied the pursuers' averment that his property was part of the precincts of their port of Newhaven, even supposing it to be as extensive as they alleged; and it was impossible to establish the same without a proof on the subject. He had also averred that the lands in question had never formed part of the port of Newhaven. But besides the pursuers' charters, according to their true reading, did not define the limits of the port, but as the limits either of the links, or of the territorial grant, not forming part or pertinent of the grant. And as the grant was not of "free" port, it was of an inferior nature, compared with other harbour-grants, and its privilege could not be too liberally or largely construed.²

2. The defender's property was bounded by the sea. The lands which had ever lay between it and the shore, they had been swept away by the sea many years ago, and, by transaction with the road-trustees, they had acquired every right which was ever in them, to the old high ground (but past 40 years ago) lay along the northern side of the ground. Accordingly, the defender had built an expensive wharf, and he was ready to prove that he had exercised, over the lands, every act of property and possession which he had averred that he had done. Therefore, the pursuers had never possessed any rights of harbour which could affect his property, they were now lost by dereliction.⁴

3. The averments of the defender were not only sufficient to establish an exemption from the conclusions of the act of

himself and his tenants were concerned, but to entitle him to absolvitor in respect of his lands of Trinity.

4. He was no party to the previous decisions, and could not be at all affected by them.

5. If his property was not now within the scope of the pursuers' charters, his mere vicinity to their port could not warrant any of the conclusions of their action.¹ And accordingly, the harbour projected by the Duke of Buccleuch at Granton, though in the neighbourhood, was not opposed by them.

6. Without a proof, therefore, there could be no decree in the declarator, and no interdict granted, and the dependence of the bill before Parliament could be no warrant for a premature judgment.

The Lord Ordinary reported the cause.

LORD BALGRAY.—I do not think that this cause requires a decision upon any general point of law which is attended with much difficulty. There are conflicting averments, which, in reference to some of the conclusions of the libel, might require investigation ; but the cause is ripe for judgment, as it stands, in regard to other conclusions. This is not a case in which the parties hold competing grants of a right of harbour. That right is of a public nature, and is by law vested in the Crown, or in the grantees of the Crown. In making such grants there are always certain boundaries or precincts assigned to the port or harbour, and on this subject the law is well expressed by Craig, Lib. I. Dieg. 15, § 15. In this case the Magistrates and community of Edinburgh were the grantees of the Crown, and, from a very early period, they have held an express grant of the port and harbour of Newhaven, "*cum bondis ejusdem, &c. inter Capellam Sancti Nicolai ex parte boreali villæ de Leith, et terras de Werdy Brow.*" The precincts of the port are here pointed out as St Nicholas' Chapel on the east, and Wardie Brow on the west. I do not know what these limits are, from perusing the charters, but be they where they may, the grantees are entitled to a declarator of their rights as existing within these limits ; and if, between the one point and the other, the lands of the defender lie, the pursuers are entitled to obtain an interdict against him, in the terms which they have craved. Farther than that, I do not feel inclined to go at present. If the sea has shifted the shore, and been encroaching since the date of the grant, so as to enable the defender to plead that he is not truly within the limits of the grant ; or if he lay wholly out of these limits, to the westward, as the lands of Granton do, which belong to the Duke of Buccleuch, then the pursuers would not be entitled to touch him by their action. But if his lands be between St Nicholas' Chapel and Wardie Brow, their right to interdict him is equally clear.

LORD MACKENZIE.—I concur in thinking that the titles of the pursuers contain a clear and distinct grant of free port and harbour within these limits. And it is a full King's port which is granted ; which I understand to be the same as if it had expressly been denominated " a free port," and conveys every right of port which such a Crown grant would carry. The east and west precincts to

¹ Hargreave's Tracts, p. 160.

No. 275. which the grant extends, are respectively St Nicholas' Chapel and Wardie Brow, and, on this record, I find it impossible to doubt that the defender's lands are situated within these precincts. I hold it clear that Wardie Brow lies westward of Trinity, and the defender admits St Nicholas' Chapel to be to the eastward of it. It is quite true that the relative position of these lands does not appear on the face of the charters produced by the pursuers; and it is also true, that Wardie Brow might, by possibility, have been any given point whatever within the realm of Scotland. And if there had been a serious averment made upon the record that Trinity was not within the limits of St Nicholas' Chapel and Wardie Brow, coupled with any intelligible statement where else the lands of Trinity did lie, I should have felt bound to send the question of the locality of these lands to proof. But as it is impossible to doubt, or to send to proof, whether Wardie Brow is a part of Wardie; and as, on the face of this record, I hold that precincts, extending to any part of Wardie, must be held to include the defender's lands, I must proceed to dispose of the action on the footing that his lands do lie within the precincts of the pursuers' grant. It is true the defender has not admitted that his lands lie within these precincts: but his denial amount just to this, that he admits nothing at all, and tries to deprive the port of all precincts together. But he shrinks from fairly taking an issue whether his lands lie within these precincts, or in any other given place; and as he does this, I must proceed to dispose of the cause on the footing I have just mentioned.

I have nothing to do with the motives of the pursuers in asking decree without delay. If the state of the record entitles them to ask decree, I am bound to give it. Now, in regard to the terms of their grant of port and harbour, within the precincts and boundaries specified in the grant, their right is perfectly clear to a decree of declarator in terms of that grant. The first conclusion of the summons is, "that the pursuers have good and undoubted right to exact and levy harbour, shore, and other dues, on all vessels and goods of every description, loaded and unloaded, from or upon the shore of the Firth of Forth between St Nicholas' Chapel and Wardie Brow aforesaid, or at least from or upon any part of the said shore opposite or adjacent to the property at Trinity or Trinity Bay, belonging to the said Alexander Scot, as fully, freely, and to the same extent, as they are in virtue of the foresaid royal charters entitled to do at the port of Leith." I see no good answer made by the defender. He has attempted a two-fold answer. In the first place, he alleges a general dereliction to levy dues at any part of Trinity; but upon this subject he makes no relevant statement whatever. The ports of Leith and Newhaven, with their respective precincts, were held by the pursuers, and if they continued to levy dues at these ports, that was enough to prevent the plea of dereliction from applying to any part of the precincts. Had the defender averred a constant and universal use to land, or to ship goods and passengers, at some place within the precincts, and in defiance of the right granted to the pursuers, that would have raised a different case. But there is no such averment made, and, in the absence of it, I hold that levying dues at the port prevents dereliction from attaching to any portion of the precincts.*

* His Lordship was here understood also to observe:—"The defender has, in

In regard to the first conclusion of the summons, therefore, I consider the pursuers are entitled to decree. But there are ulterior conclusions, some of which are attended with great difficulty, and which I am not at present prepared to decide. The second conclusion is, that the shore adjoining the defender's property forms part of the links belonging to the pursuers. But parties are completely at issue as to the facts, which must be ascertained one way or other, before deciding as to that conclusion. And even if it were proved that the present shore was the former links, and that these links were washed away, I should see considerable difficulty, at present, in extricating the rights of parties thence arising. The sea is, in some sort, a tyrannical intruder, yet, where it does make way and establish a permanent shore, there is a certain mixture of rights, which seems to result from the change thereby produced. There are some public rights, such as those of navigation, which appear necessarily to be carried wherever the open sea flows; but, if its encroachment should cover the lands of party who possessed a coal mine, it would be too much to say that he had thereby lost his property in the coal. But it is unnecessary to follow out any farther consideration of a part of this case, which is not yet ripe for being the subject of any judgment. The third conclusion of the summons is, that the defender has no right of free port or of harbour, "or any right or privilege whatever connected with the sea-shore within the bounds above mentioned." This is certainly too sweeping. If an encroaching sea washes up, de facto, to a man's estate, he must per force possess rights of some description on the shore. Surely he must have the right of constructing a sea-bulwark sufficient for his own protection. And there are other rights which need not be specified, as this unlimited conclusion cannot be sustained. The fourth conclusion involves the question of fact, whether the defender's property is actually bounded by the sea, and that matter of fact is not at present sufficiently cleared up. Parties are at issue respecting it. The fifth conclusion, regarding the necessity of the defender's obtaining the pursuers' consent for loading or unloading goods, is also unqualified. The right possessed by the pursuers is of a public nature, and, provided that the defender pays the legal dues, there is no necessity for obtaining any consent from the pursuers, who are not entitled to withhold it. In regard to the sixth conclusion, which proceeds on the assumption that the defender's lands do not lie within the bounds specified in the pursuers' charters, I am not for determining it now. It is not necessary to do so, and it is a conclusion which involves considerations attended with very great difficulty. I think should require a good deal of argument to support that conclusion. All that I feel at present prepared to decide is, that the pursuers hold a grant of free port, the precincts of which include the defender's lands of Trinity; and that

The second place, made a narrow averment of his having landed goods for his own use. It is true that a proprietor might have a special and limited exception in favour of himself or his tenants, but there is no title produced to support this; and even if his claim amounts to a mere servitude, it requires some title to support it. The defender has not produced his titles. The only title he has produced is one which he does not connect with his own lands. And even if the court think that a right of this sort could be acquired by possession, following on mere title of his landed property, I do not think he has averred possession sufficient to confer even that limited right."

io. 275. he has not instructed any title contrary to their grant. But to that extent I consider the Court are warranted in now deciding upon the record as it stands.

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LORD PRESIDENT.—I am of the same opinion, and concur entirely in what has now been expressed by my Lord Mackenzie. The power of granting a right of harbour is inter regalia, and it belongs to that class of rights which the King holds in trust for the public, and which he vests in his grantees, only on certain conditions. It has been urged by the defender, who does not allege any grant in his own favour, that the right of the pursuers did not extend beyond the port itself, and that the limits of St Nicholas' Chapel and Wardie Brow were not meant to mark the extent to which the right of port reached, but the boundary of some other right or property which was contained in the same charter. I cannot entertain this view, or perceive that there is the least foundation for it. In any grant of port or harbour which I ever saw, there was an addition of precincts, annexed as a part and pertinent to the port; and the reason of it is very obvious, for, if there had been no precincts added to a port, the grant would have been liable in most cases to the constant hazard of being rendered altogether nugatory. If there were no precincts, the grantee, after he had been at the expense of constructing a harbour, could have had no security against a rival port being erected within 50 feet either on the one hand or on the other. And it is only where there might happen to be a rocky and iron-bound coast, such as at St Abb's head, with only one safe creek or harbour existing in a long tract of it, that the want of precincts to a port would have been a matter of indifference to the grantee; for, in such a case, the natural impossibility of a rival and contiguous harbour would give the same protection to the Crown grantee, which is derived in other cases from the grant of special and exclusive precincts. In this instance the precincts extend from St Nicholas' Chapel on the east to Wardie Brow on the west, and I hold that, on this record, if the lands of the defender reach the sea at all, they are within the precincts. The defender has not averred that Wardie was a part of Trinity; he has made no averment, and produced no titles, to raise any doubt that precincts, extending from St Nicholas' Chapel to Wardie Brow, do not comprehend all the coast along the lands of Trinity, and within these precincts, I think it clear that there is a grant of free harbour belonging to the pursuers, and to them exclusively. The first conclusion of the summons appears to me, therefore, to be well founded. The second, however, is not so, for it calls on us to find that the shore forms part of the links belonging to the pursuers. The Court cannot do that, as the sea has washed the links away; but we might find, that what is now the shore did formerly make part of these links, if the counter-averments of parties on this subject were cleared up by a proof of the fact, so as to support such a finding. There are ulterior conclusions also, the terms of which are too broad, or which involve questions not sufficiently prepared for decision. But I cannot refrain from observing that the defender does not produce his titles, and that the extract from them which he quotes, appears to state their northern boundary not to be the sea, but the highway to Cramond. And I believe there are various feus of parts of the lands of Trinity, leaving only the superiority of them in the hands of the defender, and naturally carrying to the feuars the full right of the shore, if it belonged to the defender, unless, indeed, there were reservations in the feu-rights, of which we cannot judge in the absence of the titles. But however that may be, I consider

Court are justified and warranted in now declaring that the sole and exclusive right of harbour is in the pursuers, and that the defender has no such right, and granting an interdict against the defender accordingly.

No. 10
June 10
Taylor
Simson.

THE COURT pronounced this interlocutor:—"Find and declare, 1mo, That the pursuers have good right to exact and levy harbour and shore dues, and other dues, on all vessels and goods, loaded and unloaded, from and upon the shore of the Firth of Forth, between St Nicholas' Chapel and Wardie Brow, or at least from or upon any part of the said shore opposite or adjacent to the property at Trinity, or Trinity Bay, belonging to the said Alexander Scot, as freely and to the same extent, and as fully, as, by virtue of their royal charters, they are entitled to do at the port of Leith: 2do, That the said Alexander Scot has no right of free port or harbour within the bounds above mentioned: 3tio, That the said Alexander Scot has no right to use and occupy the shore adjoining his own lands for making piers or similar purposes: 4to, That neither the said Alexander Scot, nor any one deriving right from or through him, have right to make a harbour, pier, or dock, or to load or unload goods, belonging to themselves, or for their own use, of any description, from or upon the said property at Trinity or Trinity Bay, without payment of the said shore, harbour, or other dues, exigible by the pursuers in virtue of the foresaid royal charters; and no right whatever to land or receive goods of others thereon, except under the grant of free port belonging to the pursuers, and as authorized by them, and subject to the payment and conditions of their right of dock and harbour: Reserve consideration of the remaining conclusions of declarator: Interdict and prohibit the defender from erecting, building, or establishing a harbour, pier, or dock, or other building, so as to interrupt, interfere with, or encroach on, the said rights vested in the community of Edinburgh, or the pursuers, representing them, as aforesaid, and decern."

GRAHAM and ANDERSON, W.S.—A. Scot, W.S.—Agents.

JOSEPH TAYLOR, Pursuer.—*D. F. Hope*—*A. M'Neill*.

WILLIAM SIMSON, Defender.—*M'Neill*—*Patton*.

No. 11

Homologation—Writ—Rei Interventus—Cautiomer.—1. An improbative letter of guarantee validated by homologation and rei interventus. 2. Circumstances in which a cautioner was liable (and had confessed his liability) for the difference in amount between two inventories of shop goods, which had been adopted as indicating the quantity of goods extant at the beginning, and again at the end, of the intrusions to which his cautionary letter was held to apply.

The chief part of the discussion in this case depended on special June 10, 1830, circumstances. Gilchrist, a shopkeeper in Bowmore, Islay, became bankrupt, and on 13th September, 1830, he disposed and assigned his stock of goods to Joseph Taylor, merchant in Glasgow, as trustee for his creditors. An inventory of the goods, valuing them at £153,

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No. 276. 2s. 4½d., was made on 17th September by Alexander M'Donald and Robert Laird; and Gilchrist was afterwards allowed to resume possession of them, in consideration of the following letter to Taylor, which William Simson of Gartmain, Islay, signed on 28th September, 1830 :—

“ SIR,—In consequence of your condescending to give Alexander Gilchrist, merchant here, possession of the stock of goods, &c., as per inventory taken by Messrs Laird and M'Donald, both residents here, I hereby bind and oblige myself to become security for his intromissions with the same, by your delivering to him the key of the shop now possessed by him, along with the goods, &c. as aforesaid; and at same time you will have the goodness to report to his creditors this arrangement, and let them consider whether Mr Gilchrist can pay 7s. 6d. in the pound sterling, or any other composition or not, which I find he leaves to their own superior judgment; and in the event of their not agreeing to a judicious composition, the goods, &c., per inventory, deducting therefrom any sales that may be effected for one month from this date, for which the cash shall be forthcoming and delivered to you on behalf of all concerned, to be delivered at the expiration of one month without any trouble or obstruction, if required. I am, Sir, your obt. servant.”

(Signed) “ Wm. SIMSON.”

This document was attested by one subscriber, who added “ witness ” to his name.

Sometime after Gilchrist had entered into possession, he was incarcerated by one of his creditors, and his son then took charge of the shop. No notice of these circumstances was sent to Taylor, who lived in Glasgow, by Simson, who lived near Bowmore. The stock on hand was re-delivered to Taylor, under a new inventory and valuation, made up on 5th January, 1831, at the sight of both Simson and Taylor. The value of the goods was there stated at £88, 0s. 11¼d. Correspondence ensued between Simson and Taylor, which amounted to an acknowledgment on the part of Simson that he was liable for the difference in amount between the first and second valuation, under a small deduction of £4, 16s. 5d., which Taylor admitted. But as Simson afterwards refused to make payment, Taylor raised an action for the difference, under that deduction.

Simson pleaded in defence, that the letter of guarantee was imprudent; and, farther, that, as Gilchrist's possession of his shop was interrupted by his incarceration, he (Simson) was not liable for any subsequent sales of goods. Besides this, Simson claimed deductions on account of several sums alleged to be due to him.

Taylor answered, that the letter was followed by homologation and ratification, and was therefore valid; that he did not know of the incarceration.

ation of Gilchrist, or the son's taking possession of the shop at the time of the occurrence, as he (Taylor) lived in Glasgow; and as Simson lived on the spot, he should have certiorated him (Taylor) of the fact, if he thought it material to stop the son's possession. But farther, the subsequent correspondence of the parties amounted to an admission of Simson's liability, for the difference in amount between the two inventories, and indeed the last inventory had been made up, at Simson's sight, for the purpose of ascertaining the balance due by him. As to the other deductions claimed by Simson, these would require to be disallowed unless duly instructed.

The Lord Ordinary "repelled the defence that the missive founded on is not probative, in respect it was homologated and acted upon by both parties: Found that the defender is bound to account to the pursuer for the value of the shop goods intromitted with by Gilchrist, as ascertained by comparison of the inventory and valuation dated the 17th of September, 1830, with the inventory and valuation dated the 5th of January, 1831, the former being expressly referred to in the letter of guarantee, and the latter made up at the sight of the parties, and subscribed by them; under deduction of such claims as are admitted by the pursuer, or shall be substantiated by the defender; and before further answer, appointed parties to be heard with regard to the mode of adjusting those claims in the most expedient manner, and on the remaining points of the cause." *

Simson reclaimed.

THE COURT unanimously adhered.

CAMPBELL and MACDOWALL, W.S.—CAMPBELL and TRAILL, W.S.—Agents.

* "NOTE.—It is unnecessary to advert to various defences which are clearly untenable. The only point which requires observation is an averment, that after Gilchrist was imprisoned, his son maintained possession of the shop; from which it is inferred that the defender was released from his obligation. But the defender was on the spot at that time, while the pursuer was in Glasgow, and it was at the defender's instance, and on the faith of his guarantee, that Gilchrist was allowed to resume possession of his shop. After his incarceration, therefore, it was the duty of the defender, if he meant to get free of his obligation, to certiorate the pursuer to that effect, that the son might have been dispossessed. So far from doing so, he remained silent till the pursuer recovered possession, and then concurring in the inventory and valuation of 1831, for the very purpose of ascertaining the amount of the claim against him, and in his subsequent correspondence with the pursuer, he repeatedly debits himself with the balance so ascertained, while he merely sets forward separate claims for deduction, which are referred to in the interlocutor, and remain to be adjusted. The Lord Ordinary would have allowed a proof as to these claims, as parties are at issue as to the facts, but they are so very trifling that he is anxious, for the sake of both, that it should be avoided if possible."

No. 277.

DAVID SMITH, Pursuer.—*Dundas.*KIRKMAN FINLAY and OTHERS, Defenders.—*D. F. Hope—M^cNeill.*

June 10, 1836.

Smith v.
Finlay.

Road—Contract.—Road-trustees assoilzied from a claim for an account for surveying a line of road, in respect of the land-surveyor's failing to instruct employment by them.

Dixon v.
Brown.

June 10, 1836.

1ST DIVISION.
Ld. Fullerton.
B.

THIS was a case of a special nature. David Smith, land-surveyor and civil engineer in Glasgow, brought an action against Kirkman Finlay of Castle Towart and others, as road-trustees of the Cowal District, Argyleshire, for payment of an account of £43, 12s. 11d., alleged to have been incurred on their employment, for surveying a line of road from Kilmun along the banks of Loch Eck to Loch Fyne. With the exception of some of the defenders, who were concluded against, both as individuals and as road-trustees, and who made no appearance, Smith failed to prove the alleged employment by the other defenders as trustees, acting under the Road Act, and

THE COURT, altering a judgment of the Lord Ordinary, assoilzied with expenses.

A. DOUGLAS, W.S.—MACLACHLAN and IVORY, W.S.—Agents.

No. 278. ANTHONY DIXON and OTHERS, Pursuers.—*Rutherford—H. J. Robertson.*
MRS JEAN BROWN or DIXON and CHILDREN, Defenders.—*D. F. Hope—More.*

Provisions to Children—Implied Condition.—A party having settled certain provisions on his younger children, and the heirs of their bodies, leaving the residue of his succession to his eldest son, who had a family at the date of the settlement, without mention of heirs, and the eldest son having predeceased the testator by one day,—Held that the provision to him did not lapse, but transmitted to his children.

June 10, 1836.

2D DIVISION.
Lord Jeffrey.
F.

THE late Mr Jacob Dixon, senior, of the Dumbarton Glass-Work Company, by trust-settlement dated in November, 1824, conveyed his whole heritable and moveable property to certain trustees, for the following purposes,—1st, payment of debts; 2dly, payment of the following provisions, viz. “To Anthony Dixon, my second lawful son in life, and the heirs of his body, the sum of £2800, which, with £1200, which I have already paid and advanced for my said son for outfitting him and putting him in business, make up the sum of £4000 sterling, which I intend to be the amount of his provision as one of my children:” Further, “To Joseph Dixon, my third lawful son now in life, and to the heirs of his body, the sum of £1500, which, with the sum of £2500, at-

any advanced to him or paid by me on his account, makes up the sum of £4000 sterling, which I intend to be the amount of his provision as one of my children :” Further, “ To Elizabeth Dixon, my eldest lawful daughter, spouse of the Rev. William Jaffray, minister of the Gospel at Dumbarton, and to the heirs of her body, the sum of £1500 sterling, which, with the sum of £1500 which I have already paid and advanced to my said daughter, and her said husband, makes up the sum of £3000, which I intend to be the amount of her provision as one of my children :” Also, “ To Louisa Dixon, my second lawful daughter, the sum of £3000 sterling, and to Catherine Ann Sophia Dixon, my youngest lawful daughter, the like sum of £3000 sterling.” The last of the trust purposes was to the following effect :—“ I appoint my said trustees to convey, deliver, and make over to Jacob Dixon, my eldest lawful son, the residue of my said means and estate, after satisfying the provisions and others above-mentioned, and that so soon after my death as my said trustees may have recovered and laid aside sums sufficient for satisfying the provisions, annuities, and others provided by this deed, and the relative supplementary deed before mentioned, care being always taken, that my said eldest lawful son shall not receive less, out of my means and estate, than the sum of £6000 sterling, or the value thereof ; which provisions so to be paid to my said children, shall be accepted by them, and the same are hereby declared to be in full of all legitim, portion natural, bairns’ part of gear, share of goods in communion, executory, and others whatsoever, which they or any of them can ask or demand by and through my death, or the death of their deceased mother ; declaring, that if any of my said children shall quarrel, or attempt to impugn this deed of settlement, or the relative supplementary deed before referred to, by process of reduction or otherwise, upon any ground whatever, then, it is my will, and I hereby declare, that such child or children shall amit, lose and forfeit all rights, claim, or interest which he, she, or they would otherwise have, under this trust-deed and settlement : and in that event, I hereby recal the provision or provisions made by me in favour of such child or children.”

At the time of the execution of the settlement, Jacob Dixon, junior, who had been admitted to a share of the glass-work concern, had several children by the defender, Mrs Dixon, a woman in an inferior rank of life, with whom he had formed a connexion previous to marriage, his father being cognisant of this marriage and of the existence of the children.

Jacob Dixon, junior, died on the 25th September, 1831, predeceasing his father, who died the day following. The other children survived their father. The only accepting and acting trustees under the settlement were the testator’s sons, Anthony and Joseph Dixon, who subsequently assumed another trustee.

Thereafter, Anthony Dixon, and, with one exception, the other younger children of Jacob Dixon, senior, as four of his nearest of kin, raised action against the widow and children of Jacob Dixon, junior, the residuary

No. 278. legatee under the settlement, setting forth the provisions of the deed, the state of the family of Jacob Dixon, junior, and his decease and that of his father, and concluding to have it found and declared that the residuary legacy in favour of Jacob lapsed by his predeceasing the testator, and did not transmit to his children, but that Jacob Dixon, senior, died intestate, and that the succession to the free residue of his estate, which residue the trustees were bound to make over to the pursuers, as his legal executor and nearest of kin.

The defences were, 1. that the provision in favour of Jacob did not lapse by his predeceasing the testator, but implied a conditional institution in favour of his children; 2. that the pursuers were expressly barred by the trust-deed from making any claim against the estate of their father, except for the special provisions bequeathed to them.

The pursuers, in support of their action, maintained on the general point—

Although the defenders plead that this is a case of conditional institution, the doctrine of the condition, *si sine liberis*, forms, according to all the cases, the basis of their plea, and that doctrine is inapplicable to the present case. It proceeds on the presumption that, at the time of making his settlement, the testator had not contemplated the existence of issue to the legatee, and had consequently omitted to include them in his bequest; as, therefore, Jacob Dixon, junior, had children at the date of the execution of the settlement, of whose existence the testator is admitted to have been aware, the condition *si sine liberis* cannot come into operation.¹ Its application may be likewise excluded by evidence, arising from the deed itself, of the testator's intentional omission to provide for the issue of the legatee,² and of this the variation in the style of the provision to Jacob Dixon, and of the provisions to his brothers, which are left to them and "to the heirs of their bodies," is sufficient evidence. This doctrine always implies a condition, and can only be applied, as it was likewise in the Roman law, where there is an ulterior substitution; and this appears from all the cases, in none of which was the condition applied to defeat intestacy, as is proposed in the present instance.³

The defenders answered—

The maxim, *si sine liberis*, against the effect of which the pursuers have directed their argument, does not very clearly apply in the present case, the principle contended for by the defenders being that of conditional institution, whereby, in the case of a settlement by a father on his children, if a child predecease the testator leaving issue, they take the part

¹ Voet ad Pand. l. 36, t. 1, § 17, 18; Mantica, l. 1, c. 10, t. 8, § 9; Yule v. Yule, Dec. 20, 1758 (6400); Oliphant of Bachilton, June 19, 1793 (6603).

² Earl of Lauderdale, May 19, 1830 (ante, VIII. 771).

³ Magistrates of Montrose, Nov. 21, 1738 (6398); Cuthbertson, March 1, 1797 (4279); Wallace, Jan. 28, 1807 (F.C.); Booths, Feb. 8, 1831 (ante, IX. 406).

on which would have gone to their father. This is the rule laid down in the leading cases on this point,¹ and it is not affected by the circumstance of the testator being previously aware of the existence of the children of a legatee on whom he settles a provision,² or by immaterial variations in the terms of bequests.

The Lord Ordinary pronounced the following interlocutor, adding the *te* subjoined : *—“ In respect that the question relates to the construc-

¹ Wallace, *supra* ; Booths, *supra* ; Wilkie v. Jackson, Feb. 11, 1836 (not finally added).

² Neilson v. Baillie, June 4, 1822 (ante, I. 457, new ed. 427).

* “ Holding the *conditio si sine liberis* to depend on the *presumpta voluntas* of a testator, there probably have been few cases, where, on the whole matter, there were so strong reasons for applying it as the present. The only circumstances which could give a colour to the claim of the pursuers, are, 1st, That the father was aware, when he made his settlement, that his eldest son had children ; and, 2d, That in providing for such of his other children as had issue, he has expressly named the heirs of their bodies as conditional institutes, but left his provision to the eldest son individually, and without any such addition. In an ordinary case, these circumstances might be of moment, and it is with a view to obviate their effect that the Lord Ordinary has brought into notice the other circumstances which are stated in the body of his judgment ; and taking them all together, as elements in the complex question as to the real or presumed will of the testator, he thinks it cannot be reasonably doubted how that question should be decided.

“ The existence of children at the date of the settlement is not of much weight *per se*, and has often been disregarded in cases of this kind. The variance of style in the provisions for the married children, and for the eldest son, is no doubt much more material, and in some cases has been held conclusive as to the presumed intention of the testator ; and, even in the present case, it would present great difficulties, if the eldest son had stood in the settlement, in the same line or rank with the other children, that is, as a proper or special legatee for a definite sum of money. But though this is their condition, his is fundamentally different. He is not a legatee in the proper sense at all, but the general heir or successor to the father's whole estate, burdened only with the special legacies to his brothers and sisters, or the heirs of their bodies, and insured even against those encroaching on his inheritance beyond a certain amount. It might be very natural, therefore, for the father to express his intention of continuing those special burdens on his general succession, in favour of the issue of his other children, while he considered no such intimation necessary as to the more comprehensive and final destination of that succession to his eldest son.

“ It is impossible to read the settlement, with its codicils, without seeing that it was the testator's *enixa voluntas*, not to die intestate with regard to any part of his property ; and when the concluding words of the deed are attended to, along with the necessary effect of sustaining the claims of the pursuers, it is apprehended that, if effect is to be given to that will and intention, those claims must be rejected. The deed not only leaves the whole residue to the eldest son, but expressly provides, that the portions allotted to the children shall be in full of all legitime, executry, and all that they could ask or claim through his (the father's) estate, or that of their mother ; and farther declares, that, if any of them shall in any way quarrel or object to the settlement, they shall forfeit all right under it. Now, though this clause may appear in words, to apply to the eldest son as well as the other children, it is manifest that in substance and effect it can apply to them only, since the eldest son is made successor in *universum jus* of the father, and could never therefore be paid off or satisfied of his legal rights by the tender of any specific sum. The meaning of the clause, in short, is plainly to exclude and extinguish any claim on the part of the other children or next of kin, as heirs-

No. 278. tion of a general family settlement by a father upon his children, which it is manifest that he intended his whole succession to be

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at-law (in mobilibus) of the father. But it is impossible to give it to the eldest son, who, by the very terms of this deed, is made the sole and universal successor to the father, under the burden only of the debts which are thus limited and conditioned for his sole and exclusive benefit. The pursuers of this action are those other children, and the claim now in question is, that, as heirs-at-law, they shall take beyond what they are limited by the terms of the deed, and make an intestate succession, by denying the validity of any ground for presuming that this was in any way contrary to the intention of the testator.

“From what has now been said, it will be easily seen that, in the view of the Lord Ordinary takes of the matter, the cases in which the *conditio si sine liberis* prevents a partial intestacy (where the deceased has settled his whole property by deed), and excludes only the heirs-at-law, to whom nothing is there said of that character, are far more favourable cases for its application than those in which its effect is to disappoint and exclude nominatim substitutes, who are preferred to the heirs-at-law, and expressly pointed out in the deed as next in the testator's order to the parents of the children, who are, notwithstanding, allowed to exclude the nominatim substitutes. The grounds of this opinion are thought to be too obvious to need explanation. It was not without some surprise, therefore, that the Lord Ordinary found in favour of the pursuers maintaining, at the debate, that the case which here occurs was favourable for the application of the condition in question, and that it was inadmissible, except where it was introduced to disappoint an expectation.

“The argument seemed to be very much rested on the circumstance of the condition being described as a condition; which, it was said, implied that there must be some ulterior destination to be affected by such condition; and that was not the case, where, on the failure of the legatee named, the provision fell back into the general estate of the testator. In all this, however, the Lord Ordinary thought that the true reason and principle of the law is overruled by a mere verbal subtilty. It is impossible to reflect for a moment on this without seeing that the only question, in all such cases, is whether there is sufficient ground for holding that the testator truly wished and intended that the provision made to an individual should, on his predecease, go to his surviving children, though not named in the bequest, rather than to that person (whoever he be), to whom it must have gone if there had been no such children? There must always be some one to whom, in that case, it would have gone; and whether that person was a nominatim substitute, or the next of kin of the testator, is a matter of indifference, except as affording more or less ground for conjecture as to the testator's probable intention; and, in that view, it seems impossible that the interest of a nominatim substitute, who is named to the prejudice of the next of kin, must have been more tenderly regarded by the testator, than the interest of the next of kin, who is excluded. If the children, therefore, are allowed to cut off the nominatim substitute, it would be strange if they should fail as against the next of kin. Whether they are properly described as succeeding in either case, or whether this is less of the nature of a condition, where the persons claim only on the *hæreditas jacens* of the testator, are matters which do not at all touch the plain principle upon which they do succeed, and resolve into criticism on the language used in law books in relation to this rule rather than arguments as to the grounds of its application. If the heirs-at-law be actually called, by a form of words importing a substitution, is it possible to suppose that this would have given the children of the predeceasing eldest son a right to exclude them, than if they had been passed by altogether, and never

d, and to leave no part of his property to the distribution of the law: And farther, in respect, that by the said settlement, the eldest son is evidently the persona predilecta, and that his share is not, like that of the other children, a definite sum or portion, in full satisfaction of all legal claims, but the whole residue of the estate, after paying the portions of the other children, and even guaranteed, at the expense of those portions, to the extent of a minimum, greatly exceeding the maximum of what is thus provided to each of the other children; finds that the provision so made in favour of Jacob Dixon, the younger, the testator's said eldest son, did not lapse, or fall to the heirs ab intestato of the father, by the said eldest son having predeceased his said father by a few hours, but that the principle of the implied condition, *si sine liberis decesserit*, carries the whole right and benefit of the said provision to the defenders in this action, the surviving children of the said Jacob Dixon, the younger, as conditional institutes in the same, and therefore sustains the defences, disqualifies the said defenders from the whole conclusions of the action, and accords; finds them entitled to expenses."

The pursuers reclaimed.

LORD GLENLEE.—I am inclined to think this claim on the part of the pursuers very unconscionable, and justly repelled by the Lord Ordinary. We must attend to the nature of the deed, which is a settlement by a father apportioning his fortune among his children, in which case the general rule is, that if a man dies, his children just come into his place and take his provision. It is an extraordinary notion in regard to the testator's intention, that he should have in view that his grandchildren should succeed if his son died an hour after himself, but not if he died shortly before him. I cannot listen to this view of his intention, which is inconceivable, unless it were clearly indicated by the deed. Because the testator knew of the existence of his grandchildren, did he mean therefore to exclude them? Unless he says something to the contrary, the children just come

named (in that character) in the settlement? and yet this is the argument of the pursuers. If the testator had said, 'and failing my said eldest son, I direct the provision hereby made for him to be divided equally among my next of kin,' the pursuers admit that they would have been excluded by his surviving children. But they contend that the children have no claim in this case, because the next of kin are not called at all in the settlement, and that their taking any thing in that character is indeed anxiously precluded. To the Lord Ordinary it seems impossible to give any weight to such an argument, of which he can find no trace in any former case on the subject. On the contrary, it appears that effect was given to the principle, as against heirs-at-law, in one branch at least of the case of Wallace, 28th January, 1807 (Morr. App. voce Clause, No. 6), and in the very recent case of Wilkie v. Jackson, which was decided last week by the First Division, adhering to an interlocutor of Lord Corehouse of 30th June, 1835. That last case indeed presented both the grounds of difficulty on which the pursuers rely in the present, the children who prevailed having been in existence at the date of the settlement, and the provisions to the other children, in the same deed, being taken expressly to these heirs, while those to their mother were only given to her individually."

its principle, but it is absurd to suppose that the rule was introduced into our law, as it was expressly adapted to the Roman Fideicommissum.

LORD JUSTICE-CLERK.—Lord Glenlee has put the case upon the principle of the *conditio sine liberis*. We are to apply the principle in question so as to make it conform to the terms of the rubric in Wallace's case, transmit to the residuary legatee, putting such a construction on the deed as is consistent with the intention of the testator. Jacob Dixon, junior, being married when the deed was executed, his father makes him residuary legatee, and we must suppose that some provision is made upon a child, particularly if he is the eldest child. The intention of the testator to cut out the issue of that child is manifest. As the *conditio sine liberis* seems not distinctly to apply to the case, we should vary the interlocutor.

LORD MEDWYN.—I agree with Lord Glenlee that this is the case in which the *conditio sine liberis* properly applies, and I also agree with the pursuers that it comes in, as in the Roman law, by way of substitution. But the principle of the *pietas paterna* is quite a different thing, and it does not require a substitution to give effect to it. It is difficult to figure this principle interfering in any other way with the settlement of provisions by a father on his children, and I do not think it should interfere to prevent the pursuers coming in by way of succession. The decided cases on which I chiefly found myself are *Neilson v. Baillie*,¹ *Aitchison v. Binning*,² and *Binning v. Binning*.³

LORD MEADOWBANK concurred.

THE COURT accordingly pronounced as follows:—"The Act of the Lord Ordinary submitted to review, in relation to the provision made in favour of Jacob Dixon, the youngest son, did not lapse or fall to the heirs ab intestato."

DAVID BLAIR and MANDATARY, Pursuers.—*Rutherford—Cowan.*
 MAGISTRATES AND TOWN COUNCIL OF DUNBAR, Defenders.—*Keay—*
Ivory.

No. 27

June 10,
 Blair v.
 Magistrate
 Dunbar.

de—Warrandice—Burgh.—The magistrates of a burgh received authority from council to dispose of certain lands, the property of the burgh, in the description which in the articles of roup there was no mention of teinds; a sale was accordingly effected, of which, as conform to the articles, the council by a minute approved; thereafter the magistrates granted a disposition both of the lands and the teinds thereof, with absolute warrandice, the narrative referring expressly to the articles of council and articles of roup, on which the purchaser was duly infeft—this was not an effectual conveyance of the teinds, and that the magistrates and council were not bound, under the clause of warrandice, to relieve a purchaser or successor of the original disponee, of payments of stipend allocated on the

the year 1800, the magistrates and council of Dunbar, in order to discharge their debt, resolved, by minute of council of 23d January, to sell part of the lands belonging to the town, and appointed a committee, consisting of the provost and two bailies, for “fixing the upset prices and preparing the articles of sale.” Articles of sale were accordingly drawn up and entitled, “Articles and conditions of roup and sale of the several heritable subjects after-mentioned, belonging to the town of Dunbar, which are to be exposed to sale.” Lot third was thus described:—“All and whole these lands called the West Common of Dunbar, containing of fourteen acres or thereby, English measure, all as presently occupied,” &c. [then follow the boundaries] “at the upset price of £800 sterling.” Another lot was described as “All and whole these four acres or thereby, English measure, called Forest’s lands,” &c. as to the teinds of the said lands, as acquired by the community of Dunbar,” &c. By one of the articles of sale, the magistrates bound and obliged “them and their successors in office, to grant and subscribe a full and valid disposition of the said several subjects to the respective purchasers, and their heirs and successors, containing procuratories of ratification,” &c., and “to free and relieve the said subjects of all debts and encumbrances affecting the same, and of all cess and other public burdens payable for the same at and preceding the term of Whitsunday the purchasers being obliged to free and relieve the said subjects in and after the term of Whitsunday, and in all time thereafter.”

The lands of West Common, as above described, were accordingly exposed to sale and bought by Mr Thomas Mitchell, who subscribed the articles of roup as a purchaser, the relative minute of town council of 18th March bearing, “It was stated to the meeting, that in consequence

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No. 278. of the powers devolved upon the magistrates, they had sold Forest at the sum of £670, the Latch parks at £900, and the West Common at the sum of £800 sterling, conform to articles and enactment of roup of the 20th day of February last; all of which the meeting hereby ratifies, and authorize the magistrates to grant dispositions thereto accordingly."

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 Mr v.
 Magistrates of
 Dunbar.

In the following month a disposition to the West Common was made in favour of Mitchell in the following terms:—" Know all these presents, that we, Charles Hay, Esq. provost, and George Ston, Andrew Watson, and Joseph Hogg, bailies of the burgh of Dunbar for ourselves and the remanent members of the town council and community of the said burgh, heritable proprietors of the lands after disposing, considering that by articles of roup dated the 20th day of February last registered in the town council books of Dunbar the 4th day of March last, both last past, we, as specially empowered and authorized by minute of council of the date therein mentioned, having exposed to public sale sundry lands belonging to the said burgh, and Thomas Mitchell manufacturer in Dunbar, being the only offerer for lot third of the said subjects, at the upset price of £800 sterling, was preferred thereto at that price, payable at the term of Whitsunday next, as the said articles of roup and minute of enactment and procedure more fully bear; and that the said Thomas Mitchell has instantly, at our desire, notwithstanding of the aforesaid term of payment, made payment to Robert Hogg present treasurer of the said burgh of Dunbar, of the aforesaid £800 sterling, which we are satisfied will be applied by him for the use and behoof of the community, whereof we hereby grant the receipt and discharge the said Thomas Mitchell thereof for ever; therefore we do hereby sell, sold, alienated, and disposed, as we by these presents, for ourselves and our successors in office, in terms of the said articles of roup, and we, the said specially empowered and authorized so to do by minute of council of date the twenty first day of March last, sell, alienate, and dispose, and in favour of the said Thomas Mitchell, and his heirs and assigns, to whomsoever, heritably and irredeemably, the said lot third of the said subjects, being all and whole these lands called the West Common of Dunbar, consisting of fourteen acres or thereby, English measure together with the teinds, parsonage, and vicarage, of the said lands, with right and privilege of driving and using the sea-weed or ware washed ashore upon the sands within the liberties of the said burgh, for the purpose of manuring the said lands allenerly, and for no other purpose whatsoever."

The disposition farther contained the following clause of absolute ratification:—" Which disposition, and subjects hereby disposed, in full ratification of resignation, and infeftments to follow hereon, we bind ourselves, and our successors in office, to warrant the said"

shell and his foresaids, at all hands and against all deadly, as law No.

In this disposition infestment was taken, the instrument of sasine ing that Mitchell received sasine and possession of the lands of West amon, “and of the teinds, parsonage and vicarage, of the said ls.”

June 10
Blair v
Magistr
Dunbar

In August 1823, Mitchell disposed the lands of West Common, “to- ter with the teinds” thereof, to the pursuer Blair, who was duly ft.

A process of augmentation and locality having been thereafter brought he minister of Dunbar, the lands above mentioned were localled upon stipend, they not having been previously so burdened, whereupon Blair le appearance in the locality and claimed exemption, as possessing an able right to the teinds by virtue of his titles. His claim was rejected he common agent on the ground that the magistrates of Dunbar, who disposed the teinds of West Common to Mitchell, had no right to same. Blair then called upon the magistrates to produce in the lity the writs necessary to instruct an heritable right to the teinds he lands, but they having failed to do so, he was obliged to pay the ion of stipend localled on the lands during the years between 1823 1834.

In these circumstances, founding on the disposition by the magistrates Dunbar to his author of the lands and teinds of West Common, and clause of warrandice, Blair raised action against the magistrates and ncil, setting forth the proceedings in the augmentation and subsequent lity and his own payments of stipend, and alleging that there was ndance of free teind in the parish, and that the lands of West Com- a had been localled on solely in consequence of the magistrates having ed to instruct an heritable right to the teinds thereof, and concluding ave them ordained to make payment to him of the sum which he had dy paid as stipend, and to free and relieve himself and his successors he stipend allocated on the said lands for the years subsequent to 1834, which might hereafter be allocated.

In defence against this action it was pleaded—

The conveyance of the teinds of West Common to Mitchell, and the vative title in the person of Blair, are wholly inept, as flowing a non ente potestatem, for the magistrates of themselves had no power to ate the property of the burgh without express mandate from the ncil,¹ and the minutes of council only gave authority to sell the lands hout mention of the teinds; the magistrates, therefore, being strictly nd as mandatories by the terms of their mandate, had no right to ey the teinds. The circumstances of the case, and especially there ig in the articles of roup no mention of teinds in regard to West Com-

¹ *Magistrates of Selkirk v. Clapperton*, June 11, 1828 (ante, VI. 955).

by the council. The question whether the teinds we
pend on the understanding of the parties, the best evi
the disposition, and the fact of its never having been
whenever the circumstances of the case would permit
have been in the practice of finding the teinds to be
position of lands, even where there was no mention o
the parties intended that the teinds should be conveyed
be given to the clause of absolute warrandice, which is
the disposition.

The Lord Ordinary pronounced the following inter
subjoined note : *—" Finds, I mo, That it must be he

¹ *Scott v. Muirhead*, Feb. 27, 1672 (15658); *Dunning v. Cr*
July 5, 1748 (15659); *Campbell v. Earl of Moray*, July 9, 1777
v. Robertson, May 26, 1838 (ante, XIII. 832).

* " Since the decision in the case of *Selkraig*, 11th June, 1
it has been settled that the magistrates have no power to alien
burgh property without the express authority of the council
council in this case authorize the sale of the lands only, the L
the express conveyance of the teinds is entirely without warr
shown to have been necessarily implied from the terms in v
dispone the lands is conceived. But there are truly no terms,
or in the articles of roup to which they refer, that can at all
plication. In all the cases referred to there were such exp
chasers were either assigned into the benefit of current tac
tenants were expressly entitled to possess both stock and t
expressly burdened with stipends—or with future augmentation
way clearly designated as purchasers of the right to the tei
lands. But there is not a word to this purpose in any instrum

ates who granted the disposition containing the clause of warrandice belled in favour of the deceased Thomas Mitchell (the author of the present pursuer), on the 5th of April, 1800, had no other warrant or authority to grant the said disposition, than the acts or minutes of council, of the 23d of January, and 24th of March respectively, in the said year 1800; and that it is admitted that neither of these acts or minutes contained any express warrant or mandate to convey the teinds of the lands thereby directed to be sold, or to bind the council or community of the burgh in absolute warrandice for the teinds of the said lands: Finds, Ho, That, upon a sound construction of the decisions in the cases of Scott and Muirhead, the Creditors of Tullibole, Lord Moray, and others, referred to by the pursuer, they cannot be held to import more than that may be inferred from clear and unequivocal indications in a disposition of lands, that the disponent meant also to convey any right which might be in him to the teinds of the lands so conveyed, and could not be allowed at an after period, to maintain that the said teinds, being actually reserved in him at the time of the disposition, were reserved, and remained to him, merely because not expressly or separately conveyed; but that these decisions afford no authority for holding that persons who grant (or give mandate or commission to grant) a right to lands only, can be subjected in warrandice for the alleged eviction of the teinds of the said lands, when it turns out that they themselves had no right to such teinds, merely because it may be proved or admitted, that at the time of granting the conveyance to the lands, they believed that they had a right to the teinds so, and truly intended to convey such right to these teinds as they actually possessed, and therefore, and in respect that neither of the acts or minutes of council, by which alone (or acts done in conformity to which) the defenders can be bound, contain any such clear indications of a purpose to grant the teinds as formed the grounds of decision in the cases referred to, and in respect that if the committee acting under these acts or minutes of council, had applied (as they ought to have done) to the said council, when requested by Thomas Mitchell to include the teinds in his conveyance, the reasonable and legal presumption is that the said council would not have authorized them to grant such a conveyance, and to bind them in absolute warrandice to the disponent, but would either have looked into their own titles, and refused to convey the teinds to any extent whatever, or would have merely assigned over such right to the said teinds as they themselves might be found to possess, and with warrandice from fact and deed only: Finds that the defenders, as successors in office of the magistrates and council, who concurred in the acts and minutes of council referred to, are not bound by the clause of warrandice belled, or by the implied warrandice in the disposition onerously granted

and, and that the defenders have judic'ally offered, in this case, to rescind the transaction."

No. 278. to the said Thomas Mitchell, in so far as relates to the teinds unwarrantably conveyed thereby to the said Thomas Mitchell, his heirs and cessors: And therefore sustains the defences, assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defenders entitled to their expenses."

Blair reclaimed.

LORD GLENLEE.—I think the interlocutor right. The action is founded on the clause of warrandice, and the Lord Ordinary seems to me to put a just construction on it and the claim. The absence of mention of it in the lot of the lands of West Common, as described in the articles of roup, its insertion in another lot, demonstrate that there could have been no doubt the teinds of the first were not exposed and not meant to be exposed. The articles authorize the magistrates to give a disposition with a clause of warrandice on the terms of the articles of roup. Then it is important to mark the terms of the minute of council of 24th March after the sale, which was the only authority for the magistrates to grant a disposition. The disposition itself specially refers to the powers devolved upon the granters by the council, and to the articles of sale, and it bears a clause of absolute warrandice against all deadly "against the will;" but as neither the articles of roup nor the minutes authorized a conveyance of teinds, still less a conveyance with absolute warrandice, the clause must be construed as having referred only to the lands.

The other Judges entirely concurred, and

THE COURT accordingly adhered, finding additional expenses due.

PATRICK DALMAHOY, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agree.

No. 279.

ARTHUR ROBERTSON, Pursuer.—*C. Robertson.*

JOHN M'CULLOCH and OTHERS, Defenders.—*E. S. Gordon.*

Process—Citation.—A defender having been edictally cited as furth of Scotland when he was de facto residing in Glasgow, the defence of no process sustained although his father and brother, who were also defenders and regularly had refused to inform the pursuer where he was to be found.

June 10, 1836.

2D DIVISION.
Lord Jeffrey.

THIS was an action for implement of a contract, in which of the defenders, Duncan M'Culloch, having been edictally cited as furth of Scotland when he was de facto residing in Glasgow, pleaded preliminary defence that he had not been legally cited. The pursuer answered that M'Culloch was barred from pleading this defence, and if sustained would defeat an inhibition on the dependence, because of other defenders, his father and brother, through whom he had entered into the contract libelled on, when applied to at their residence in Glasgow wall for information, had refused to say where he was to be found.

¹ Sandbach v. Caldwell, Nov. 12, 1825 (*ante*, IV. 170, now ed. 173).

the pursuer farther stated, that, previous to the edictal citation in question, he had made enquiry after Duncan M'Culloch in various parts of Glasgow, as appeared from certain letters in process.

The Lord Ordinary having reported the point verbally, the Court, holding *Sandbach v. Caldwell* to be a very special case, directed his Lordship to sustain this preliminary defence.

WIGHT and REID, W.S.—ROY and WOOD, W.S.—Agents.

LORD DUNDAS, Pursuer.—*Rutherford—Speirs.*

MRS JEAN ANDERSON or YOUNG, and HUSBAND, Defenders.—*Milne—Mure.*

Wadset—Property—Summons—Accessorium sequitur, &c.—In the declarator of a right to redeem a portion of certain lands which had been affected by a proper wadset more 150 years ago,—held sufficient, in point of relevancy, for the pursuer to libel that the lands had been onerously acquired by his predecessor, from the reverser, under a decree of ranking and sale; though the pursuer did not specially deduce, in the summons, his right to the reversion except by giving a special deduction of his title to the lands.

LORD DUNDAS raised an action setting forth that he was “heritable proprietor of the lands of Pittenskene, part of the barony of Clackmannan, and having right to redeem those parts of the said lands of Pittenskene, with the pertinents thereof, particularly after described, which were wadset by the deceased Sir Henry Bruce of Clackmannan.” The summons then narrated that David Bruce was infeft in the lands of Pittenskene in 1674, as heir to his father, Sir Henry, who had previously been infeft in them; that a ranking and sale of the lands was brought, and decree of sale pronounced, in 1705; and that, after a series of feudal transmissions from the purchaser, the lands were bought by an ancestor of the pursuer, in 1763, from whom, by successive infeftments, the pursuer had derived them. The summons next stated, that, on 1st May, 1667, a pretended contract of proper wadset was entered into between Sir Henry Bruce and Robert Whyte, flesher, in Clackmannan, whereby in consideration of the sum of 1000 merks Scots money, borrowed and received by the said Sir Henry Bruce, from the said Robert Whyte and his spouse, he, the said Sir Henry Bruce, bound and obliged himself fully and sufficiently to infeft and seise the said Robert Whyte and his wife and spouse, and the longest liver of them two, in conjunct fee, and the heirs lawfully gotten, or to be gotten betwixt them, which failing, the said Robert Whyte his own nearest and lawful heirs and assignees whatever, heritably and irredeemably, under reversion always by the payment of the said principal sum, in manner specified in the said contract, shall and hail these the said Sir Henry Bruce’s six riggs of land, lying

No. 280. in that part called Pittenskene, with the pertinents thereof." The summons deduced the right to this contract of wadset, and the six riggs of Pittenskene, through a series of transmissions, into the persons of **Mrs Jean Anderson or Young**, and her husband, John Young, labourer, Clackmannanshire. The successive dispositions, including that to one William Aitkman, in 1763, were stated as bearing a price of exactly 1000 merks, and as containing reference in gremio to the contract of wadset. Subsequent to that disposition and sasine, there was no subsequent sasine till 1808, in favour of a son of Aitkman, who, in 1820, sold the lands to the defenders. The summons concluded for reduction of the contract of wadset, or at least for declarator of the pursuer's right to redeem, on payment of 1000 merks.

June 11, 1836.
Lord Dundas
Anderson.

The defenders stated that they had purchased the lands in 1820 for £405, which was their full value; that they had transacted with Aitkman as a party standing infest in fee-simple; and they pleaded, as the first of their preliminary defences, that the pursuer had merely libelled that he was heritable proprietor of the lands of Pittenskene, and had not set forth that he had acquired the right of reversion, of the six riggs of land in question, or by what titles he had acquired it; that, notwithstanding any thing which was libelled, the right of reversion might be merely personal to Sir Henry Bruce; and the pursuer had not only failed to libel any title or interest to insist in the right of redemption, but had even stated a title which was inconsistent therewith, viz. a full right of property, which was at variance with a right of redemption, since such right implied the property to be in another.

The pursuer answered, that his ancestor onerously acquired right to the whole lands of Pittenskene, as fully in all respects as they had belonged to Sir Henry Bruce, and he therefore acquired the right to redeem the wadset portion of these lands in the same manner as Sir Henry Bruce could have done. The defenders must, therefore, produce their titles, and join issue with him on the merits.

The Lord Ordinary "repelled that part of the first dilatory defence which alleges that the summons is irrelevant; and appointed the defenders to satisfy the production of the writs called for against the first day in the ensuing vacation, under reservation of all other dilatory defences."

The defenders reclaimed.

LORD PRESIDENT.—I think the interlocutor right. The pursuer has onerously acquired, according to the state of the libel (and this is a mere question of relevancy), the whole lands of Pittenskene, as sold under the decree of sale. It appears to me, if he instructs what he has libelled, that he has acquired every right therein which belonged to Sir Henry Bruce; at least, that he cannot be stopped short in his action by the allegation of an irrelevant summons. And that is all which the Lord Ordinary has decided.

LORD M'KENZIE was understood to say, that the onerous acquisition of the plenum dominium of the lands of Pittenskene was sufficiently libelled, and that this included the right of reversion, if the pursuer, when let into the merits of the case, could instruct that it remained in force, and that the defences on the merits were ill founded.

LORD BALGRAY.—I think it impossible, *hoc statu*, to turn the pursuer out of Court on the ground of irrelevancy in his summons. He has libelled a relevant title to insist. But when he gets into the merits, it will rest with him to prove that he is in titulo of the right of reversion, as the representative or assignee of Sir Henry Bruce. But then he must, in the mean time, be allowed to proceed with his action.

LORD GILLIES was absent.

THE COURT adhered.

KER and DICKSON, W.S.—J. MARSHALL, S.S.C.—Agents.

— LYON, Pursuer.—*Paterson*.

HIS CREDITORS, Defenders.—*Maitland*.

Cessio—Process.—Though the pursuer of a cessio has obtained an interlocutor finding him entitled to the benefit of it, yet it is competent for the creditors on the same day, and before the interlocutor is signed, to obtain an order to see the process in common form, without the pursuer's consent, where an explanation is made to the Court why the motion to see the process was not made by them at the moment of calling the case.

THE pursuer of a cessio, which had been regularly enrolled, pleaded the case when moved by the LORD PRESIDENT, and the Court pronounced an interlocutor granting the benefit of the process. On the same day, and before the interlocutor was signed, appearance was made for the creditors, and it was stated that their agent had instructions to take out the process to see, but had been engaged in the other Division of the Court at the moment when the case was called and stated. They craved the Court to be allowed still to see the process, as if it had not been pleaded, and stated that this was the constant and necessary practice of the Court, in reference to such cases.

Lyon objected that this had never been done, unless of consent of any pursuer, who had regularly stated his case, and obtained a favourable judgment; and he refused to give his consent.

THE COURT intimated that they did not consider the creditors precluded from still seeing the process in common form; and their Lordships gave deliverance accordingly.

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LORD GILLIES was absent.

THE COURT adhered.

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HIS CREDITORS, Defenders.—*Maitland*.

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—Agents.

No. 282. GEORGE GORDON, Senior, and GEORGE GORDON, Junior, Advocators.
Forsyth—A. M'Neill.

11, 1836.
 Gordon v.
 Suttie.

SIR JAMES GRANT SUTTIE, Respondent.—*Keay—Whigham.*

Lease—Sequestration—Expenses.—1. Where a landlord uses sequestration, in security of current rents, and these rents are punctually paid when the terms of payment respectively arrive—held, that the expense of the sequestration must fall on the landlord, although he alleged that the tenant was in arrear for part of the rent of the previous year, and the lease was expiring. 2. A pottery, a mill, and a farm were included in one lease, and a sequestration was used in security of the current rents of them all; the sequestration included certain horses, and also certain stacks of oats; the horses were sequestered for the whole rent indiscriminately, payable for the three subjects: held, that it was no breach of sequestration to consume two of the stacks of oats in feeding the horses, though it was alleged that the horses were employed for the pottery and not for the farm.

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SIR JAMES GRANT SUTTIE of Prestongrange was proprietor of a pottery, a mill, and some arable land, all of which were let to Robert and George Gordon, under a twenty-one years' lease, which expired at Martinmas, 1832. The rent for the pottery and mill was £78, payable at Whitsunday and Martinmas; the rent for the arable land was £160, payable at the terms of Candlemas and Whitsunday, ensuing the crop and year for which the rent was due. This land contained clay which the Gordons were entitled to use for their pottery. In September, 1831, Sir James presented a petition to the Sheriff of Haddington, alleging that the Gordons were in arrear for the rent of crop and year 1831, to the extent of £102, as to which his right of hypothec was now lost; that the current rent for the pottery and mill falling due at Martinmas next was £39, and the current rent for the arable land falling due at Candlemas was £80, and at Whitsunday £80 more; and, therefore, craving warrant to sequester both the effects in the pottery and mill and the crop and stocking of the arable ground, in security of these rents, in respect that this was the last year of their possession, and there was a risk of the crop and effects being carried off. Under this application the effects in the pottery and mill, and also the crop and stocking, were inventoried. Among the latter were included three horses and three colts, and also several stacks of grain, including three stacks of oats. George Gordon and Robert Gordon (who was ultimately represented by his son, George Gordon, junior) denied that they were in any arrear of rent, except to the extent of £50, for the year 1831, as to which they alleged that they possessed claims of damages against Sir James to a larger amount, in consequence of his having sunk a coal-pit on their farm: but they made no opposition to the sequestration in security of the current rent. Before the term of Martinmas arrived, Gordons thrashed out two of the stacks

of sequestered oats, and applied them to feed the sequestered horses, which were employed by them in carrying on the business of the pottery. Sir James, then, with concurrence of the procurator-fiscal (who was also Gordon's private agent), presented a petition and complaint to the Sheriff, complaining of breach of sequestration, and craving the Sheriff to ordain Gordons "to return the two stacks of corn carried off," and "to inflict such punishment upon them, by fine and imprisonment, or one or other of them, as your Lordship shall consider adequate to the offence," &c. Gordons pleaded, that, in applying sequestered oats to feed horses which were included in the same sequestration, they committed no breach of sequestration, as this was necessary for preserving the horses; and that there was no necessity for abiding the result of a judicial application for leave to do this, both in respect of the recent decision of Miller, June 23, 1831,¹ and in respect of the reason of the thing, as the horses would starve before any judicial authority could be obtained to feed them. And though the horses were employed in the business of the pottery, that did not affect the question, especially as the pottery rent was due under the same lease with that of the arable land. Sir James answered that the case of Miller was not a precedent to this case, especially as the horses were beneficially employed in the business of the pottery, and should have been supported out of their own earnings, and not out of a crop which was under sequestration for the rent of the arable land. The Sheriff, in the petition and complaint, "found that Gordons acted unwarrantably in taking away, or using, two stacks of corn under sequestration, without applying to the Court for its authority to do so; that they have offered no valid excuse for so doing; therefore ordained them, within ten days, to restore the said stacks, or, in default thereof, to consign the value of the same in the hands of the clerk, subject to the future orders of Court, or to find security for the value; fined and amerced them in the sum of £1, to be disposed of as shall be afterwards fixed, for having acted in contempt of Court; and found them liable in expenses."

Gordons brought an advocacy of this process.

In the mean time, when the term of Martinmas, 1832, arrived, they paid the rent which then fell due. A few days afterwards, a charge of horning was given to them for this rent, which, however, was speedily discharged by a letter explaining that the charge had been given by an agent of Sir James, in ignorance of the rent having been already paid. When the terms of Candlemas and Whitsunday arrived, the rents then due were also punctually paid. Sir James then lodged a minute in the process of sequestration in security, asking to be allowed the expenses of that diligence. He alleged, that, as Gordons were in arrear to the amount of £102, for past rents, and as it was the last year of their lease,

¹ Ante, IX., 792.

No. 282. he was justified in resorting to the precautionary measure of a sequestration, *currente termino*; and, therefore, should be allowed the expense of it. Gordons, in answer, denied that the alleged arrears were due; and stated that the only arrear, of £50, was overbalanced by claims of compensation; but, that, independently of this, as the current rents were punctually paid so soon as they became due, it was wholly unprecedented to allow the expense of laying on a sequestration *currente termino*. The Sheriff, "in respect Gordons were in arrear of some part of the rent previously due to the petitioner when the sequestration was awarded, found them liable in the expenses thereof."

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Gordons brought an advocacy of this process, which was conjoined with the first advocacy.

The Lord Ordinary* "advocated the processes, recalled and altered the interlocutors complained of: In the conjoined advocations, assoilzied George Gordon, senior, the defender, and George Gordon, junior, heir cum beneficio inventarii of the now deceased Robert Gordon, from the conclusions of the original processes, and decerned: And found them entitled to expenses, both in this and in the Inferior Court."

* "NOTE.—A sequestration *currente termino*, in security of rent which has not become due, is a severe measure on the part of the landlord. He may be justified by circumstances in resorting to it, but there is scarcely any case in which the expense ought to be laid upon the tenant. The advocator was in arrear to the amount of about £50, but the respondent neither sequestered for that arrear, nor attempted to recover it by any other species of diligence. This certainly gives some colour to the advocator's statement, that they had a claim of damages against the respondent to the same or a greater amount, in consequence of a coal-pit being sunk on their farm. Be that as it may, the present sequestration was not for payment of any arrear, but solely in security for rent to become due afterwards, at the terms of Martinmas, Candlemas, and Whitsunday, and which it is not denied was duly paid when these terms arrived. The sequestration may not have been minious, indeed there is no evidence as to that, either on the one side or the other, but no ground whatever has been stated why it should have been taken out at the tenant's expense.

"With regard to the other question, the respondent sequestered the whole crop and stock of the advocator, including three horses and three colts. These horses and colts required to be fed during the period from the date of the sequestration till the rent was payable, and for that purpose a quantity of oats was thrashed out. The advocators' averment is not denied, that the whole grain so thrashed was applied exclusively in feeding the horses. In the case of Miller, the Court held that the tenant was justified in doing the same thing under a sequestration for payment, a fortiori therefore he was entitled to do so under a sequestration in security only.

"It is said that some of the horses were not employed in agricultural labour, but in carting clay for the potter work which the advocator carried on. The advocator, however, held the arable land, the pottery, and a mill, all under the same lease, from the respondent, and the horses were sequestered for the whole rent indiscriminately, payable for those three subjects. In these circumstances, it is of no consequence whether the horses were employed in the one way or the other. They were all sequestered for the landlord's rent, and it was for his interest as well as the advocators', that they should not be allowed to starve."

LORD PRESIDENT.—I think the proceedings of Sir James appear to have been quite sharp enough against his tenants. Undoubtedly a landlord may have recourse to the precautionary measure of a sequestration for rent not yet due, but only if current; but when a landlord takes that step, he must show good cause for doing so, or he will certainly have to bear the expense of it himself.

LORD BALGRAY.—I am of the same opinion.

LORD MACKENZIE.—I am of the same opinion too. The interlocutor of the Lord Ordinary is perfectly right. It would be a very strong thing, indeed, to allow a landlord the expenses of a sequestration, *currente termino*, where the rents were regularly paid as soon as the term of payment arrived. Although it is the last year of the lease, that is quite immaterial. If a landlord wishes to protect the rents of that year by any unusual degree of security, he must just stipulate for it, in his lease. And if he omits this, but wishes to take the precaution of a sequestration for current rent, and thereby increase his security, he is entitled to do so, but it must be at his own expense, when the tenant regularly pays the rent as it falls due.

Whigham, for Sir James Grant Suttie.—The Court have not adverted to the point raised in the complaint for breach of sequestration, whether the tenants are entitled, without any judicial sanction, to consume two of the stacks of sequestrated oats.

LORD BALGRAY.—Does Sir James really mean to maintain that the horses are not to be fed because he had sequestrated them? The horses were included in his sequestration equally with the oats.

LORD PRESIDENT.—It has been decided again and again that it is no breach of sequestration to apply oats, which fall under the sequestration, to the feeding of horses, which equally fall under the same sequestration.

LORD M'KENZIE concurred.

LORD GILLIES was absent.

THE COURT adhered, and awarded additional expenses.

W. ALLAN, S.S.C.—J. and A. SMITH, W.S.—Agents.

ALEXANDER STRUTHERS (Mudie's Trustee), Raiser.—*Robertson*
—*Reid*.

ALEXANDER GOWAN (M'Donald's Trustee), Claimant.—*Rutherford*
—*Thomson*.

Multiplepoinding—Expenses—Bankrupt.—Special case, involving objections to the competency of a multiplepoinding which had been raised in the name of the trustee on a sequestrated estate, by a party claiming a reference for a law-account covered by a writer's hypothec. The Lord Ordinary sustained the competency of the process by a judgment, which was acquiesced in, and, after receiving a Report from the Auditor, his Lordship disposed of certain objections to it, by an interlocutor, to which the Court adhered.

A. GOWAN.—T. JOHNSTONE, S.S.C.—Agents.

...company, which was a joint-stock company, granted to the
(on the application of the joint-stock company, to which no oppositi
to make up a title by precept of clare constat in favour of his wa
the expense of the ward; and curator bonis authorized to concur
to the purchaser.

June 11, 1838. IN 1811, a number of persons formed a society, named the
1st Division. Bath Street Society, and entered into a contract of copar
B. which the stock was apportioned among the partners subscri
of £25 each. The Society purchased two houses, and took a
in favour of the individual members, and to their heirs a
whomsoever, in proportion to the number of shares held by e
Infeftment followed on the disposition. The Society sustain
able losses, and, in 1831, resolved upon a sale of the houses
powers to that effect provided in their contract. For this pu
surviving members concurred in a disposition of the houses to
Dickson, merchant in Leith, as trustee for the whole partne
son sold them by public roup. Dickson afterwards presented
the Court, stating that the late Joseph Williamson, teind
the partners, holding four shares of the Society's stock, had d
leaving a general trust-disposition of all his heritage and a
favour of Mrs Williamson and others; that, to enable the
give a good conveyance of the two houses to the purchaser,
sary for him to obtain a conveyance of Williamson's pro-indiv
partner of the Society; that Williamson's eldest son, Joseph
junior, was labouring under mental derangement, and a curat
some time ago, been appointed to him by the Court; that the

Portobello, in which the deceased Joseph Williamson was infest, to be made up by precept of clare constat and infestment, in the person of Lieutenant Joseph Williamson, before designed; and also to authorize the curator bonis of the said Lieutenant Joseph Williamson, to grant, at the petitioner's expense, a conveyance of the said shares in favour of the petitioner."

THE COURT, after service and intimation, granted the prayer of the petition, to which no opposition was made.

R. Boog, S.S.C.—Agent.

DUCHESS-COUNTESS and DUKE of SUTHERLAND, Complainers.—
Anderson.

DUGALD GILCHRIST, Respondent.—*Wood.*

Salmon Fishing—Interdict.—In an application at the instance of a proprietor and lessee of salmon fishings for an interdict against the use of fixed machinery in the firth of Dornoch, which was alleged to be an arm of the sea—bill of suspension passed, but interdict refused in hoc statu.

THE respondent Gilchrist erected certain fixed machinery for taking salmon in the firth of Dornoch ex adverso of his property of Spinningdale, and granted a lease of the fishings to a tenant. Thereupon the Duchess-Countess and Duke of Sutherland, as heritable proprietors in liferent and fee respectively of the lands opposite to Spinningdale, with salmon fishing, and as lessees of the other salmon fishings in the firth, applied for letters of suspension and interdict to have Gilchrist and his tenant prohibited from using the machinery so erected, and from erecting such in future, on the ground that it was illegal, as being of the nature of stake-nets,¹ and an injurious encroachment on their Graces' rights, against which there was a standing interdict as applicable to the firth of Dornoch. Gilchrist answered, without admitting that the machinery was of the same description as a stake-net, that the firth of Dornoch, opposite to the lands of Spinningdale, was neither a river nor an estuary, but an arm of the sea, in which, therefore, it was lawful to fish by stake-nets or any other fixed machinery.² In proof, he referred to various articles of evidence;³ and, while he was willing that the bill should be

¹ *Duke of Athol v. Wedderburn*, Dec. 16, 1826 (ante, V. 153, new ed. 139).

² *Earl of Kintore v. Forbes*, May 31, 1826 (ante, IV. 640, new ed. 648): affirmed, W. and S., 261.

³ Especially a report by Mr Stevenson, civil engineer, made by order of the Court in *Macdonald v. Syme and Johnston*, July 6, 1830 (ante, VIII. 1013).

No. 285. passed to have this question duly tried, he contended, chiefly on the authority of *Mackenzie v. Syme and Johnston*, that the interdict applied for ought to be refused.

June 11, 1836.
Duke of
Sutherland v.
Dess.

The Lord Ordinary reported the bill with answers.

LORD JUSTICE-CLERK.—I am not for granting this interdict. In the proceedings in 1817, when an application was made for an interdict against fishing by stake-nets in the firth of Dornoch, the Court granted the interdict by a majority, from which I took the liberty of dissenting, being humbly of opinion that the fishings in question were sea fishings. The case is now materially altered, since it has been decided that fishings on the proper shore of the sea are not subject to the prohibition as to stake-nets and fixed machinery. Now the fishings in Dornoch firth are described as being in the sea itself, and not in a place where the sea ebbs and flows, and it is so averred by the respondent; and this is also the opinion of Mr Stevenson, the engineer. We cannot, therefore, grant an interdict in hoc statu.

The other Judges having concurred,

THE COURT remitted to pass the bill and refuse the interdict in hoc statu.

WILLIAM MACKENZIE, W.S.—INGLIS and DONALD, W.S.—Agents.

No. 288.

DUKE OF SUTHERLAND, Pursuer.—*Anderson*.

HUGH ROSS, Defender.—*Neaves*.

Salmon Fishing.—1. A right of salmon fishing cannot be constituted by a grant “cum piscationibus” and subsequent use of taking salmon by means of rod fishing only. 2. Question whether a right to fish salmon with a rod can be constituted by feudal grant either directly or by reservation.

June 11, 1836.
1st Division.
F.

IN the action of declarator mentioned ante, VIII. 816, (which see), originally at the instance of Mr Mackenzie of Ardross, author of the Duke of Sutherland, the present pursuer, to have it found and declared that he had the sole and exclusive right of fishing for salmon and other fish in the water of Shinn, the judgment of the Court of Session, finding that the pursuer had a sufficient title to the property of the salmon fishing, but that the defender Ross, had a right to fish trouts in the river Shinn with trout rods, but not with net and coble, or in any way that might be prejudicial to the salmon fishing of the pursuer, having been affirmed on appeal (May 14, 1832), the cause returned to this Court, and was remitted to the Lord Ordinary. His Lordship remitted it to the jury roll with a view to a trial on an issue of fact as to the state of possession regarding the fishing for salmon. The pursuer then raised a plea on the relevancy of the averments on this subject by the defender, who was thereupon appointed

give in a minute explanatory of his averments, which were as follows: N
 “1st, That from time immemorial, the proprietors of Achany, prede- June
 cessors of the defender, have been in the constant custom of fishing sal- Duk
 mon with the rod in the river Shinn openly, and as a matter of right, and Suth
 without molestation. Ross

“2d, That from time immemorial, they have been in possession of a right of fishing for salmon in the Shinn with a hand or hanging net.

“3d, That the channel of the Shinn, opposite the lands of Achany, is rocky, that rod fishing is the only practicable mode of fishing; that this is the mode there used by the pursuer himself, and that the nature of the ground alone has prevented the defender from practising a more extensive mode of fishing.”

The pursuer expressly denied these averments. He admitted that one of the former proprietors of Achany had fished for salmon with the rod, but averred that this was done with the consent and permission of the pursuer's authors.

On this state of the facts the question of relevancy arose, whether a right of salmon fishing could be constituted by a grant* cum piscationibus, and subsequent possession by means of rod fishing and fishing with a hand net? It was thought advisable that the point of law thus raised should be settled by the Court before sending the case to be tried by jury, and after hearing parties, the Lord Ordinary (Mackenzie), on the 10th November, 1833, found “that the averments of the defender, as explained by him relative to the exercise of a right of salmon fishing by himself or his authors, are not relevant to support his defences,” and at the same time his Lordship issued the note subjoined.†

The defender having reclaimed against this interlocutor, the Court ordered minutes of debate.

* The grant of the lands of Achany flowed from a subject-superior having no title to salmon fishings on the Shinn.

† “The Lord Ordinary thinks the authorities, particularly the case of Forbes & Fountainhall, and the cases of Colquhoun and Chisholm, are substantially in point. In none of these cases could the decision rest on any other ground than an opinion held by the Court, that where there is not any express, special, or limited title of salmon fishing in another person, but a competition between two general unlimited titles of salmon fishing, then the weaker general title cannot be supported to any extent at all by possession, even continuous for forty years of fishing, without objection, by the rod. And the averred accompaniment of an occasional (not said to be continuous) use of a net, whether a hanging net, which is alleged in any view, or a hand net, which must mean some small kind of net, could not make the matter materially stronger. The annexed circumstance that the pursuer's authors fished always wholly by cruives near the mouth of the river, would make the case weaker for the defender, as they had the less call to interfere with any trifling rod fishing, or to watch any petty net fishing in the river above the cruives.”

with cruive fishing, is yet a good ground for constituting this particular kind of privilege to the extent to which been possessed.

3. None of the cases referred to support the pursuer on the contrary, they are perfectly consistent with the plea tained.

4. At all events, much, in a question of this kind, will the exact character and extent of the possession proved, either a mere tolerance, or as asserting a positive right, and of law ought to be reserved for consideration along with investigation into the facts.

It was pleaded for the Duke of Sutherland—

The pursuer being invested with the unqualified right salmon fishings in the river Shinn, the claim of the defender regarded in the light of an encroachment on that right; the fishing implying an encroachment equal in principle, though less, than the claim to fish with net and coble. The generis piscationibus, occurring in a grant of lands from a subject had himself no title to the salmon fishings, points out clearly that what was intended to be conveyed which could ever come in conflict with the pre-existing express grant from the crown in favour of the Duke, and the acts of possession averred are insufficient to convert the grant in its own nature ineffectual, into one valid and effectual as constituted by a crown grant. The plea of the defender cum piscationibus, followed by possession by means of an ancient right to sustain a right of the limited character he contends

not serving to constitute the right, and consequently being only ascribable to tolerance or precarious possession. But even assuming the efficacy of a grant of rod fishing, it by no means follows, in the absence of authority, that a right not generally sanctioned or recognised in law can be acquired by prescription, although capable of being created by an express grant. The doctrine of a common law right of salmon fishing with the rod carried apart and pertinent of the lands adjacent to a river, is at variance not only with the declared practice of the country, but with the general understanding of the law on this subject, the principle on which it is rested being that salmon are *res nullius*, and that it is not the nature of the fish, but the nature of the engine with which the fish is caught, on which the owner's rights depend. The precedents are all in favour of the view of the pursuer, that possession of a fishing by rod and spear is not sufficient to raise a grant *cum piscationibus* into a valid right of salmon fishing to the extent.¹

No.
—
June 1
Duke of
Sutherland
Ross.

The cause was this day put out for advising.

LORD MEDWYN.—In the titles of the pursuer's author, Sir George Munro, salmon fishing in the Shinn is described as a coble fishing, and there is nothing to show that his right could not be so exercised, as well as by the rod. The rule of law as to salmon fishing is thus laid down by Craig:—"Nam sal-

Forbes v. Udney, Dec. 3. 1701 (7812); *Leith v. Heritors on the Don*, 1773 (not reported); *Smollett v. Colquhoun*,* 1779 (not reported); *Chisholm v. Fraser*, June 1801 (*Mor. voce Salmon Fishing*, App.)

In this case Sir James Colquhoun held an express grant, flowing from the crown, of the salmon fishings on the river Leven within certain bounds. The family of Smollett held of the crown the lands of Bonhill *cum piscationibus*, situated on one of the banks of the Leven, within the same bounds, and were in use to fish salmon with the rod *ex adverso* of their own lands.

Disputes having arisen, Mrs Smollett brought a declarator against Sir James, concluding that she had a right to a salmon fishing on the Leven *ex adverso* of her lands in virtue of titles joined with immemorial possession, and also concluding that Sir James should be restrained from disturbing her in her right of fishing. Mrs Smollett having been allowed a decree of possession, from which it appeared that salmon had been in use to be killed for the support of the family, and that a servant had been kept for the purpose, the Lord Ordinary (Anchinleck) pronounced an interlocutor in the following terms, which was subsequently affirmed by the Court:—"Having considered the several proceedings in this cause, written and verbal, testimonies of the witnesses, and the mutual memorials, finds the pursuer, Mrs Smollett, has a grant of her lands *cum piscationibus* which, with continued uninterrupted use for forty years, would give her a good right to a salmon fishing by prescription; and the proof brought by her, being chiefly by the rod, which is a fishing of a mean kind, which, when persons living in a good neighbourhood are permitted to use, does not constitute a right of salmon fishing, but may well be ascribed to the indulgence of good neighbours; and besides, even this mean kind was not continual, and therefore, she cannot prevail with the defender, who stands in feft, *cum salmonum piscationibus*, which is a proper and exclusive right; and therefore, finds the defender has the exclusive right to the salmon fishing within the bounds libelled, and assoilzies him from the present process, and

No. 286. *monum piscatio apud nos inter regalia numeratur, neque cuiquam hodie videtur, nisi specialis ejus in concessione mentio fiat: antiquitas tamen mine piscationis comprehendebatur, etiam apud nos, quoties perpetua hominum memoriam possessio accesserat.*¹ Stair describes the right which are nearly a translation from Craig.² A clause cum piscationibus a charter from a subject superior, is sufficient, if the possession be con net and coble; but the mere exercise of rod fishing for the supply of the amusement is not evidence of such possession, especially in opposition and undoubted royal grant with full possession. The decisions of Forb lett, Leith of Freefield, and Chisholm, concur in establishing the principle that the use of rod and spear is not the kind of possession which is required to constitute a custom of fishing. And it may be observed, that the symbols of coble, used in the conveyance of salmon fishings, show the nature of the right which the law had in view. In some of the cases referred to, it is held that the use of fishing with rod and spear might exist, but I cannot discover any authority dictum in favour of such a doctrine. It seems to have had reference to the view of the law, as to salmon fishings being confined to navigable rivers as mix with the sea, which is now exploded. I am therefore of opinion that a grant cum piscationibus, followed by the mere exercise of rod fishing, is sufficient to constitute a right of salmon fishing, even to the extent contended for.

LORD JUSTICE-CLERK.—I agree. I think Lord Mackenzie's interference is unfounded, and can discover no authority for holding that a right of salmon fishing can be established, of the limited description contended for by the appellants. What would be said if all the proprietors whose estates are bounded by the sea, having merely charters with a clause of "fishings," were to claim the right of fishing salmon with the rod from the tacksmen of the same estates, interfering with the supereminent right of the owners of the salmon fishings? It is a matter of practice, both on the Tay and the Tweed, for such adjoining proprietors to chase the right of fishing salmon with the rod from the tacksmen of the same estates. On the whole, looking to all the authorities and decisions, I cannot but be of opinion that a right of salmon fishing can be constituted in the way proposed.

LORDS GENLEE and MEADOWBANK having concurred,

THE COURT adhered.

WILLIAM MACKENZIE, W.S.—**SANG and ADAM, S.S.C.**—**Agents.**

No. 287.

REV. DAVID HARRIS, Pursuer.—*S. Keir.*
HIS CREDITORS, Defenders.—*A. McNeill.*

Cessio—Clergyman.—A clergyman, having a wife and seven children, amounting to £1868, and his stipend to about £150 per annum, allowed the cessio on assigning to his creditors one-half of his stipend.

June 11, 1836. **THE Reverend Mr Harris, Minister of Fearn, pursued a petition for cessio.**

2D DIVISION.

¹ Craig de Feudis, l. 16, 38; see also ll. 8, 15.

² Stair, ll. 3.

essio; having a wife and seven children, and his debts, which had been No. chiefly incurred through losses on a farm, amounting to £1868. His June 14 creditors demanded that a part of his stipend, which was about £150, in- A B v. lading the sum for communion elements, should be conveyed to them.

THE COURT ordered one-half of the stipend to be assigned, and de-
cerned in the cessio.

Cases referred to by Defenders.—Scott v. Macdonald, March 5, 1823 (Shaw's App. 183); A B v. Sloane, June 30, 1824 (ante, III. 194, N. E. 133).

JOHN BROWN, Agent.

A B, Petitioner.—*B. R. Bell.*
C D, Respondent.—*G. G. Bell.*

No.

Poors' Roll.—Where a man of middle age, and fit for work, had a sum of £50 past in the bank, and had, a few years before, paid £200 for heritage now yielding him £6 per annum—Held that he was not in such circumstances as to be held to be put on the poors' roll.

In opposition to an application for the benefit of the poors' roll, it was June 14 held that the petitioner was not a proper object, as he had saved a sum 1st Di £50, which was now lying in the bank, and, in 1832, had paid a sum £200 for heritage, which now yielded him an income of £6 per annum. His age was about 45, and the minister and elders considered quite able to work, though he himself alleged otherwise. He had children.

ORD PRESIDENT.—Has the applicant, at this moment, a sum of £50 now past him, in the bank?

R. Bell.—The petitioner admits that, my Lord.

ORD PRESIDENT.—Then he is not entitled to the poors' roll.

ORD GILLIES.—Besides, the petitioner is possessed of some heritable pro-

ORD BALGRAY.—It would be a misapplication of the poors' roll to place per-
in it in the circumstances of this petitioner.

ORD MACKENZIE concurred.

Application refused.

—Agents.

1st Division.
Ld. Cockburn.
Tolnd-Clerk.

ther the lands now called Holm and Holmhead, below
suers, in the parish of Cathcart, Renfrewshire, were true
under an old decree of valuation of the lands of Bogtown
of these lands, and were accordingly valued; or whether
comprehended under that decree, and were unvalued.
pursuers had been localled upon as being unvalued
brought a reduction to set aside the final decree of
locality.

The Court considered the question to be attended with
that the pursuers failed to prove their case, and therefore

Their Lordships assolizied, but refused to award
defender.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—PATRICK and CRAW

No. 290.

WILLIAM CLARK, Advocate.—*M'Neill—Mc*
JAMES GLEN, Respondent.—*D. F. Hope—Roberts*

Proof—Presumption—Payment—Discharge.—In 1827, a party
and granted a disposition containing an unqualified receipt for
the purchaser granted this letter to Orr, the agent of the seller
you delivered up to me the disposition by the seller, I only paid
price, and the balance thereof I have accounted for, to him
lieve you of the same at his hands;” it did not appear (far
might imply) at what date the disposition was delivered to

IN 1833, James Glen, fisher in Largs, raised an action before the Sheriff of Ayrshire, against William Clark, vintner in Largs, concluding for payment of an account of £41. The account comprehended, 1st, A sum of £20, with interest, alleged to be the balance of the price of a house bought by Clark, from Glen, for £340, in 1827, and of which only £320 had been paid; 2d, A balance of £4, 17s., remaining due, of a loan of £10, alleged to have been made by Glen and Clark in 1831, of which £5, 3s. had been repaid in that year; and, 3d, An item of £5, alleged to be due for herrings, furnished at sundries.

In reference to the first, and chief item, the following facts appeared: Clark bought a house from Glen at a price of £340, and took a disposition in favour of one Lawrie for his behoof. The disposition bore that the full price was paid up to Glen. Robert Orr, writer in Largs, was the agent of Glen, and was said by Glen to have been the agent of both parties. On May 15, 1832, Clark signed the following letter, which was addressed to Orr:—

“SIR,—Although you delivered up to me, for behoof of Mr Lawrie, the disposition in his favours by James Glen, feuar in Largs, I only paid you £320 of the price, and the balance thereof I have accounted for to the said James Glen; at least, I will relieve you of the same at the hands of the said James Glen.”

Parties were at issue whether the disposition of the house had been given up to Clark, at the date of its execution, in 1827, or only at the date of this letter in 1832; and both parties referred to the terms of this letter, as supporting or countenancing their respective counter-averments. There was no other evidence bearing on this fact.

The Sheriff, in respect of “the letter from the defender to the pursuer’s agent, of date 15th May, 1832, wherein the defender acknowledges to have only paid £320 of the price of the house, thereby leaving £20 of a balance, and as the defender alleges that he has accounted for this balance to the pursuer, at least that he will relieve the pursuer’s agent of the same at the hands of the pursuer, before advising, ordained the defender to condescend and say how he has accounted for this sum, and to produce a particular account thereof.”

In a note to the interlocutor, the Sheriff intimated, that he considered the letter of May, 1832, as a written admission by Clarke that a balance of £20 was not settled, and that the onus was thereby thrown on him to prove payment.

Clark gave in a condescendence, averring that, prior to the disposition of him, he had made sundry small payments and furnishings to Glen, amounting to the difference; but he did not support these averments by proof.

In these circumstances, Clark pleaded in defence, that, as he held a disposition, which bore, in gremio, an acknowledgment of the full price having been paid, nothing but his writ or oath could take off the effect

No. 290. of it. And his letter of May, 1832, could not do so, for it expressly
 —————
 ine 14, 1836. stated that the balance had been accounted for to Glen. The object-
 lark v. Glen. ed clause, "at least I will relieve you of the same at the hands of
 James Glen," was not an admission that any balance was due to Glen,
 but merely an undertaking, as between Orr and Clark, that Orr should
 have no trouble about the matter. But this could not take off the effect
 of the full receipt contained in Glen's disposition.

Glen answered, that the letter signed by Clark was, in substance, a
 written admission that the balance of £20 remained unsettled, and there-
 fore took off the effect of the receipt in the disposition, except to the ex-
 tent of the admitted sum of £320. It therefore lay with Clark to prove
 how he had paid that balance which was denied.

In reference to the balance of £4, 17s., remaining out of the alleged
 loan of £10, the Sheriff allowed a parole proof; and Glen adduced, let,
 John Lang, who swore "that he heard the defender admit he had
 borrowed from the pursuer, £10:"—"that he cannot tell at what
 period this money was borrowed:" and that he had heard the parties
 talking about it within five years, and perhaps within three years since.
 2d, Robert Glen, who swore that some time ago, and probably two or
 three years ago, he had heard the defender say that he had borrowed
 a sum of money from the pursuer, and had repaid him, and yet the
 pursuer was demanding second payment of it. The witness thought the
 sum was £10, but was uncertain.

Glen objected to the whole procedure as incompetent, because, al-
 though only a sum of £4, 17s. was demanded, yet the basis of the de-
 mand was rested on an alleged loan of £10; and it was incompetent to
 prove such a loan by parole.

Glen answered, that, to the extent of the only sum now claimed by
 him, being under £100 Scots, parole evidence was competent; any loan
 of a sum exceeding £100 Scots, could be proved to the extent of £100
 Scots, just as a nuncupative legacy of a greater amount would be sus-
 tained, as duly proved, to that amount.¹

Glen failed to prove the alleged debt for herrings.

The Sheriff "found, from the oaths of John Lang and Robert Glen,
 that the defender borrowed from the pursuer ten pounds sterling, and
 therefore finds him liable in the sum of £4, 17s. sterling, the balance re-
 maining due of that sum as libelled: That the pursuer has failed
 to prove the article of herrings admitted to probation: Found the
 defender liable in the £20 sterling, remaining due of the heritable
 property, with interest thereon as libelled, in terms of the interlocutor
 of court: and found the defender liable in expenses."

¹ Gordon, June 11, 1833 (ante, XL 696).

Clark brought an advocacy, in which the Lord Ordinary “Advoca- No. 2
 he cause, altered the interlocutors complained of: Found that it is June 14,
 proved, nor offered to be proved, by competent evidence, that any Clark v.
 of the price of the heritable property remains unpaid, nor that any
 of the alleged loan remains now due: assoilzied the defender from
 conclusions of the original libel before the Sheriff, and decerned: and
 the advocator entitled to expenses.”

Glen reclaimed.

LORD BALGRAY.—The disposition by Glen bears an explicit and unqualified
 acknowledgment that the whole price was paid. And the question is, whether the
 of this is taken off by competent evidence. It is admitted that £320 of the
 was paid; Clark alleges that the balance was made up by some minor pay-
 s and furnishings, anterior to the disposition, and that statement is confirm-
 the unqualified receipt in the disposition. In these circumstances, I am
 disposed to allow the short letter of May, 1832, which contains no explicit
 ment of the transactions of the parties, and is not repugnant to Clark’s statement
 referred to, to take off the effect of the solemn acknowledgment of full pay-
 which is contained in the disposition.

LORD GILLIES.—I take the same view. The letter of May, 1832, does not
 appear to me to be an admission that any thing whatever was still due by Clark
 Glen, or remained due after the date of the disposition. The greater part of
 a statement directly the reverse, as it asserts payment; and though there
 clause adjoined, by which Clark undertakes at all events to free Orr from
 claim by Glen for the balance, I see nothing in that which is inconsistent

Clark’s statement that the balance had been made good, in the shape of
 very small furnishings and advances, prior to the date of the disposition, when
 signed the receipt in full. It is true that such a statement and letter by
 Clark would be no evidence in his own behalf to prove payment; but the dis-
 position itself does that, unless the effect of it be taken off by the letter; and,
 in the circumstances, I am not prepared to allow such an effect to it.

LORD MACKENZIE.—I am not able to form so clear an opinion in accordance
 with the interlocutor of the Lord Ordinary, which, on the contrary, appears to
 me to be attended with very great doubt. If the letter of May, 1832, had
 simply stated that Clark had paid or accounted for the balance to Glen, I am
 satisfied that it would not have taken off the effect of the receipt in the disposi-
 tion. But Clark, after making that statement, does not stop there, but qualifies
 by adding, “at least I will relieve you of the same at the hands of James
 Orr.” I apprehend these words qualify the allegation of having either fully
 paid or accounted, and reduce the statement to an admission which falls short of
 payment. Suppose the statement had applied to the whole price, in place of applying
 to a balance of £20, and that Clark had said he had paid the price to Glen,
 at least he would free Orr from any claim at Glen’s instance, could this have
 been held any thing less than a written admission that the price was not then
 paid? And suppose that Glen were to raise an action against Orr for pay-
 ment of the balance of the price, would it be a good defence to Orr to produce
 Clark’s letter, and allege that it proved payment, and was a sufficient voucher to

No. 290. him, to induce him to deliver up the disposition? Parties are at issue as to the date when the disposition was delivered up to Clark, but it appears to me to have been at the same time with Clark's writing the letter of May, 1832; and if so, the retention of the disposition, till that time, when coupled with the terms of the letter of Glen, appear to be sufficient evidence that the full price of the house was not paid up, as recited in the disposition. I think there is a difficulty in dealing with the question, because Orr is no party to the case. But suppose that Orr came forward, founding on this letter of Clark, and called on Clark to relieve him of all claim at Glen's instance for the balance, it is surely very doubtful whether Clark could do so by merely producing the disposition, with its receipt in gremio; seeing that Clark himself only got hold of that disposition upon granting the obligation of relief. If the disposition, while in Orr's hands, afforded no evidence of the balance having been paid, it is difficult to see that it could become evidence of this by being passed into Clark's hands, in virtue of the letter of May, 1832. Indeed, if the delivery of the disposition to Clark was to be equivalent to the extinction of all claim at the instance of Glen, I do not see what object there could be in Clark's granting any letter at all to Orr.

LORD PRESIDENT.—I concur with the Lord Ordinary, and with the majority of your Lordships. The principal part of Clark's letter consists in a direct assertion that the whole price was paid or accounted for to Glen, and it would be giving by far too strong an effect, to the clause of relief in favour of Orr, occurring at the close, if it were allowed to overcome the force of the unqualified receipt contained in the disposition. And I am the less inclined to allow so much force to that clause, because it does not appear to me that the disposition was delivered to Glen, of so late a date as 1832. The letter does not speak of the delivery of the deed as a contemporaneous thing, but as a thing that was performed and past at some period antecedent to the date when the letter was written. It runs thus:—"Although you delivered up to me, for behoof of Mr Lawrie, the disposition by James Glen, I only paid you £320 of the price, and the balance thereof I have accounted for to the said James Glen." These words do not appear to imply that the delivery was got at the time of granting the letter, but rather that delivery had been made at a former period, and when no letter was granted at all. And the object of this letter probably was merely in reference to the state of accounting between Orr and Glen, and not at all as between Glen and Clark, the granter and grantee of the disposition. I think the Court should adhere.

THE COURT adhered, and awarded additional expenses.

W. B. CAMPBELL, W.S.—**W. and J. B. DOUGLAS, W.S.**—Agents.

BY SWAYNE and MANDATARY, Pursuers.—*D. F. Hope—Marshall.* June 14,
BANKING COMPANY and WILLIAM DRUMMOND, Defenders.—*Fife Bank*
Robertson. Swayne v.
Fife Bank

cases—Jury Trial—Admissions.—The expense of examining a witness by commission, whose deposition was rendered unnecessary at the trial, in consequence of admissions made two days before, disallowed to a gaining party,—the Court observing, that before taking the examination in question, the agent should have applied to the opposite party, to ascertain if the admissions would be made.

taxing the defenders' account of expenses in this case,¹ the auditor June 14,
presented for the consideration of the Court an objection stated by the 2d Division
counsel to the charge for obtaining and executing a commission for the
examination of a witness in Kirkaldy, amounting, as taxed, to £29, 11s. 7d.
The witness had been allowed to be so examined on account of the infirmity
of his health. The evidence in his deposition related chiefly to the
production of certain documents which, it was expected, would be used at
the trial. Two days, however, before the trial, by arrangement of parties,
the documents which this evidence would have been required to prove
were formally admitted, so that no use was made of the deposition.
On the report coming to be advised, the pursuer contended that as the
evidence contained in the deposition was not necessary to be used at the
trial, the expense of the commission should not be allowed.

COURT.—It is of great importance to the working of the system of jury-trial
that the expense attending it should be kept down, and it was the duty of the
Court, before taking the examination in question, to have applied to see if the
admissions above mentioned were to be made.

Power of Faculty.—A party has it always in his power to call on his adversary
to make admissions before the trial, and it would be beneficial if this were oftener
done.

MR MEDWYN.—I believe the great expense of Jury trials to be occasioned
chiefly by admissions not being more frequently made in this way. There are
instances of cabinet ministers being brought down to Scotland to prove facts which
they have been admitted beforehand with safety to the interests of the party.

THE COURT accordingly sustained the objection to the charge in question.

ANDREW SCOTT, W.S.—JOHN SHAND, W.S.—Agents.

¹ See ante, p. 726.

No. 292.

JOHN ANDERSON, Pursuer.—*D. F. Hope—Robertson.*

no 16, 1836.
Anderson v.
Blair.

ALEXANDER BLAIR (Treasurer of Bank of Scotland), Defender.—
Keay—M'Neill—Whigham.

Title to Pursue.—A party executed a settlement in 1820, under which his second son, John, had a beneficial interest in part of the lands; the party executed a new settlement and disposition in 1825, under which his eldest son, James, obtained immediate possession of the whole estate, which he burdened (including the portions previously destined beneficially to John), with heavy debts: James predeceased his father without issue, and John, after his father's death, in the character of heir-at-law of his father, raised a reduction of the settlement 1825, as having been fraudulently impetrated by James,—and also of the heritable securities granted by James: the heritable creditors objected that John had no interest, as heir-at-law, because, even if the settlement of 1825 was cut down, there would be no intestate succession, as the settlement of 1820 would be revived:—Held that the pursuer, who was heir under the last investiture prior to 1825, and who had a special interest under the settlement of 1820, was entitled to pursue.

Process—Jury Trial.—Circumstances in which case remitted to the jury roll, for the purpose of ascertaining disputed facts, before disposing of certain pleas in law which might be superseded by the issue of the jury trial.

no 16, 1836.

IT DIVISION.
l. Cockburn.
S.

THE late Robert Anderson of Stroquhan executed various dispositions and deeds of settlement, at successive periods of his life, and in particular he did so in 1820 and in 1825. Under the settlement of 1820, he conveyed part of his lands to his eldest son, James, in trust, for behoof of his second son, John, upon certain conditions. The deed of 1825 was a general conveyance of all heritage and moveables, to James, under the burden of the granter's debts, and paying the free annual proceeds of the estate to the granter during his life, and certain provisions to the younger branches of the family after his death. The deed proceeded on the narrative of the granter's incapacity, from old age, to attend to his affairs; and as his circumstances were involved, it contemplated James Anderson's immediate entry into possession, and proceeding to realize funds and pay debts, and bring the affairs into order.

James Anderson entered into instant possession of the estate and effects falling under the deed, and he proceeded to burden the heritage to a very large amount, which was said greatly to exceed its value. These burdens affected, inter alia, the lands which were beneficially destined to John Anderson under the deed 1820.

James died in November, 1827, and his father, Robert, died in December following. The whole debts affecting the heritage came to be vested in the Bank of Scotland, against whose securities an action of reduction was raised by John Anderson, the second son of Robert Anderson. He libelled, that he was the eldest surviving son and heir of his father; that his father's disposition of 1825 in favour of James Anderson, his deceased brother, was not signed before witnesses; that it was grant-

ed by him when not possessed of a disposing mind; and that it was impetrated from him by fraud and circumvention. He concluded that it should be set aside, and that, therefore, the right of the Bank, consisting of dispositions in security by James Anderson, must also fall, if the disposition to James was reduced.

Besides defences on the merits, including, *inter alia*, a plea that the pursuer had homologated the disposition under reduction, the Bank pleaded, that the pursuer merely libelled his title as heir-at-law of his father; but that he had no interest to pursue in that character, because the whole succession of his father would be regulated by the settlement of 1820, if that of 1825 was cut down; and the reduction did not strike at the settlement of 1820.

The pursuer answered, that, whether his father had executed a settlement in 1820 or not, he, as the heir of investiture, but for the disposition of 1825, was entitled to reduce that deed as void or fraudulent; especially as the disponent, under it, had imposed heavy burdens on the heritage, including that of which the beneficial interest was conveyed to him by the settlement of 1820.

The Lord Ordinary “repelled the defences of want of title or interest, and, *quoad ultra*, before further answer, and particularly before answer as to the plea of the defenders, that the grounds of reduction, even if well founded, could not operate in law against them, who maintain themselves to be bona fide onerous creditors, remitted the cause to the jury roll, reserving all questions of expenses.” *

The defender reclaimed.

THE COURT adhered.

J. HOPE, JUN. W.S.—DAVIDSON and SYME, W.S.—Agents.

* “NOTE—The Lord Ordinary has disposed of the pleas, that the pursuer has no title or interest, because they go to exclude all farther discussion. But the defenders, mistaking the meaning of what was done in the case of Braidwood, maintain that other legal questions, which raise the merits of the case, should be disposed of before any trial of the facts. The Lord Ordinary is not of this opinion. Wherever it is possible that a trial may be requisite, if the law of a case be settled in a particular way, he thinks that the facts, especially if they may supersede the legal discussion, should be ascertained first; partly because evidence may perish, partly because the legal point is generally affected by the circumstances, and partly because no Court ought to determine legal points unnecessarily. But independently of this, one of the grounds of reduction here is, that there is a defect in the execution of the deed; that is, that there is no deed at all. Yet, in this situation, it is proposed to go on ascertaining what the legal effect of the deed is. The defender’s plea, founded on their being onerous creditors, is not raised if there be no deed.

“The defenders also maintained that the whole case was disposed of by homologation. A verdict finding homologation may possibly render it unnecessary to proceed further with the trial. But though it may sometimes be, it is rarely the province of the Court to decide this fact; especially when, as here, even the party pleading it has no one, or no two clear writings to prove it, but only infers it from

June 16, 1836.

1st Division.
Ld. Fullerton.
8.

THE firm of M'Callum and Morrison, writers in Hamilton, law-agents of James Neilson, farmer, Cambusnethan, who had rendered an account to them. On 3d April, 1830, Neilson accepted a bill for a favour, at four months, for £55, 18s., "to account of a business rendered." The whole account and interest then due by M'Callum and Morrison to be above £70. Neilson failed to pay the bill when due, or otherwise to settle his account, and John I. Morrison, assignee of M'Callum and Morrison, raised an action, in the Sheriff of Lanarkshire, for payment of the contents of the bill. Neilson took out the summons to see, but returned no answer. A decree was passed against him in absence. The account was submitted to taxation.

Morrison raised letters of horning on the decree, and impounded Neilson, who presented a bill of suspension, which was passed on caution.

Neilson insisted, inter alia, that he was still entitled to have his accounts submitted to taxation.

Morrison answered, that his account had been rendered to Neilson in 1830; that Neilson had then liquidated a portion of the account amounting to £55, 18s., by granting a bill for it, and had all that time elapsed without intimating that he did not, or that he disapproved and acquiesced in the justice of the account; that the amount alone, as contained in the bill, was then taken, and the suspension following on the decree ought not now to be suspended.

The Lord Ordinary "repelled the reasons of suspension, and the letters orderly proceeded, and decerned; and found the sus-

June 16, 1834

Grant v.
Shepherd.ROBERT GRANT, Advocate.—*Keay*.JAMES SHEPHERD, Respondent.—*R. Thomson*.

Advocation.—In an advocation of a competing brieve from a sheriff to the session, an objection having been taken to the form of the letters, that contained no regular conclusion for an advocation,—the Court repelled the objection, being of opinion that the will of the letters bearing a warrant for advocation cured this defect.

was an advocation of a competing brieve, from the Sheriff of Edinburgh to the Junior Lord Ordinary, under the 1st and 2d Geo. IV. c. 2d Division

The letters of advocation, after setting forth the circumstances which the competing parties respectively claimed to be served, proceeds as follows:—"That, as the question as to the priority of their respective rights must depend on the construction of the substitution of the said estate by the said deed of entail, and as the same may therefore be attended with difficulty, it is necessary that the Lords of Council and Session to advocate the brieve, &c.: And, that the said Sheriff of Edinburgh, as Sheriff in that part, and all inferior judges and their deputies, ought to be discharged from all proceeding or cognoscing therein, in time coming, for the reasons above foresaid, as is alleged. Our will is herefore, &c." The will of the said Sheriff was the usual warrant for advocation in common form.

The Lord Ordinary having pronounced an interlocutor advocating the respondent, Shepherd, put in a reclaiming note, praying to be accompanied by answers, in which he objected that the letters were informal, as containing no conclusion for an advocation, and referred to the case of *Brownlie v. Donald*, Jan. 24, 1829, where Lord Corehouse rejected an objection to letters of suspension containing no other conclusion than the following,—“Therefore, the complainer beseeched our Lord Ordinary to grant letters of suspension in the premises, on caution in common with the respondent.”

THE COURT, taking up the question as to the form of the letters of advocation, repelled the objection, being of opinion that, as the will of the letters bore a warrant for advocation, any defect arising from the want of a regular conclusion was thereby cured.

A. STORIE, W.S.—JOHN GORDON, W.S.—Agents.

No. 295.

June 16, 1836.
Tennent v.
Macdonald.

PATRICK TENNENT and OTHERS, Pursuers.—*Rutherford—Penney.*
JAMES MACDONALD and OTHERS, Defenders.—*M'Neill—Shaw.*

Lease—Title to Pursue—Arbitration—Condition.—A father and his three sons took a lease of certain subjects in Glasgow for the purpose of carrying on a dye-work, which it was declared should be forfeited “in the event of the bankruptcy by sequestration of the party or parties carrying on the work;” the parties to the lease also agreeing to refer all differences arising out of it to a certain arbiter named: one of the sons subsequently quitted the concern, without withdrawing his name from the lease, and thereafter the parties carrying on the dye-work failed and were sequestrated, while the other continued solvent, and entered into partnership with the arbiter named in the lease: the landlord having died, his trustees, who were in right of the subjects, brought an action against the four lessees, to have the forfeiture of the lease declared, and for a removing, some of the trustees having taken infestment only after the summons was called in Court,—Held, 1. That the arbiter named in the lease having subsequently become the partner in business of one of the defenders, who was also cautioner for the composition of the others, was disqualified from acting on account of his interest: 2. That the action being a declarator, the trustees were in titulo to insist in it, though they had not been infest till after it was in Court; and that, being infest, they were entitled to obtain a decree of removing, as consequent on the declarator: 3. That, in consequence of the bankruptcy by sequestration of the parties carrying on the dye-work, the solvent party having retired therefrom, the lease was ipso facto forfeited, in terms of the clause to that effect.

June 16, 1836.

2D DIVISION.

Ad. Moncreiff.
T.

In the year 1821, the late Robert Tennent granted a lease to John Macdonald and his sons James, William, and Alexander, of four and a half acres of land in Glasgow, for nineteen years, from Martinmas, 1821, “for the purpose of establishing a dye-work and carrying on the operations connected therewith.” It was declared in the lease “that, in the event of the bankruptcy of the party or parties carrying on the said dye-work, by sequestration, or in the event of the conveyance of their estate for the behoof of creditors, this lease shall, in the option of the proprietor and his successors, be held and construed to be ipso facto thereby forfeited, and the said proprietor shall be entitled to remove the said tenants within six months thereafter, without the necessity of any declarator or process of law.” There was also a provision “that in the event of any difference of opinion as to the meaning of any part of the foregoing stipulations, they hereby agree to submit and refer all questions and differences arising in relation thereto to the final decision of Mr Hugh Mackay, brewer in Glasgow.”

The lessees thereafter established the dye-work, and carried on the operations connected with their establishment under the firm of John Macdonald and Sons. In 1825, James Macdonald left the concern, and ceased to act as a partner of the firm, and after engaging in various employments, entered into partnership with Mackay, the arbiter above mentioned, his name, however, never being withdrawn from the lease.

In 1832, the parties carrying on the dye-work, and constituting the firm of John Macdonald and Sons, failed, and, on 2d November, were sequestrated; James not being included in the sequestration, and continuing individually in a state of solvency. In March, 1833, the bankrupts made offer to their creditors of a composition of 6s. 6d. in the pound, which was agreed to, and subsequently carried through, James Macdonald being a petitioner for payment of the composition.

The subjects contained in the lease having been conveyed by the father, who was now dead, to trustees, had been purchased from them by his son, Hugh Tennant, one of their number, who drew the rents as proprietor, though the feudal title remained in the persons of the trustees. On the 18th April, 1833, he addressed the following letter to each of the four lessees:—"Sir,—I hereby intimate to you that I mean to resume possession at Whitsunday first of the subjects let by you and Messrs John, James, and Alexander M'Donald, as described in a lease granted to you by my late father, which commenced at the term of Martinmas, 1821, and this I mean to do in virtue of the clause in the lease, by which it is declared," &c. (here follows the irritant clause already quoted) "I am," &c.

John, William, and Alexander Macdonald refusing to quit the premises which they had been carrying on the dye-work, and to give up the lease, the trustees, as heritable proprietors of the subjects let, raised action against them and James Macdonald, as joint lessees, in which, after setting forth the lease, and the provision for its falling in the event of bankruptcy, and reciting the withdrawal of James Macdonald, and the subsequent bankruptcy of the partners carrying on the dye-work, they concluded that it should be found and declared that John, William, and Alexander having become bankrupt, the irritancy stipulated in the tack had been incurred; or at least, that in consequence of the bankruptcy of the only parties carrying on the work, James having ceased to be one of the parties, the whole four defenders had incurred the irritancy so stipulated, and that they should be accordingly ordained to remove from the pursuer's premises. Several of the trustees took infestment only, and the action was brought into Court.

In defence against this action it was maintained, inter alia, that the trustees as a body had no title to insist, some of them having been infested only after the action was in Court; that as the lease contained a special clause, referring all disputes arising out of it to a certain arbiter named, the action was incompetent; that John, William, and Alexander Macdonald, though at one time bankrupt, having been restored, in virtue of a composition-contract, to a state of legal solvency before the summons was raised, the forfeiture under the provision of the lease was thereby avoided; that the irritancy never came into operation, in consequence of James Macdonald, one of the parties to the lease, continuing in a state of solvency, which circumstance distinguished this from all other cases where

No. 295. a similar provision had occurred in leases, since, if a solvent par
 16, 1836. mained, by whom the dye-work might be carried on, the event pr
 nant v. for in the lease, of all the parties in the concern becoming insolvent,
 McDonald. occurred.

The trustees answered, That the objection of their not being al
 till after the summons was called in Court was inapplicable in the
 case, where the most important conclusions were declaratory, and
 pendent altogether of the conclusion for removing; that the arbiter
 in the lease having gone into partnership with one of the defenders
 was also cautioner for the composition of the others, had become
 lified by this supervening interest;¹ that as the lease was expres
 clared to be forfeited "in the event of the bankruptcy of the party
 ties carrying on the dye-work, by sequestration," this event havi
 yond all question occurred, the conclusions of the action must l
 tained.

The Lord Ordinary pronounced the following interlocutor, addi
 subjoined note:—* "Repels the preliminary defences: Finds, 1

¹ Mackenzie v. Clark, Dec. 19, 1828 (ante, VII. 215).

* "1. This being a declarator, the Lord Ordinary has no doubt that th
 tees were in titulo to insist in it, though they had not been infest till after
 in Court; and that, being infest, they are entitled to obtain a decree of re
 as consequent on the declarator. This case is essentially different from an
 summons of removing, which must either be good at the time when it is
 into Court, or can take no effect at all.

"2. The Lord Ordinary is of opinion that the clause of arbitration cann
 to a question like this; more especially when a declarator is rendered ne
 But he also thinks, that the arbiter named having subsequently become the
 in business of one of the defenders, who is also cautioner for the compos
 the rest, is disqualified from acting, seeing that he has or may have a mat
 terest in the issue.

"3. On the merits, the Lord Ordinary is of opinion that the stipulation
 contract is a fair and just stipulation, to which it is the duty of the Court
 fair effect. The lease was granted for the establishment of a dye-work, an
 it was once established, the landlord had a manifest interest, not only for
 of his rent, but for the continuance of a work of that description, that he
 have solvent tenants in actual possession and carrying it on. The value
 ground and premises might be entirely changed by their ceasing to carry
 dye-work: and a company and its partners in a state of bankruptcy could
 afford security for the rent nor give the landlord any confidence in the cont
 of the work. Therefore, the landlord stipulated, as he had a right to do, t
 lease should come to an end, not by the bankruptcy of all the individual
 but by the sequestration of the parties carrying on the dye-work, or their ex
 a trust-deed. The event took place; and the Lord Ordinary is of opinion
 continued solvency of James Macdonald, who had ceased to have any conce
 the dye-work, and was engaged in a rival work, could not prevent the conse
 expressly stipulated.

"The lease provides that the forfeiture shall take place in the option of t
 prietor. The Lord Ordinary doubts very much whether, strictly, there
 limit to that option, except simply what the law would give, that it must be
 in reasonable time, the subsequent clause being rather, in his opinion, a stip
 for regulating the power of removing without necessity of declarator. But
 it on the construction of the defenders, he is of opinion that Mr Hugh T

consequence of the bankruptcy by sequestration of John Macdonald, William Macdonald, and Alexander Macdonald, and of the company of John Macdonald and Sons, who are admitted to have been the parties carrying on the dye-work in question under the lease libelled on, the said

letter of the 18th April, 1833, which is admitted to have been within six months from the date of the sequestration, and at which time the sequestration was still subsisting, was a sufficient declaration of the option. By a deed of agreement produced, it is shown that in January, 1827, the whole subjects in question had been sold by Mr Tennant's trustees to Mr Hugh Tennant. There is no doubt of the power of the trustees to make such a sale; and it is no concern of the defenders, whether they were right in doing so or not. Mr Hugh Tennant had not indeed obtained a feudal conveyance, but he held the obligation of the trustees to grant such a conveyance, and he was in possession, by receiving the rents, and otherwise managing the property, and had received and discharged the rents of these defenders. He was also himself one of the trustees; and therefore, having the beneficial title and interest, the Lord Ordinary can see no cause to doubt that he had a right to exercise the option, and that he did so sufficiently for himself and the trustees, so far as it was necessary, by writing the letter, no particular form being prescribed by the lease.

"The defenders having refused to remove, a declarator became necessary. But the lease declares that the tenant may be removed without declarator. It is impossible, therefore, to maintain that the defenders refusing to remove according to their contract, declarator shall not be competent, because the six months have expired before the declaratory action is raised. It appears to the Lord Ordinary, that if sufficient notice was given of the intention to proceed on the forfeiture and resume possession, and if the parties were bound by the contract to give obedience to the demand without declarator, declarator could not be prevented by the lapse of the six months.

"The Lord Ordinary is further of opinion that the settlement by composition-contract could not in any view purge the irritancy, so far as this condition can with any propriety be called an irritancy. The event which Mr Tennant provided against took place, the complete bankruptcy of the parties carrying on the dye-work. Is that event at all altered or removed by the fact that their creditors, finding that they could not get payment of their debts, agreed to discharge them on payment of a composition of 6s. 6d. in the pound? The Lord Ordinary is of opinion that it is not; and he thinks that the opinion expressed by Lord Corehouse in the case of Hall v. Grant, May 19, 1831, and which he thinks was confirmed substantially by the judgment of the Court, is perfectly well founded. It comes to this, that instead of persons perfectly solvent and in good credit, the landlord, after expressly providing against it, must put up with tenants who have been sequestrated, who have paid less than a third of their debts, and who must be presumed to be without any capital whatever.

"The defenders urge that the composition-contract was settled on the footing that the lease was to subsist. As far as the Lord Ordinary can judge, there is no correctness in this statement. It is clear that the clause of the lease was fully in the view of the factor and trustee, and put before the creditors; and the Lord Ordinary can find no trace of any valuation being put upon the lease. How the buildings, &c., were to be valued, is another matter. But surely the defenders, knowing the terms of the lease, and having Mr Tennant's letter in their possession, cannot be allowed to state that they were at all misled by him, or could settle their composition on any legal assumption that the forfeiture had not taken place. If they did so, it must have been on the faith of some of the reasoning now employed by them, which the Lord Ordinary thinks erroneous. But none of the pursuers were parties to that transaction.

"The term of removing, and any question as to the value of the buildings, must be otherwise discussed, if this interlocutor shall become final."

work, as carried on at the date of the sequestration : Finds of such bankruptcy by sequestration to produce a forfeiture is not prevented or removed by the circumstance of the debt being settled with their creditors by a contract for a composition : That the pursuers are not in any way barred from insisting by such composition-contract : Therefore repels the defence and declares in terms of the declaratory conclusions of the petition : Finds that the pursuers are entitled to a decree of removal of the defenders : But, before further answer, appoints the cause to be continued in order that the term of removal may be determined in the circumstances of the case : Reserves all questions with regard to the works or buildings erected by the defenders, and the value thereof, and as to the mode of settlement with the pursuers thereon : Finds expenses due."

The defenders reclaimed, but

THE COURT adhered.

GEORGE SYM, W.S.—FISHER and DUNCAN, S.S.C.—Agents.

No. 296.

WILLIAM EDWARD, Advocate.—*Rutherford*—
PETER KERR, Respondent.—*Sol.-Gen. Cunningham*—

June 17, 1836.

2^d Division.
Lord Jeffrey.
F.

THIS was a question as to the possession of a country from the Sheriff of Aberdeen, in which the Court adhered to the petitioners' claim, and awarded expenses, to an interlocutor of the Lord Ordinary remitting the same to the petitioners simpliciter.

FORSYTH'S TRUSTEES, Pursuers.—*Rutherford—Ivory.*

GEORGE LEARMONTH, Defender.—*Keay—Pyper.*

Et e contra.

No. 2

June 17,
2d Divi
Lord Jel
T.

THIS was a special question as to a building contract. The Lord
Jury pronounced an interlocutor finding in favour of Forsyth's trust-
to which

Forsyth's
Trustees
Learmonth

THE COURT adhered.

Shirreff v
Brodie.

J. ADAM, S.S.C.—RICHARD COWAN, W.S.—Agents.

No. 2

JOHN SHIRREFF, Pursuer.—*Ivory—Moncreiff.*

GEORGE BRODIE and OTHERS (James Shirreff's Trustees), Defenders.—

Rutherford—Walker.

Verdict—Process—Proof.—In a reduction of a trust settlement, raised by an ap-
parent heir of conquest, who libelled that the deceased was not possessed of a dis-
sound mind, two legatees were made defenders as well as the trustees; the trust-
deed alleged that these legatees had possessed peculiar opportunities of intimate
personal intercourse with the deceased, down to the period of his death, and that
they had been made defenders for the purpose of stopping their mouths as wit-
nesses; they paid up the legacies, and renounced all claim of repetition, in any
event, whatever, and the legatees discharged them, and the representatives of the
deceased, of all claim under the settlement: the Court thereafter, on the motion
of the trustees, and after a record was closed, assolizied the legatees, before the
case went to trial with the trustees.

THE QUEL of the case reported ante, p 845, which see. In the new June 18,
case of reduction, in which the pursuer insisted as "apparent heir of
the deceased," of the deceased, he called, as defenders, certain other parties
besides the trustees of the deceased James Shirreff. Two of these were
John Bruce, formerly clerk to the deceased James Shirreff, and Adam
Smith, hairdresser, who had been employed as such by the deceased for
many years. A legacy of £200 was left to Bruce, by the settlement,
and a legacy of £100 to Smith. Among the reasons of reduction, it was
alleged, that the deed had been fraudulently impetrated "by the de-
ceased, or one or other of them," from the deceased, to the pursuer's
prejudice and lesion, and through facility and ignorance on the part of the de-
ceased. It was farther libelled, that the deceased "never gave any in-
structions for preparing the deed, the instructions for this purpose having
been given by the said John Bruce, or one or other of the defenders."
The pursuer also libelled that the deceased was not of a sound and disposing

1st Divi
Ld. Cock
D.

The trustees in their defences alleged, that Bruce and Smith had had

No. 298.
 —
 June 18, 1836.
 Shirreff v.
 Rodie.

the best opportunities of frequent and close personal intercourse with the deceased down to the period of his death; that they were therefore most important witnesses as to the state of his mind, and also of his bodily health; that Bruce was also witness to the instructions given by the deceased for preparing the deed; and that these parties had now been made defenders, only for the sinister purpose of depriving the trustees of their testimony. The trustees therefore paid up the legacies to Bruce and Smith, and took a discharge from them exonerating the trustees, and also the representatives whomsoever of the deceased James Shirreff, of their legacies, and of the settlement so far as concerned these legacies, with absolute warrandice. The discharge contained a declaration that the trustees, by acceptation thereof, passed from all recourse against Bruce or Smith for repayment of any part of the legacies, either in the event of the settlement being reduced, or of the funds proving inadequate, or in any other event.

The record in the reduction was closed on summons and defences, but before closing, the trustees put in a minute averring that Bruce and Smith had no interest in the issue of the cause. After the record was closed, they moved the Lord Ordinary to assoilzie Bruce and Smith, in respect that the pursuers could effectually try the validity of the settlement without keeping Bruce and Smith as defenders on the record, and they had no legitimate interest to keep them there. Their true motive was to prevent the trustees from having the benefit of the legatee's testimony, which was important for their defence. But the payment of the legacies, coupled with the obligation undertaken by the trustees which guaranteed against a claim for repetition, in any event whatever, had the effect of extinguishing all interest in the issue of the cause, on the part of the legatees, and thereby rendering them competent witnesses. This was the more evident, as the pursuer was only heir of conquest, so that his reduction could only affect the heritage, and did not entitle him to call in question the application of the moveable funds. Bruce and Smith should therefore be kept no longer as defenders on the record.

The pursuer answered that the motion was at least premature. If the whole interest of Bruce and Smith in the issue of the cause was discharged, they could be tendered as witnesses at the trial, notwithstanding their remaining in point of form co-defenders. But as they had regularly been made defenders in this action, they could not be assoilzied from it without prejudging the merits of the cause. But their interest had not been effectually discharged, because, if the deed were set aside, the next of kin of the deceased would have a right to call to account both the trustees and them, for the value of the legacies. Though the pursuer was only heir of conquest, the issue in this case would be precisely the same as if the next of kin were reducing, viz. whether it was not the deed of the deceased? And if the legatees would have an interest to support the deed, against a challenge by the next of kin, it was precisely the same

issue which they were to be called to support now. But, separately, the payment of £200 to a party, was not the way to qualify him to support a challengeable deed, even if so conceived that in the event of the deed being reduced, the sum should remain as an absolute gift to the party. Such a transaction savoured too much of giving a good deed for evidence, to render a witness admissible: and if it did not serve that end, the defenders ought not to succeed in their present motion.

The Lord Ordinary made an oral report of the case.

LORD BALGRAY.—I think it clear enough that Bruce and Smith were made defenders in this cause for the purpose of shutting their mouths as witnesses. I think they should be assoilzied.

LORD PRESIDENT.—The trustees have discharged these legatees of all claim, even in the event of the deed being reduced. And if the deed remains good, they have no interest, as their whole legacies are paid. I think, therefore, they ought to be assoilzied, as the pursuer has qualified no legitimate interest for keeping them defenders on the record. Indeed, he is merely the heir-at-law, and it is *jus tertii* to him, how the moveable funds were applied, whether in payment of these legacies or otherwise.

LORD GILLIES.—The legatees have now no interest whatever in the issue of this cause, and I think they should be assoilzied as defenders. A sufficient reason for doing so has been stated to the Court, and no satisfactory answer is made to it.

LORD MACKENZIE was understood to concur.

THE COURT assoilzied Smith and Bruce, reserving expenses.

J. KNOX, S.S.C.—WALKER, RICHARDSON, and MELVILLE, W.S.—Agents.

HUGH BRODIE, Pursuer.—

JAMES SMITH, Defender.—*Steel.*

ALEXANDER THOMSON, Defender.—*Inglis.*

Process—Small Debt Act—Citation.—The constable, in executing a citation of a complaint under the Small debt Act, stated in the copy-citation that the defender was to answer “at the instance of the above designed Alexander Brodie:” the complainer’s name was Alexander Thomson, and the copy of the complaint, to which the copy-citation was appended, correctly set forth the name and designation of Thomson, the complainer: a regular and correct execution of citation of the defender personally apprehended, was returned: decree passed in absence, and was followed by incarceration:—Held, in the circumstances, that both Thomson and the constable were entitled to be assoilzied from an action of reduction and damages, which was founded on the irregularity of the citation.

By the Small Debt Act, 6 G. IV. c. 48, it is provided (§ 14), “that the decree given by the Justices in any case competent to them by this act, shall not be subject to advocacy, nor to any suspension, appeal, or other stay of execution, excepting only in case of consignation, as herein

Officer, it shall be in the power of the Justices to punish to the poor, or by imprisonment, the fine not exceeding 2 the imprisonment not exceeding 10 days, reserving to the any claim of recourse competent to him by law, against the or other officer, for damage which he may have sustained l or violation of duty as aforesaid."

Alexander Thomson, collector of poors' money, for the burgh, presented a complaint to the Justices of the Peace of Edinburgh, under the said Small Debt Act, stating that grocer, Howe Street, was indebted to him in £1, 3s., and decree to that amount, and expenses. On 4th December, was granted to cite Brodie to compare "upon the 15th ber, 1834, at 11 o'clock forenoon, to answer at the instance of the complainer."

James Smith, constable, was employed to cite Brodie, & citation which he left with Brodie he filled in the blank, the printed schedule for the complainer's name, with the name of Brodie, in place of Alexander Thomson. The citation was in these terms:—"I, James Smith, constable, summon, you, Hugh Brodie, above designed, to compare," &c., in the instance of the above designed Alexander Brodie, on default, to be held as confessed, with certification." Smith then returned a regular execution of citation, bearing that he had been personally cited at Thomson's instance.

When the case was called on 15th December, no appearance was made for Brodie, and decree in absence was taken against him. He was ordered to make payment, and on May 15, 1835, he was ordered to pay the sum of £1, 3s., and expenses.

o, cited Brodie to answer “at the instance at the above designed **No. 2**
 ainer;” the only complainer was regularly designed in the com- **June 18,**
 ; the addition of the complainer’s name was therefore unneces- **Brodie v.**
 n the citation, and a clerical error therein, could not be fatal or **Smith.**
 ial.

That the circumstances of the case indicated an intention by the
 er to entrap the defender into an action of damages, and that in
 r there was no true damage sustained.

e defender Thomson pleaded the same defences, with the addition,
 e could not be held liable for any accidental irregularity committed
 constable whom he was obliged to employ in the duty of citation.
 fee for that duty was 4d., and no person of eminent skill or qualifi-
 could be got to discharge it, and it would be unjust to subject
 collector of poors’ rates in penal damages for an error of the con-
 , especially in the copy-citation, when the principal execution was
 ar.

ie Pursuer answered—

The statute gave no protection except to proceedings which were
 under it. But the objection here was, in substance, that there was
 ation (or legal citation) received by the pursuer, and that a decree
 been nevertheless taken against him. If this objection was well
 led, the procedure could not be covered by the statute, otherwise
 debt decrees would be good against defenders who never had an
 ntunity of defending themselves.

Even if the copy-citation would have been sufficient without the
 of the complainer being inserted, that was not the species facti.
 citation bore in gremio to be at the instance of Alexander Brodie;
 no other citation was given. This was equivalent to no citation at
 the instance of Alexander Thomson.

The allegation that there was a desire to betray the defenders into
 ction of damages was denied; and as for the question whether real
 ges were sustained, that was for the jury alone.

As to the separate defence of Thomson, he stood in the ordinary
 ion, towards Smith, of master and servant, or mandant and manda-

Whatever questions of relief might exist inter se, both were liable
 lidum to the pursuer, to the extent of making civil reparation.

he Lord Ordinary “repelled the defence of incompetency, reserving
 uestions of expenses; and appointed the pursuer to give in a condes-
 ance within eight days, and the defenders to answer the same by the
 box-day in the ensuing vacation.” *

* **NOTE.**—The Lord Ordinary holds the action to be competent, notwith-
 ing the finality of the Justices’ decree, by the 6th Geo. IV. cap. 48, because
 error was never brought legally before the Justices. The act prescribes the
 of citing a party, and even common law requires that a defender shall be told

No. 299.

The defenders reclaimed.

June 18, 1836.
Brodie v.
Smith.

At the first advising, the Judges were equally divided, the LORD PRESIDENT and LORD BALGRAY being inclined to adhere to the interlocutor, and LORDS GILLIES and MACKENZIE to alter it. The case was again advised on the following day.

LORD PRESIDENT.—I think the citation was inept. In the copy-citation left with the defender, the complainer was designed as Alexander Brodie, when in reality he was Alexander Thomson. If this is not to render a citation liable to reduction, I think an erroneous statement of the name of the defender for whom it is intended should also be overlooked, or an error in both names together. But I conceive the Court cannot do this, and that if the copy-citation sets forth a complainer who has no existence, the citation cannot be defended from reduction.

LORD MACKENZIE.—This is a question which may be attended with very important practical consequences. I perceive from the schedule appended to the statute that a sum of 4d. sterling is the precise fee due to the constable who executes this citation. There was a regular copy of the complaint signed by the clerk, and a regular warrant to cite, and all that remained was for the constable to execute the warrant by leaving a copy of the complaint, and a copy-citation with Brodie, for his fee of 4d. Of course such a constable was a man of no skill or particular qualifications, whose services were to be procured on these terms. In making out the copy-citation, there was no necessity for the constable's repeating the name or designation of the complainer. But he did more than was necessary, and added superfluous matter, in which he certainly fell into an inaccuracy by writing the surname of the complainer as Brodie in place of Thomson. But is it possible for Brodie, on whom service was so made, to allege that he was in any doubt who the complainer was? Can he deny that he was fully certificated of that by the complaint and relative citation, such as it was? I do not think he even avers that he ever was in doubt or uncertainty on the subject, and I cannot satisfy myself that we are now called on to reduce the decree in absence following on that citation. A regular execution of citation was returned by the constable, and a regular copy of the complaint had been put into the constable's hands. So far, therefore, as his employer, Thomson, could see, every thing was regular. But the poor constable, one of a class whom Thomson was bound to employ, made an error in the copy-citation which was left with Brodie, and which was exclusively under the control of Brodie. In these circumstances Brodie declined to appear, decree passed in absence, and execution followed thereon, to the effect of incarcerating Brodie: and then Brodie comes forward with this copy citation, which he has kept up all the while, and brings his action of reduction and damages against both Smith the constable, and Thomson his employer. If we are to sustain such an action, in reference to proceedings in which the great object of the statute is to have petty cases decided in a cheap, safe, and

at whose instance he is to appear. But here a blunder vitiated the citation in this respect, so that the defender was never put under the operation of the statute. A much slighter objection has been repeatedly found to exclude the statutory finality,—particularly in the analogous jurisdiction of the Sheriff Small Debt Court.

summary way, then we must allow such an action at the distance of any period within forty years of the date of the decree in absence ; and the innocent party will have to answer for the employment of the 4d. constable. We must allow these petty decrees to be the foundation of processes in the Supreme Court, involving the costs, perhaps, of a jury trial. Surely such a result would be, in all respects, the very opposite of what was intended by the statute regulating the small debt court. And how many of these cases might be raked up from time to time I cannot guess. And it is maintained that all this must be allowed, without any ground for it, except the error in point of form—the mere verbal inaccuracy—of this petty constable, which was an inaccuracy of such a kind that it could not mislead the party who now attempts to turn it so extraordinarily to account. I cannot hold that this party has properly interpreted the statute, when he considers that we are bound to sustain an action which comes before us, in all the circumstances of this. He ought to have appeared when cited, as his citation could not leave him in any doubt as to the true complainer: he did not choose to do so, and I am not inclined to allow him to bring his action of reduction and damages now. I do not mean to decide what shall be the result in other cases, which are not in all their circumstances parallel to the present ; but I think the interlocutor in this case ought to be altered. And your Lordships will observe that the same law which applies to citations in the Court of Session will not apply to this cause, for it is a special statute, having no bearing on this cause, which requires the designation of pursuer and defender in Court of Session causes, under the pain of nullity ; and even that statutory rule has been subjected to some modifications.

LORD BALGRAY.—Although I do not think the case free from doubt, I incline rather to adopt the opinion of **LORD MACKENZIE**, after what I have just heard, than to adhere to the interlocutor of the Lord Ordinary.

LORD GILLIES retained his opinion.

THE COURT, therefore, by a majority, altered and assoilzied with expenses.

J. CULLEN, W.S.—J. ROSS, S.S.C.—H. INGLIS, W.S.—Agents.

THOMAS STENHOUSE, Suspender.—Deas.

REV. JOHN ADAMSON, Respondent.—Penney.

Process—Burgh.—Bill of suspension of a warrant of ejection from an urban tenant on the ground of informality in the process of removing, the suspender offering neither caution nor consignation—refused.

THE suspender, Stenhouse, tenant of the respondent, Adamson, in a house in the burgh of Inverkeithing, having failed in payment of his rent, received, on 12th March, 1836, a warning to remove. Adamson then brought a summons of removing before the Magistrates of Inverkeithing, which, after stating the title of the pursuer, proceeded as follows :—“ That Thomas Stenhouse, defender, having possessed the house in sometime past, and the complainer being desirous to remove him therefrom, caused Andrew Forbes, officer of court, upon the 12th day of

and to leave the same void and redd, to the effect the co
others in his name, may then enter thereto, and peaceably p
and enjoy the same in time coming; conform to the laws an
tice of Scotland, used and observed in the like cases, in all
alleged.—According to Justice, &c.

“ (Signed) GEO. MILLER,
“ Signed 23d May, 1836.”

Upon this summons Stenhouse was cited to appear before
trates the day after the execution, and, on his failing to do
was granted for his ejection.

Thereafter he presented a bill of suspension, on the grounds
summons, not being raised before the Sheriff of the county,
on the Act of Sederunt, 1756, was incompetent; and the bill
irregular, as containing no will, and the inducæ being con
contending, that although removings within burgh were
tent privileged, yet certain forms of law must be observed
caution or consignment was offered.

Adamson answered, that the usual solemnities were not
in removings from urban tenements, and no proper grounds
pension had been stated; and he referred to Bell on Leases
Note 1.

The Lord Ordinary refused the bill, finding Stenhouse
penses; and on a reclaiming note being presented,

THE COURT adhered.

ANDREW STEWART, Pursuer.—*W. Bell.*
ROBERT STIRLING, Defender.—*Paterson.*

Process—Bankruptcy—Perjury.—Circumstances in which an action and conjoined declaratory action, which were raised with concurrence of the Lord Advocate, to obtain a discharge and composition-contract under the Bankrupt Act, and which were founded on charges of perjury and fraudulent bankruptcy, were dismissed as incompetent or regularly laid, reserving to the pursuer to institute any new action in proper form.

In June, 1832, the estates of Robert Stirling, horse-dealer in Edinburgh, were sequestrated. Richard Haxton, jeweller, was appointed trustee, and under the regular statutory forms, a composition of 6d per pound was reported to the Court by Haxton, to have been accepted by the majority of the creditors, and the composition contract was approved of, and Stirling discharged by a decree in common form, in April, 1832. In June, 1833, Andrew Stewart, horse-dealer in Edinburgh, a creditor of Stirling's for a debt of £66, with concurrence of the Lord Advocate, raised an action of reduction of the composition and of the decree of discharge: the action was directed against Stirling alone; it libelled Stirling had only given up a pretended state of his affairs, and had nevertheless emitted the oath required by the Bankrupt Act; that, for purpose of defrauding his creditors, Stirling had secreted or privately disposed of the most valuable part of his effects, including three horses, some plate and table linen, and a quantity of horse-harness of great value; that he had secretly indorsed away a bill, drawn by him on, and accepted by James Bonar, for £45; that he had "wilfully failed to exhibit a fair and true state of his affairs to the said trustee, and is consequently a fraudulent bankrupt, whereby he has incurred all the forfeitures and penalties set forth in the said statute: Decimo, That the foresaid contract of composition, act and decret approving thereof, exonerating the trustee, and discharging the said Robert Stirling of all debts contracted by him prior to the date of his sequestration, are null and void, and reducible in terms of the Act of Parliament above referred to, whereby it is enacted and declared, by section 33, 'That if the bankrupt shall wilfully fail to exhibit a true and correct state of his affairs, or to make oath in terms above-specified, or to make a complete surrender, he shall be considered as a fraudulent bankrupt, and punished accordingly, and rendered ever after incapable of holding any office of public trust or emolument, and, in either case, shall forfeit every benefit or privilege arising from the present act.'" The action was concluded for declarator of nullity of the composition contract, and that the pursuer should be reponed against it; and that Stirling should be ordered to make full payment of the debt of £66. Stirling pleaded in defence, that as the action involved charges of the

In 1835, during the making up of the record, Stewart
mentary action, calling the trustee, one of the two cauti
representative of the other, who was now deceased, and a
of Stirling, who had ranked or claimed on his estate. 7
also with concurrence of the Lord Advocate. The reason
again set forth that Stirling gave up a pretended state of
nevertheless emitted the oath required by the statute; th
of affairs was, "in many respects false, fraudulent, and d
he had secreted or privately sold the most valuable part o
cluding three horses, a considerable quantity of silver pla
table linen, and a quantity of horse-harness of great valu
privately indorsed away the bill above mentioned for £4.
propriated the proceeds; that he had "wilfully failed to
fair surrender of his estate, or to exhibit a correct or fair
facts to the said trustee and creditors, and whereby the fa
of composition, act and decret approving thereof, exoner
tee, and discharging the said Robert Stirling of all debts
him prior to the date of his sequestration, are null and void,
both at common law and in terms of the act of parliament
to, whereby it is enacted, sec. 33, 'That if the bankrupt
fail, &c., he shall be considered as a fraudulent bankrupt,
accordingly.'"

Stewart libelled the additional reason, that the contrac
approved of by the statutory majority of creditors, and th
majority was "simulately and fictitiously made up," and w
posed of creditors who had got a private gratuity for thei

pursuer and other creditors of Stirling were entitled to revive and follow out the sequestration. It did not contain a conclusion for payment of the pursuer's own debt.

Similar defences were lodged to this supplementary action, except that no objection now remained that all the proper parties were not called. The two actions were conjoined, and a record being completed up, the Lord Ordinary found "that the action is not competently or regularly laid, therefore dismissed the same, and decerned; reserving to the pursuer to institute any new proceeding in proper form, and to the defender his defences against any such proceeding; and found the pursuer liable in expenses."*

Stewart reclaimed.

THE COURT adhered.

J. MALCOLM, S.S.C.—J. CULLEN, W.S.—Agents.

MAGISTRATES OF FORRES, Petitioners.—*Sol.-Gen. Cuninghame.*

Prison—Process.—Where there has been a very recent examination and report as to the condition of a building, on which the Court of Justiciary granted warrant to use it as a temporary legal prison for criminal prisoners; held, that the Court of Session may grant a similar warrant, as to civil prisoners, without any new examination or report.

THE Magistrates of Forres presented a petition, stating that their present jail was in a ruinous state, and they were about to erect a new one; 1st

* "NOTE.—This process consists of an original and a supplementary action conjoined. The original action is radically of a criminal nature. It has civil conclusions, but these are set forth as only consequent on a conviction of the defender of fraudulent bankruptcy, and, accordingly, the penal character of the principal subject of the complaint being clear, it is instituted with the concurrence of the public prosecutor. Now this action, taken by itself, is plainly destitute of all the precision, and other privileges, due to the accused. But it was objected, in the defences against this proceeding, that certain additional persons ought to have been called in defenders. On this a supplementary action was raised, which not only calls these persons, but does a great deal more, and this proceeding is supposed to remove the previous defects. Now, even this second attempt is very defective in articulate detail, though the Lord Ordinary is not prepared to say that to a certain extent it might not do. But it is liable to the fatal objections, 1st, That it is a summons supplementary of another, which is utterly inadmissible; 2d, That it totally changes the character of the previous complaint,—new parties are introduced, the demand for a conviction of fraudulent bankruptcy is virtually departed from, and the action, from being a criminal, is made into a purely civil proceeding. The Lord Ordinary thinks that the only way of dealing with such a case is, to dismiss the action, reserving to the pursuer to begin correctly if he chooses."

LORD PRESIDENT observed, that, as the application to Justiciary had been duly intimated, and as sufficient evidence of the building was then adduced, it appeared to be to order any farther intimation or report. This petition is a warrant in relation to prisoners in civil cases, to the same Justiciary Court had already granted as to prisoners in criminal cases and it seemed proper to grant it without delay.

THE COURT concurred with his Lordship, and granted it forthwith.

MACKENZIE and INNES, W.S.

No. 303. JAMES DINGWALL FORDYCE, and OTHERS, Petitioners.-

June 23, 1836. *Tutor and Curator—Minor—Process.*—Where the nearest of kin of a minor were resident abroad, the Court, in conformity with the practice, “dispensed with the citation of the kin of the said mother’s side, and found that the inventories made, or to be made, in the said process, with concurrence of the two next of kin on the mother’s side, or with concurrence of a delegate to be named by the Court, shall be as valid and sufficient, and shall have the same force and effect as if the nearest of kin of the said minor on the father’s side had been cited and concurred in making up the same, or, after

ROBERT ROBERTSON, Petitioner.—*Jamieson.*

No.

—
Roberts

Bankruptcy—Cautioner.—An offer of composition, payable at six, twelve, and eight months, after the date of approval by the Court, was unanimously accepted by creditors; a bond of caution for the amount was signed by the bankrupt, and a cautioner approved by the creditors; the bankrupt then died, and a petition presented by the trustee alone, praying the Court to approve of the composition, to exoner the trustee, and to discharge the bankrupt's heirs: after the usual caution, the Court granted the petition, which was not opposed.

THE estates of M'Gregor were sequestrated on 30th June, 1835, and June 23
Robert Robertson, merchant in Perth, was appointed trustee. At a 1st D.
meeting of creditors, held after due advertisement, on March 9, 1836, D.
M'Gregor made an offer of composition of five shillings per pound, pay-
in three equal instalments, at six, twelve, and eighteen months, from
date of approval by the Court. The offer was entertained, and, a
meeting being duly called, to decide on it, on April 2d, the offer
unanimously accepted, and Robertson, the trustee, was authorized to
report the proceedings to the Court, and obtain the approval of the com-
mission, and the discharge of himself and the bankrupt. A bond of cau-
tion for payment of the composition was, on May 14th and 23d, signed
M'Gregor, and by a cautioner, of whom the creditors had approved.
Subsequent to the execution of this bond, and before any application was
made to the Court, M'Gregor died. Robertson then presented a petition,
setting forth these circumstances, and founding on the 68th section of the
Bankrupt Act, which enacts that when any petition for sequestration is
presented, "it shall be competent for any other creditor to concur there-
in, and to follow forth the same, even without the consent, or after the
death of the creditor or creditors originally petitioning," &c.; and if the
bankrupt shall happen to die after the petition for sequestration shall
be presented, the proceedings under this act shall, notwithstanding, be
carried on, and followed out to their conclusion, as if he were in life."
The petition prayed the Court to appoint the petitioner's bond of caution
to be delivered up, "and thereafter to find the said proposal of composi-
tion reasonable, and to approve and confirm the same, and to interpose
the authority of the Court thereto, and grant warrant to deliver up to
the trustee an extract of the bond for payment of the composition, for
the use of the said creditors; to find and declare the said Robert Robert-
son trustee, exonerated, and the said James M'Gregor, his heirs, exe-
cutors, and successors, discharged of all debts contracted by the said James
M'Gregor, prior to the 30th day of June, 1835, the date of the foresaid
sequestration, except as to the payment of the said composition; and to
decree that all proceedings in the sequestration shall cease."

No. 304. The trustee's report bore that the whole creditors concurred in the application. No appearance was made to oppose it.
 June 23, 1836. *Curtis v. Curtis.* At first moving the petition in the single bills, the

LORD PRESIDENT expressed a doubt as to the competency of approving the composition-contract after the death of the bankrupt.

But, on the case being resumed, after intimation, which was merely made in common form,

THE COURT granted the petition.

W. B. CAMPBELL, W.S.—Agent.

No. 305. JOHN LESLIE, Advocator.—*M'Neill.*
 THOMAS CURTIS and MANDATARY, Respondents.—*Keay—Neaves.*

Ship—Register Acts—Contract.—Where a party residing in Edinburgh stood on the register as sole owner of a ship, and had made oath to that effect at the Custom House, and held a bill of sale of the ship in his own favour—held liable for necessary furnishings, such as provisions, &c. made in London, on the order of the master, in fitting out the ship for an outward voyage to Australia, though the party alleged that the master was the only owner, and that he himself was merely a creditor of the master, holding no true right in the vessel, excepting in security of a debt.

June 23, 1836. IN June 1834, a bill of sale of the ship *Nimrod*, was taken from the owners of that vessel, in favour of John Leslie, residing in Windmill Street, Edinburgh. The vessel was at that time registered at Greenwich, and on 18th September following, an indorsement was made on her certificate of registry, by the former owners, declaring that she had been transferred by bill of sale to Leslie. A new certificate of registry was taken out at Leith, and on 22d September, Leslie made oath at the Custom House of Leith, that he was sole owner, and that Francis William Hepburn was master of the vessel. The new certificate of registry at Leith bore that Leslie was the sole owner, and that Hepburn was master. Hepburn was the brother-in-law of Leslie.

During this time the vessel was lying in the Thames, and fitting out for a voyage to Australia, on which voyage it was usual for a vessel to be fitted out with a view to the transport of passengers as well as goods. Hepburn, the master of the ship, ordered provisions for her, from Thomas Curtis, shipping butcher in London, and was supplied with meat, for consumption in harbour, amounting to £3, 3s. 10½d., and with provisions for the voyage amounting to £42, 10s. Among the latter furnishings in charge of £2, 10s. for a goat and her kid were included. These furnishings were all made between the 19th and 25th September, and chiefly on the 23d and 25th September.

In January 1835, Curtis and his mandatary raised an action before the No. 1
Admiral of Leith, against Leslie, concluding for payment of the above June 2
count of furnishings. Leslie pleaded in defence, 1st, That they had Leslie
been made without any authority from him, and that, although he now
stood on the register as sole owner, yet the true owner had always been
his brother-in-law, Francis William Hepburn, for whose behoof it had
been bought in June 1834, and who was also master; and that he (Leslie)
had merely taken the conveyance in his own favour as a security for a
loan to Hepburn: 2d, That as his title, on the register, was not complete
at the date of the furnishings, or part of them, he should not be subjected
to such part, if he proved that de facto he was not owner, but merely a
factor of the true owner: 3d, That the furnishings, especially the goat
and kid, were not of a necessary or ordinary sort: and, 4th, That at
least the furnishings ought not to have been made to such extent without
direct authority, even if he was to be dealt with as owner.

Curtis answered, 1st, That as early as June 1834, a bill of sale was
executed in favour of Leslie, as purchaser, which was followed up by an
indorsement on the Greenock certificate of registry in his favour, as pur-
chaser, on 18th September; by his oath that he was sole owner on 22d
September; and by the Leith certificate of registry, in which he was
named as sole owner and Hepburn as master. In all questions with bona
fide third parties he must therefore be dealt with as owner: 2d, The
fact of the title made him liable as owner during the whole period of the
furnishings: 3d, The furnishings were of the ordinary and most neces-
sary kind, being provisions for a voyage; and as there were generally a
large number of passengers in vessels, on that voyage, a goat and her kid were
regularly taken to supply them with milk: and, 4th, That the furnishings
were such as might be ordered by the master, and would bind the owner,
without any immediate authority from the owner; especially as London
is a remote port, relatively to the residence of the owner, which was in
Edinburgh.

The Admiral of Leith, "In respect of the admitted deed of vendition
on the ship *Nimrod*, and the subsequent indorsement proceeding thereon on
the ship's register at Port-Glasgow, and in terms of the defender's declara-
tion at the Custom House, Leith, on taking a new certificate of regis-
tration of the said vessel, and in terms of the said certificate, finds that the
defender was, when the furnishings in question were made to the master,
owner of the ship; and found the defender liable to the pursuer for
the amount of the said furnishings," &c.

Leslie brought an advocacy.

The Lord Ordinary "found it proved, in terms of the interlocutor
in review, that when the furnishings in question were made to the
ship, the advocator was sole owner of the ship, and therefore liable to
be responsible for the amount of the said furnishings; remitted the cause

LORD GILLIES.—The Court cannot listen to any allegation that merely a creditor of the true owner. He stood registered as sole must be dealt with as such.

LORDS BALGRAY and MACKENZIE concurred.

THE COURT adhered, and awarded additional expenses to the

A. M'NEILL, W.S.—M. and W. SMILLIE.—Agents.

No. 306.

WILLIAM ISLES, Pursuer.—D. F. Hope—Pypa

JOHN GILL, Defender.—Robertson.

JAMES REID, Defender.—Patterson.

Bill of Exchange—Arrestments—Assignment—Stamp.—A was employed to do wright work on his house to an extent exceeding £300, and various payments to account: he addressed to B the following November 18, 1831. "SIR,—Pay the bearer the sum of £40 sterling the same against my account of wright work for your house." B signed in token of acceptance of the order contained in it: Held that it was a bill of exchange, and not being written on stamped paper, was void.

June 23, 1836.

**1st Division.
Ed. Cockburn.**

IN a conjoined process of forthcoming and multiplepoinding by the sheriff of Forfarshire, William Duncan was common debtor and the balance remaining due of a debt of above £

charge the same against my account of wright-work for your house." No ed) "WILLIAM DUNCAN." (Signed) "JAMES REID." The June 7th signature of Reid was stated by him to have been affixed in token of Isles' concurrence of the order in the letter. Gill alleged that this letter was sent to an assignation of the debt then due by Reid to Duncan, at which he had intimated the letter to Reid and obtained his signature on the same date with the letter. Isles alleged that Duncan, Reid, and Gill were in collusion, and that there was no such letter, or at least no assignation to Reid, until after the date of his arrestments. But he alleged separately that the letter was essentially a bill of exchange,¹ and that, on unstamped paper, it was a nullity. Gill contended that it was an assignation of the balance of an account, precisely similar to that in the case of Lawrie,² indorsed on the back of an account, which had been found in the case of Lawrie² not to require a stamp.

After ascertaining by judicial remit, the amount of the balance of the debt due by Reid to Duncan, it appeared that it would be more than covered by the expenses of the raiser of the multiplepoinding, and the validity of the document founded on by Gill, if sustained as an intimated assignation, prior in date to the arrestments of Isles. The sheriff found the raiser entitled to his expenses, &c.; and that after these deductions, a balance of the fund in medio will amount to £25, 11s. sterling; and, in respect of the case of Lawrie, 6th February, 1810, the order or mandate founded on by the claimant John Gill is not struck at by the stamp laws; and therefore sustained said order or mandate, and ranked and preferred the claim of the said John Gill primo loco on the fund in medio; and found that said claim, being so ranked and preferred, will exhaust the whole of the remaining balance of the fund," &c.

Isles raised a reduction of the decree against Gill and Reid. The Lord Ordinary "sustained the defences and assoilzied," &c.

Isles reclaimed.

LORD PRESIDENT.—I consider that the letter by Duncan to Reid is essentially a bill of exchange. If it had been simply an order "Pay the bearer the sum of £40 sterling, and charge the same against my account," it appears to me that it would indisputably have been, both in form and substance, a bill drawn by Reid for £40. But the words "of wright-work for your house" are added to those which I have just quoted, and it is said that these essentially alter the nature of the draft. I do not think so. I look on it as a bill, and, being without a stamp, it is of no legal effect. The judgment of the Lord Ordinary should be altered and the case sent back to his Lordship with a finding to that effect.

LORD BALGRAY.—The objection of the want of a stamp is one for which I

¹ Alexander, Feb. 26, 1830 (ante, VIII. 602); Mackintosh, May 13, 1830 (ante, VII. 739); Pirie's Representatives, Feb. 28, 1833 (ante, XI. 473).

² Feb. 6, 1810 (F.C.); Thomson, March 1, 1831 (ante, IX. 520).

expenses.

J. D. LAWRIE, S.S.C.—J. STUART, S.S.C.—J. CHRISTIE, S.S.C.—A

No. 307.

THOMAS M'CHLERY, Petitioner.—*W. Bell.*

Bankruptcy—Process.—Where the bankrupt is abroad, and a petition is presented, with concurrence of the trustee and the requisites of creditors—petition superseded, in respect the Court will not grant to take the bankrupt's oath abroad.

June 23, 1836.

1st Division.

It is enacted by the Bankrupt Act, § 61, that the Court give a discharge to the bankrupt as there specified, "the bankrupt taking an oath before the Court, or on commission before the Court, before the act can be extracted, that he has faithfully complied with the requisites of the statute," &c.

In the application of Thomas M'Chlery, merchant and partner in Dromore, Wigtonshire, for discharge under the Bankrupt Act, with concurrence of the trustee and the requisite proportion of creditors, it was stated that M'Chlery was abroad, but had left a partner to support this petition, and the Court were moved to grant a discharge and take the oath abroad and have it reported to the Court.

LORD PRESIDENT.—The petition must be superseded. The

CAIRNS'S TRUSTEES, Pursuers.—*Keay—Ferrier.*
 WILLIAM BROWN, Defender.—*D. F. Hope—Russell.*

Bill of Exchange.—The drawer of a bill induced the holder to delay presenting it for payment when due; after the protracted term had elapsed, the drawer, at his own request, had the bill sent to him by the holder to receive payment, and thereafter protested it for non-payment, but neglected to use any measures of diligence against the acceptor, who became insolvent;—Held, that the drawer was liable in payment of the contents of the bill, and was barred from pleading want of due negotiation.

In February, 1830, the defender, Brown, writer in Kinross, applied by letter to the late Christopher Cairns, in the following terms, for a loan of £200 :—“ A client of mine, a very responsible man, is in want of £200, for which I, along with him, would grant you a bill. If you can spare this sum even for six months, it would both oblige me and my friend; and if you have £400 or £500 to lend on landed security, I could, I believe, get you a first security for such a sum or sums about Whitsunday. Please write me by post upon receipt if you can give the £200 presently wanted, and also if you could give £400 or £500 at Whitsunday.”

Cairns having agreed to this proposal, a bill for £200, at 12 months, was, on 5th March following, drawn by Brown upon and accepted by one Thomson, innkeeper at Kinross, and was thereafter indorsed by Brown to Cairns, who accordingly advanced the money. On the 2d March, 1831, three days before the bill became due, Brown wrote to Cairns as follows :—“ Owing to the sale which takes place (of the cattle, &c) at Springfield, on Thursday, the 10th current, I find it will be out of my power to meet you at Corstorphine, according to promise. I wish, however, that you would write both me and Thomson by post, requesting the money to be paid, as you are requiring it to pay off the balance due for the building of your house, and that you trust this will be done on or before the 25th current, or if not then paid that you will be obliged to resort to measures disagreeable and expensive. Send separate letters, one to each; and you may also complain that I did not meet you at Corstorphine, according to promise, and that you are much disappointed.”

In consequence of this communication, Cairns did not present the bill for payment when it fell due. On the 22d March, Brown again wrote to Cairns in the following terms :—“ Mr Thomson wishes, if convenient for you, to be allowed to retain the £200 which he owes you, for some months longer, say three or so, by which time, as the business will then be increasing on the road, he expects to be able to pay you. The interest will be remitted you for one year, by a bank

No. 308. draft, in the course of a few days, and in the mean time I will expect to hear from you as to the principal sum, whether you can let it lie off or not.”
 ne 23, 1836.
 Cairns's Trusts
 s v. Brown.

On the 11th April, Cairns answered as follows:—“ I was favoured with your's of the 22d ult. saying that Mr Thomson wished to retain the £200 for 3 months longer; but I expect Mr M. will be pointed in making prompt payment at the elaps of that time. I am summoned as a jurneyman on the Circuit Court here on Saturday first, and must be at home,—as there will be some of your intimat acquaintance here also,—I will take it kind if you will hand me the intrest by a parcel in that weay.”

Brown in answer, of date the 15th, wrote in these terms:—“ I was duly favoured with yours of the 11th current, the contents of which I communicated to Mr Thomson; and he requests me to return you his best thanks for the favour you have granted him, by allowing the £200 to lie over for other three months; at the same time, he has paid me the interest for the last twelve months, which ought to have been paid you on the 11th March, or thereabouts. I got the money, £9, last night, and I now send it to you by my friend and acquaintance Mr Robert Birrell of Kinneswood, which I hope you will receive safe.”

Nothing farther took place till the 20th August, when Brown addressed a letter to Cairns, requesting that the bill should be transmitted to him, in order that he might call on Thomson for payment. The bill was transmitted accordingly by Cairns, who expressed a hope that he should receive immediate payment, and on the 1st September it was protested by Brown for non-payment. In March, 1832, Thomson, the acceptor, declared himself insolvent; and, nine months thereafter, a poinding was executed, and arrestments used in the hands of a debtor, at the instance of Brown. From the insolvency of Thomson till the death of Mr Cairns, in July, 1834, various letters passed between him and Brown, in which Cairns made repeated applications for payment of the sum in the bill, while Brown stated his attempts to recover it from Thomson's bankrupt estate, without discharging his own liability as drawer. The contents were never recovered. After the death of Cairns, an application on the part of his trustees and representatives was made to Brown, to pay the sum contained in the bill, and take an assignation to the debt. Brown having refused to do so, the trustees brought the present action for payment of the bill in question, and also for the balance of a prior bill, which was found to be prescribed, and to which it is unnecessary to advert.

In defence against the action it was pleaded, That Brown was not liable in payment, as the holder had failed in duly negotiating it; and, the rule of law being clear, there were no circumstances to warrant the debt being kept up as a debt against him, in the face of the legal discharge which was operated by the neglect of Cairns duly to negotiate: That, although

Brown might have consented to the acceptor receiving indulgence for a limited term, and on certain conditions, he was freed by Cairns having, at his own hand, exceeded the term, and dispensed with the conditions.

The trustees, on the other hand, maintained the following pleas in law :—

1. Brown, the drawer and indorser of the bill, having, by his advice and directions, induced Cairns, the holder, to abstain from presenting and protesting it when it became due, is barred, *personali exceptione*, from pleading the want of such presentment, and protest, and notice of dishonour, as a ground on which to be freed from his obligation on the bill, and is liable in payment of it, with interest, equally as if it had been duly negotiated.

2. Brown, who, as appears from the correspondence, acted as Cairns's agent, having written to him in the terms he did, offering to grant a bill amongst with a party desirous of a loan, whom he represented as a "very responsible man," thereby put himself forward as Thomson the acceptor's, guarantee, and, as such, is liable in payment of the bill.

3. He is liable also on the ground of culpable negligence in not enforcing payment from Thomson, inasmuch as he neglected to do due diligence in recovering the contents of the bill for many months after it had, at his own request, been put into his hands for that purpose, having allowed six months before Thomson's bankruptcy and nine months after that event to elapse, without taking any step to recover the contents of the bill.

The Lord Ordinary assoilzied the defenders with expenses, and issued the subjoined note.*

* "It is quite extravagant in the pursuers to represent the defender's letter of 2d March, 1831, as 'expressly directing Cairns to abstain from protesting the bill.' There is not a syllable about protesting in that letter, and nothing of the nature of a direction to abstain from any thing. The want of protest, therefore, would of itself be an insuperable bar to the action; and in the case of Campbell referred to 20th December, 1833, 12 Shaw, 269), though formal notice of dishonour was said to have been passed from, there was a regular protest. But the case does not rest there. Even if there had been a protest, and notice of dishonour in due term, the Lord Ordinary inclines to think that the conduct of the party would have afforded the drawer a sufficient defence against this action. On the 22d of March, 1831, the defender writes, professedly as agent for Thomson, the acceptor, requesting in his name an indulgence for three months longer; and on the same paper, though on a separate page, he writes in his own name, stating that he wished that Thomson's application should be substantially refused, but that he might be told that, on condition of his paying down one half of the bill on the first of April, the other half might be allowed to lie over for two months or so. Now, this request of the defender, Cairns thinks proper entirely to disregard. He does not even answer it till near a fortnight after the first of April is past, and then says that he consents to let Thomson have three months longer credit for the whole sum; and, as a point of fact, gives him five months without the knowledge or consent of the defender, and then, in the end of August, sends the bill to the defender himself to

payment from Thomson. Cairns then applies to have payment of this the protracted term. After this Brown came to be agent of the debt, and he protests the bill on the 1st September, nothing more till March 1832, when the defender coolly writes that he had made repeated demands on Thomson, who had failed, and he gives himself no farther trouble. All this time no step of poinding or arrestment at last a poinding is attempted. Had the defender been charged with poinding at the first the money would have been paid to the pursuers, which goes on the ground of the defender's conduct appears to be likewise invincible. I am, therefore, for an execution.

LORD MEDWYN.—I concur in the views which have been expressed chiefly on the ground of the last plea in law. I do not know whether I was agent for Cairns in all his concerns, but in regard to this bill it is not to be denied that he acted as such. The money was advanced by Brown alone, and he obliged himself equally, though the bill was not accepted by Thomson. The bill became due on the 5th day before Brown writes to ask that indulgence may be given

endeavour to make it effectual against Thomson, when it is found to have been protested—a defect which the defender immediately proceeds, as agent for Cairns, to make a claim on Thomson founded both by poinding and arrestment. Thomson falling into the snare brings an action of multiplepoinding, in which the defender pleads the bill as Cairns's interest, and says he probably would by this time have made full payment, had not Cairns died in 1834, and his trustees (who) thought fit to refuse him authority to go on in their name, and to institute the present action.

expense should be put upon the bill. This is agreed to, and then, in his letter of the 22d March, he asks a farther delay. If the case had stood upon this one it would have been different. According to the view taken by Brown, he should have asserted that he was freed when Cairns granted the indulgence. But he acquiesced, and lulled Cairns into full security, who would naturally suppose that matters remained just as before, but with a waiver of negotiation. Until after Cairns's death no hint is given of the want of notification. On this point I think the interlocutor not well founded; but I am equally clear on the point of culpable neglect on the part of Brown, after the bill was transmitted to him, to follow up measures of diligence against Thomson. Where he was already acting as agent for Cairns, he takes no step except protesting the bill, giving no charge, and not even writing to Cairns whether he should go on with diligence or not.

LORD JUSTICE-CLERK.—I am clearly of opinion that this interlocutor should be altered on both the grounds stated by Lord Medwyn. First, this defender wrote and acted so as to lead Cairns originally to rely on Thomson. Then the letters referred to led Cairns farther to rely on this, that if he granted a temporary indulgence for a few months he should be secure. In none of Brown's letters do you observe a hint of the neglect of diligence by Cairns. Again, when Brown had the bill sent back to him at his own desire, it was his bounden duty to do diligence. But the facts of the case and the letters show that he neglected this duty.

LORD MEADOWBANK.—I have doubts as to concurring. I did not see evidence at the outset that Brown was acting as agent for Cairns in negotiating the loan. Nor can I hold Cairns to have been so ignorant as to rely solely on the advice of the agent of the party who was receiving the loan. I do not think it can be inferred from the letters that he delayed demanding payment of the debt at the instigation of Brown. Then as to Brown asking the bill to be sent to him—having prompted the loan, he must naturally have felt desirous that Cairns should be paid, and at first he expected that payment would easily be had from Thomson.

THE COURT altered, and decerned against the defender with expenses.

J. and W. FERRIER, W.S.—A. and J. PATERSON, S.S.C.—Agents.

not under the ordinary prescription. 3. Circumstances in which interlocutory judgment of a Sheriff was recalled in an advocacy not complained of by the advocate, and was alleged to be final Court.

June 24, 1836. In 1834, Elizabeth Jardine raised an action before Dumfries-shire, against William Thom, surgeon in Anna
1st Division.
Ld. Fullerton.
D. in August, 1818, she had been delivered of a natural child was the father, and concluding for payment of £2, 2s. penses, and aliment, for 12 years, at the rate of £6, 6s. per interest on each respective half-year's aliment; but under £17 of partial payments to account.

Thom did not dispute that he was originally liable; but up a record, Jardine having averred, in article 2. That 1 part of the aliment or inlying expenses, except £17; Thom "Denied. He paid her in full for the aliment of her child to an agreement between her and him."

In art. 3. Jardine averred resting-owing, as to the claimed; to which Thom answered, "Denied. He paid 1 according to the agreement aforesaid."

Thom pleaded, that all claim by Jardine was now cut off by prescription.

The Sheriff-substitute, on 2d September, 1834, sustained the averments of Jardine, and "the offer to prove Thom's oath; and ordained him to appear and depone," &c.

Jardine had not made any unqualified reference to oath to make it, so that no oath was taken. The Sheriff-sub-

by sustaining a reference to his oath, had been allowed to become No. 3
without being reclaimed against, and it could not be altered in this
ess, which was not an advocacy at the instance of Jardine. It was June 24,
before the law of this case, and it left to Jardine no alternative but to Thom. v.
the cause to his oath. Jardine.

, The plea of triennial prescription should have been sustained;

, Even if prescription did not apply, he had a right to prove that
ne had made an agreement under which she discharged him in con-
tion of a sum paid to her: After she allowed the claim to lie over
long a period, the advocator was entitled to be favourably dealt
and all the circumstances, including her taciturnity, should be
into view, in going into the proof of such an agreement.

dine answered—

, That she never had made a reference to oath, and, whether the
ff-substitute's interlocutor of 2d September, 1834, became final or
t could be of no avail in sustaining a reference which was never

. But, at any rate, as the advocacy of Thom brought up the
process and interlocutors together, it was competent to the Lord
ary, if it seemed at all necessary, to recal the interlocutor unwar-
ly pronounced.

The plea of triennial prescription was inapplicable to such a debt
, and was properly repelled by the Sheriff; and,

There was no competent proof offered, of the alleged agreement;
it which, decree must go against the advocator.

: Lord Ordinary “advocated the cause; recalled the interlocutors
Sheriff, from that of the 2d September, 1834, inclusive; repelled
ea of prescription on the part of the advocator; and appointed the
, be enrolled, that parties may be heard on the remaining points
cause, particularly the averments of fact made by the advocator
record, and the mode of proof by which he proposes to establish

NOTE.—As the pursuer and respondent did not make any unqualified re-
to the oath of the defender in her condescendence, the interlocutor of the
tember, sustaining the reference, and ordaining the pursuer to appear and
, must have been pronounced per incuriam, and necessarily required to
ended, whether brought under review within the reclaiming days or not.
e was no reference, the pursuer could neither be called upon to de-
nor be held as confessed for not deponing. Besides, the whole interlocu-
ders of the Sheriff are brought up by the advocacy, without exception or
on; so that the Lord Ordinary sees no difficulty in remedying the error
interlocutor, without requiring an advocacy on the part of the re-
nt.

he main question—whether or not a claim for the bygone aliment of a na-
ild by the mother against the father, be subject to the triennial prescrip-
t attended with very considerable difficulty; arising in a great measure, as
re to the Lord Ordinary, from the different views which seem to have

cularly expressed in the statute; and as all the particulars ex-
tute were reducible to sale or location, the same are not to be
tiorum gestio.' Now aliment, in the sense in which the term
entertainment and support afforded to a party, by an individual
or calling, fairly raising any implication of contract in that
obligation which is of a different kind from that by contract. I
of recompense or remuneration; and it is so treated of express
In discussing the question, how far aliment is to be held gra
makes the following distinction:—'In all cases, aliment or en
to any person without paction, is presumed a donation, if the
and capable to make agreement. But entertainment to minors
doth ever infer recompense, according to the true value of the
'Taking the case, then, between the child itself, and the party by
voluntarily afforded, the claim of recompense, so far from being
debts' mentioned in the statute, differs from the other 'debts'
the only essential particular, to which the principle of the statu
be referred. Though 'mens ordinaries' form one of the artic
and though in one, and the literal sense, they may be said to be
aliment, they are aliment afforded by contract, or supposed con
parties; and the fair construction is, that the expressions, 'oth
support obligations of the same kind, admitting of either being
or vouched by writing; qualities which a claim of remuneratio
forded to a pupil or minor, in the supposable case of his having
tors, could not possibly possess. 2dly, When aliment is afforded
parents, or tutors or curators bound to aliment him, the claim
another light, which may bring it under another category, th
gestio. The aliment afforded there, may be fairly considered
behoof of the parent or guardian, and therefore, upon that gro
parties, upon the ordinary principle, to make recompense, but cer
certainly not exposed to the triennial prescription. 3dly, and I
which occurs here—viz. that of the claim of the mother of a bastar
father for bygone aliment—there is the additional peculiarity, th
the child, both father and mother are jointly bound, the claim

ould have proposed to the Court to order a hearing by one counsel on each for it is important to have that question authoritatively settled. But the special circumstances are enough to warrant us in adhering to the Lord Ordinary's decision.

No. —
June 2
Thom
Jardine

ding aliment, and the neglect of the important, and, as he thinks, the essential element, in which a claim of remuneration for bygone aliment differs from all the other kinds of debts enumerated in the statute. No doubt, if it could be shown that the point was closed by any consistent and conclusive series of decisions, all controversy might be superfluous: But this cannot be seriously maintained. The decisions, pronounced by the Court at different times, unfortunately present an inconsistency, which no ingenuity can reconcile, or explain away. In one case reported by Harcarse in 1683, Prescription, No. 765, a claim for alimenting seems to have been held as falling under the statute; while in another, February, 1687, it was found, that 'alimenting, and process or defence thereon, doth not prescribe more than three years, that not being the case of mens ordinaries mentioned in the Act of Alimement.' In the case of Hamilton¹ of Bangour against Lady Ormiston, 25th Feb. 1716, and in certain other cases there referred to, it seems to have been held that such claims do prescribe—although the report does not explain the precise circumstances which gave rise to the question. In the case of Davidson v. Watson² it was held that the aliment of a minor did fall under the triennial prescription; but this judgment was reversed in the House of Lords. In Paterson³ v. Pirrane, an action brought by the mother of a bastard against the father, the plea of triennial prescription was repelled; but it rather appears from the report, that it was so repelled upon special circumstances admitted by the defender, and not for these circumstances, the claim would have been held to fall within the operation of the statute. In the next case, that of Forsyth⁴ v. Simpson, the question was decided in terminis in favour of the plea of prescription. Since that time, however, the decisions, and most certainly the opinions expressed by the Court, have been in the opposite direction. In the case of Macdowall⁵ v. M'Lurg, Macdowall, the grandmother of the natural child, raised an action against the father of the child, and against the natural child herself, to whom he had left a considerable succession. Prescription was pleaded, and the plea ultimately repelled. In that case, the father had been absent from this country from the date of the child's birth; but it does not appear from the report how far that circumstance affected the opinion of the Court. In the case of Finlayson⁶ v. Gowan, the question of prescription was not directly raised, but, according to the report, it appears to have been the opinion of the Court, that 'there was no prescription applicable to such a case.' In the last case that seems to have occurred, that of Mathnot⁷ v. Symon, in which an action was raised, after a lapse of thirty-two years, by the mother of a bastard child against the father, for aliment during the time the child resided with her—the defender was assolizied, first by the Lord Ordinary, and afterwards by the Court. There it was expressly laid down in the opinion of the Lord Ordinary, and it seems to be implied in the interlocutor adhered to by the Court, that 'prescription does not apply to such a case.' And the decision rested 'upon the circumstances established by the proof, as well as by the immaturity for so long a period.' Upon the whole, then, it rather appears to the Lord Ordinary, that the preponderance of the later cases is against the admissibility of the plea of prescription; and holding, on the abstract point of law, the opinion which he has already expressed, he thinks himself warranted, notwithstanding his decision in the case of Forsyth v. Simpson, in repelling the plea as in bar of the action; though he concurs entirely in the principle adopted in the last case,

[Or. p. 11, 100. ¹ 14 Feb. 1758. ² 15 Feb. 1791. ³ 14-10 Feb. 1807, F.C.

⁴ 7 July, 1809, F.C. ⁵ 15 May, 1834, S. D. and B. XII. 590.

LORD MACKENZIE.—I am of the same opinion. I look at admissions as tantamount not only to a constitution of the debt to establishing its non-payment also, at least unless Thom shew a defence which he has averred. Had he made a simple allegation pleaded, that by the lapse of the triennial prescription he was under necessity of producing evidence of payment, but the creditor made no oath, I should have had the utmost difficulty in holding that he did not fall under the prescription just like any other debtor. But Thom has taken a different course; he rests his defence upon a plea of payment, which he will now prove, if he can, but which will not stand against the claim of Jardine.

THE COURT, in the special circumstances, adhere to the decree.

W. BELL, S.S.C.—**HAMILTON and COOPER, W.S.**—Agree.

No. 310. **WILLIAM BERRY and SPOUSE, Pursuers.**—**D. F. HENDERSON'S TRUSTEES, Defenders.**—*Sol.-Gen. C. Rutherford—Monteith.*

Interest—Provision.—The father of one of the parties to a deed having bound himself "to make payment to them of the sum of £1000 of payment not being mentioned—circumstances in which held that the principal sum was not due from the date of the contract, but only after the death of the granter of the provision.

June 24, 1836. **IN** a postnuptial contract of marriage, executed in 1834,

e payment of the sum of £20,000 to William Berry and Mrs Isa- No. 3
 Henderson or Berry, in conjunct liferent allenary," and to the
 of their bodies in fee, with a substitution in case of failure.

June 24,
 Berry v.
 Henderson
 Trustees.

here was an alternative provision that Sir Robert might discharge
 elf of the substantive obligation as to this £20,000, by settling and
 ning, at any time of his life, an heritable estate of equal value in lieu
 ad as an equivalent for the money provision, but no term of payment
 pecified. Mr Berry, on his part, settled a like sum of £20,000 on
 eirs-male of the marriage, which was declared to be payable at the
 erm after his death. The provision by Sir Robert Henderson was
 ibed throughout the contract as a sum devised and settled on the
 s and their children, and not as a sum assigned or made over, inter

In the event of both spouses predeceasing Sir Robert, it was pro-
 that the £20,000, the fee of which was provided ab initio to the
 en, should not be payable to them till the first term after his death.
 various communings which took place previous to the execution of
 ntract, the parties concerned manifested their understanding to be,
 ie provision settled by her father upon Mrs Berry should be put on
 me footing as a provision of £20,000 to a younger sister, which
 ade payable at Sir Robert's death.

he original scroll of the deed, instead of the provision for a payment
 0,000 to Mr and Mrs Berry, there was a devise of the same sum
 e laid out in land after the testator's death." No demand for pay-
 f the provision was made during the life of Sir Robert Henderson,
 ed in 1833.

reafter, Mr and Mrs Berry brought an action against Sir Robert's
 s for implement of the post-nuptial contract and payment of the
 on of £20,000, in which the only seriously contested point, was,
 r the pursuers were entitled to interest on this principal sum from
 t term after the death of Sir Robert, or from the date of the con-

They maintained that the obligation come under by Sir Robert
 cording to its legal import, an obligation to pay de presenti, no
 payment being mentioned; that this view was corroborated by the
 ce of intention afforded by the alteration which had been made upon
 oll of the deed; and that therefore interest was due from the date
 ontract. The defenders answered, that in the circumstances, it
 ar the provision was not to take effect till Sir Robert Henderson's

Lord Ordinary pronounced an interlocutor, finding, 1. That the
 s were entitled to implement of the contract under the obliga-
 rein contained to pay over to them the sum of £20,000 in money;

"That according to the just construction and true and legal
 g and import of the said post-nuptial contract, the said pursuers
 r entitled to interest on the said principal sum of £20,000, from
 term after the death of the said Sir Robert Henderson, till pay-

**JOHN H. DALRYMPLE and OTHERS, Petitioners.—*D. F. Hope—
Rutherford—Maitland.***

CHARLES RANKEN, Respondent.—*Keay—H. J. Robertson.*

No. 3

June 25,
Dalrymp
Ranken.

Curator Bonis—Trust—Process.—1. Circumstances in which, where a Scottish resident at Paris, became insane, the Court appointed a curator bonis to his ship, with the usual powers, notwithstanding the subsistence of a trust-deed lawfully granted by his Lordship for behoof of his creditors: the Court observing, such appointment did not prejudice any question either as to the validity of the said trust-deed, or the rights created by it. 2. Personal service of the petition and, besides the usual intimation, on the special motion of the petitioners.

The late Earl of Stair left a trust-settlement, under which the trustees June 25,
directed to purchase lands, in the shires of Wigton, Ayr, or 1st Divi
andbright, with the free residue of the trust-funds, and to add them D.
: entailed estates of the family of Stair. The trustees invested
698, in the purchase of various parcels of land, in which they
obtained a feudal investiture in their own favour, as trustees. The
late Earl of Stair, the first heir of entail entitled to the rents of these
entered into possession of them, by arrangement with the trust-
tees he drew the rents, and let leases, &c. In 1834 he raised an action
against the trustees to compel them to denude of the trust-heritage and
convey it to him, under the requisite fetters of entail. The trustees
made defences, alleging, inter alia, that the purposes of the trust were
not fulfilled.

In January, 1835, his Lordship executed a trust-disposition in favour
of Charles Ranken, solicitor in London, on the narrative of his various
debts and his desire to provide for the payment of his creditors. The
said deed contained a disposition of his whole heritage, specially enu-
merated, including that which had been bought by the trustees, and to
the trust-deed set forth, Lord Stair had now right under the
said Earl's trust-settlement. It also included in general terms "all and
land and others, to which I have right under the settlement of
the Earl"—"or in virtue of the deeds of entail to be executed by his
heirs in favour of me and of his other heirs of tailzie."

In May, 1836, a petition was presented by Sir John H. Dalrymple,
heir-male and of tailzie to Lord Stair as an individual, and by him
Robert D. H. Elphinstone, a quorum of the trustees of the late
Earl, with concurrence of the nearest agnate, and the nearest of kin, of
the said Earl, which stated that his Lordship was now in Paris; that he
was in a state of hopeless imbecility or insanity, accompanied with para-
lysis, and was wholly unable to administer his affairs; that Ranken, in July,
1835, had taken infestment under the trust-conveyance in his favour, and
that he acted as non habente potestatem in so far as concerned the
trust-estate, and was not lawfully vested in the trustees, yet that he was attempting to enter

...augmented members of the medical profession, chief physician to a lunatic hospital near Paris. The certificate was attested on oath by the physicians here in Paris. In addition to these, Dr John Wilson was sent to visit Lord Stair professionally, and he gave a certificate with those of the French physicians. And it was intimated that Dr Wilson was ready to give evidence before the Court as to the condition of Lord Stair, if this was deemed necessary.

At moving the petition, the Court were prayed to order that Lord Stair should be removed to a lunatic hospital on Lord Stair, besides the usual intimation, an effect was pronounced; and the petition was personally served on Lordship in Paris.

Answers were lodged by Ranken, who did not deny that Lord Stair had recently fallen into a state of mental incapacity, but he contended that at this event, he had made large advances, and come under the influence of the faith of the trust-deed in his favour; that a remainder had some time ago been raised by the late Lord Stair, and that the appointment of a trustee would not prejudice the merits of that action, because, so long as the trust remained effectual, he, as trustee selected by Lord Stair, was the proper party to administer the whole estate falling under the management of the curator bonis. If the trust-deed remained unreduced there was therefore no room for the appointment of a curator bonis, and the Court never made such an appointment where the exigency of the case required it.

say, for Ranken.—But if a curator bonis shall be appointed, he is not entitled to proceed instantly and invert the state of possession of the lands, which acquired by Mr Ranken under an onerous trust-conveyance from the pre-Lord Stair. No. 3
—
June 28,
Carmichael
v. Hay.

san of Faculty, for Pursuers.—That is a question which cannot be determined here, and will be tried in the proper process.

ORD PRESIDENT.—The Court will appoint a curator bonis with the usual powers. That is our present duty. When the curator is appointed he will exercise his powers according to law. But what he shall do, in the exercise of his powers, is not for our determination now.

THE COURT granted the petition.

Æ. MACLEAN, W.S.—MACKENZIE and INNES, W.S.—Agents.

THOMAS GIBSON CARMICHAEL and OTHERS, Suspenders.—*Rutherford—W. Bell.* No. 31

vs JOHN HAY and OTHERS, Chargers.—*D. F. Hope—Anderson.*

Contract.—Circumstances in which interdict was granted against the trustees of one sub-district of roads, from erecting three check-bars which would interfere greatly injure the tolls of another sub-district; in respect, inter alia, that the sub-districts having previously formed one district, and having contracted a debt, a division of that debt took place when the sub-districts were formed, and proportion of the cumulo debt was allocated upon each sub-district, corresponding to its existing tolls.

It was a question of a special nature, between trustees of the second district of roads in the county of Peebles, who were also obligants for advances advanced on the security of the tolls of that district, and trustees of the first district of roads of that county, who were also assignees to the tolls of that district. It appeared that these two districts had formerly formed but one, called the Western District, during which period a considerable amount of debt had been contracted. In an act which was passed in 1830, authorizing the sub-division of the Western District, provision was made for a distribution of the cumulo debt, and allocating it to the respective sub-districts; which was to be done by the sheriff of Edinburghshire, as arbiter, if the parties made a reference to him, in pursuance of the act. Such a reference was entered into, and the sheriff, in settling the debt, had special regard, inter alia, to the tolls of each respective district, the amount of which was laid before him. The tolls of the second district were by far the greatest, and the sheriff allotted nearly three-fourths of the whole debt to the second district. Subsequently to this, Thomas Gibson Carmichael and Others, trustees of the second district, and obligants for the above debt, presented a bill of suspension of interdict, complaining that Sir John Hay and Others, trustees of the first district, were about to erect certain bars or check-bars within the first

The chargers reclaimed.

No. 3

THE COURT adhered, and awarded additional expenses. LORD MACKENZIE, however, observed, that he considered the interlocutor too unqualified in stating the prejudice to the funds of the second district as the cause for preventing the erection of the three check-bars; and also that the reservation in the Lord Ordinary's interlocutor was too narrow.

June 28,
Harkness
Graham.

DICKSON and STEWART, W.S.—A. GOLDIE, W.S.—Agents.

MAS HARKNESS and THOMAS RANKEN, Objectors.—*Rutherford—Whigham.* No. 3

LIAM A. GRAHAM, Claimant and Respondent.—*D. F. Hope—G. G. Bell—Putton.*

nor—Bankruptcy—Accounting—Provisions to Children.—A party died, leaving a small apparent estate, but affected by a certain amount of debts; in order to its execution, his minor heir, with consent of his testamentary curators, who had omitted to make up inventory, granted a heritable bond for £4000; bankruptcy, in a few days, became apparent, and a ranking and sale of the estate was brought, in which the £4000 was laid on the heritable creditor to prove that the contents of the bond were applied beneficially for behoof of the minor; some of the curators apparently had intromissions with a considerable amount of curatorial funds, and allowed confusion to get into their accounts; another of them, who alone had the £4000, applied it chiefly in paying debts for which the minor was responsible or in making disbursements in the management of his affairs, but partly also in making a partial payment to the younger children of the deceased, of the sums due to them under a bond of provision by him: Held, in the circumstances, that the application of the £4000 for behoof of the minor was sufficiently proved, 1st, because the privilege of inflicting on curators the severe penalties of 1672, c. 2, is due to the minor, and does not pass to his creditors; and 2d, because the payments to the younger children (for their board and education) were made bona fide

. That the check-bars in question would, if erected, be injurious to the second district, is manifest from the sketch in process, and from the admissions of the first district. They are all within six miles of the suspender's toll-bars at Romanno and Restanes, and consequently toll could not be exacted at these two bars from those who had paid at any of the check-bars. But it is admitted that a great part of the revenue of the tolls in this part of the county arises from drove cattle which go from the North to the South and never return. It is plain that to that extent the first district is calculated to profit the first district at the expense of the second. A sufficient answer on the part of the chargers that, if these check-bars are erected, the drove cattle may possibly evade the tolls in both districts. It is agreed that they have done so hitherto, and if it shall be attempted, means must be taken to prevent the evasion which are fair and equitable for both trusts. The duty which belongs to the general trustees for the whole county, and must be committed to the discretion of either the first or second districts separately, the interest of the one district being adverse to that of the other."

The company were extensive cattle dealers. The seller and Smith nominated his brothers, and also Edward who was the brother of his wife, to be tutors and curators. The curators omitted to make up inventories; but they management of the estate, and expedite a confirmation in liam, and also made up titles, in his person, to the estate a heritable bond for £6000, affecting the estate of Jerburgh of Land was subsequently proved to be worth £24,300 confirmed being £4817, the whole estate left by Alexander including the bond for £6000, exceeded £35,000. The affected by debt to the amount of £17,883. On 5th 1 when the extent of the obligations of the firm of James there was not known, at least, to Hoggan, who was co-vance for William Smith, then 18 years of age, a loan with consent of his curators, effected on his heritable estate being borrowed from William A. Graham of Calside. In loan, the heritable bond for £6000 over Jerburgh was dispo as well as the estate of Land.

At the death of James Smith of Jerburgh, his affairs embarrassment, and a ranking and sale of his estate was as it ultimately proved that the estate and effects of the Smith were unequal to the payment of his debts, a ranking of Land was also brought. In these processes, Graham of heritable bond of £4000, and was opposed by Thomas Graham factor, and Thomas Ranken, common agent in the ranking on the ground that, as the bond was granted by a minor n

ion of the £4000, it appeared that from the want of proper books, it was impossible to discover what was the state of the proper effects and liabilities of the company of James Smith and Brothers, at Alexander Smith's death, or what was the proper share of Alexander Smith in the concern. It appeared, however, from the books of the National Bank at Dumfries, that, at that date, the company owed the bank, on account-current, £8895, 3s., and had acceptances there, amounting to £36,070, 10s. The whole of this sum, amounting to £39,974, 13s., was paid by the surviving partners, James and John Smith, but it could not be traced from whose hands it was paid. It farther appeared from the correspondence of Hoggan, W.S., and his books, which were regularly made up at a time when he had apparently no interest to misrepresent facts, that the £4000 of Abraham's loan passed into his hands, and was paid away by him to meet debts for which the minor, as his father's representative was liable. It also appeared, however, that the gross rental of Land, prior to the date of appointing the judicial factor in the ranking, amounted to £4162; and when this was added to the moveables confirmed (so far as not received by Hoggan) there was a sum of £8436, 13s. 5d., falling under the curatorial management, of which no account was given. But it did not appear that any part of this sum had been received by Hoggan, and the accountant thought it probable it had been applied by John and James Smith in paying the debts of the company.

The accounts of Hoggan with William Smith, as finally approved of by the accountant in his report, consisted, on the one hand, of charge, embracing rents and feu-duties received by him,—the proceeds of certain crop and stock sold by him,—and certain debts due to Alexander Smith, repaid by him: and, on the other hand, of discharge, including debts of Alexander Smith, paid by Hoggan; parochial burdens, &c., also paid by him; expense for buildings, improvements, and repairs, and farming expenses, amounting to fully £300; rents of farms occupied by Alexander Smith, amounting to £380; three premiums on a life-policy for £3000, effected by Alexander Smith on the life of James Hoggan, amounting to £340 (which policy was dropped by William Smith on coming of age, and James Hoggan in two years after, died); payments by Hoggan for the younger branches of the family of Alexander Smith, chiefly for their board, education, &c., amounting to £754; inventory-stamp; and law expenses, after deducting all remunerating charges for professional trouble or agency, amounting to £261. These accounts embraced a balance exceeding £500 of outlay by Edward Hoggan, prior to the date of the loan; and disbursements amounting to £2714, 6s. 9d., within three weeks thereafter. The result of the whole left a sum of £44, 19s. 7d. still in Hoggan's hands.

To the report of the accountant it was objected by Harkness and Ranken, 1st, That as no curatorial inventory was made up, the curators were liable, by 1672, c. 2, in a strict and penal accounting; the statute de-

No. 313. **June 28, 1836.** **Harkness v. Graham.** declared that they "should have no allowance or defalcation of the charges and expenses wared out by them in the affairs of the minor;" and therefore all articles for which Hoggan took credit as advanced in the management of the minor's affairs must be struck out: and as they had not given up inventory, it was to be presumed they had intromitted with curatorial funds, or they would not have made the disbursements in question. But further, the minor, William Smith, could have objected to being debited with these items, and the creditors could therefore object to any part of the loan of £4000 being applied to them, because such application could not be beneficial to the minor, since it went to satisfy debts for which he was not bound. 2d, That the books and letters of Hoggan could afford no evidence in this question, as he was a party interested, being charged with the whole loan of £4000, and liable to Graham in repetition, unless in so far as he could instruct the application of that sum to the minor's estate. 3d. The accountant should have disallowed the partial payments made to account of the provisions of the younger branches of the family of Alexander Smith, as they were not creditors, in a competition with the creditors of Alexander Smith. 4th, The sum of £380 of farm-rents paid by Hoggan should have been disallowed, because he did not charge himself with the proceeds of the crop and stocking on these farms. 5th, An inventory stamp of £120, on the confirmed testament should have been disallowed, because the Stamp Office would have refunded it, on the bankruptcy of Alexander Smith's estate being proved. And, 6th, Even the outlays of Mr Hoggan, in law business should not be allowed, as he had failed to make up inventories.

Graham answered, 1st, That this was not a question between the minor and his curators; and the privilege of inflicting penal responsibility upon curators for not making up inventory was personal to the minor, and did not pass to the creditors. All bona fide disbursements which had been made to extinguish claims against the minor's estate, ought, therefore, to be allowed, when the sole question was, in a competition among creditors, whether a certain sum of £4000 had, or had not, been beneficially employed for behoof of the minor. But even in a question with the minor, the account ought to be sustained as approved by the accountant. 2d, as there was no other evidence in the case, the letters of Hoggan, and his books, which were regularly kept, and which were chiefly made up at a time when it was expected there would be a considerable reversion to Alexander Smith's family, and when Hoggan had apparently no interest to misrepresent facts, were good evidence of the transactions they embraced. 3d. The whole payments made, during about three years, to the younger members of the family did not exceed £754, and were chiefly for board and education; the bond of provision in their favour made them creditors at least of the heir, William Smith, who was liable for an amount very greatly exceeding these payments, had the estate been solvent, and the payments were made bona fide when insolvency was not expected,

when, as yet, no diligence had been done by any creditor.¹ 4th, No. 31 farm-rents were a debt due by William Smith, whatever became of stock on the farm. Apparently that stock had been applied to pay debts of James Smith and Brothers, for which Alexander Smith, as partner, was liable; but it was enough for this question that none of proceeds of the stock (except so far as admitted by Hoggan) had their way into his hands, and that all the £380 came out of the² 5th, Before the bankruptcy of Alexander Smith's estate was known, period had passed within which it was competent to apply for repetition of the inventory stamp, which was necessarily an outlay in the first place; and 6th, as the accountant had allowed nothing to Hoggan for anything, excepting outlay, he was as well entitled to allowance for that as for any other debt paid by him.

The Lord Ordinary "having considered the objections for the judicial factor and common agent to the accountant's report, and whole process, rejected the objections, and approved of the report; and found that the contents of the bond in question were beneficially employed for behoof of William Smith the minor." *

Anderson, Dec. 9, 1802 (F.C.); Gardener, Nov. 28, 1810 (F.C.)
 Barton, Feb. 10, 1749 (8931).

NOTE.—In the state in which the affairs of the late Alexander Smith of Glasgow were left at his death, the Lord Ordinary is of opinion that it was a rational administration on the part of his eldest son, William and his curators, to advance the sum in question, with the view of extricating them, and he is satisfied with the accountant's report that it was duly applied for that purpose. That the attempt did not prove successful, does not affect the point at issue.

The property left by Alexander Smith appears from the report to have exceeded £35,000, and his heritable debts amounted only to about £17,833, while engagements, in consequence of his connexion with the company of James Smith and Brothers, could not then be ascertained, and the amount of them was unknown either to William or his curators. The attempt to effect an arrangement, however, by obtaining this loan was at that time feasible.

The principal objections which have been taken by the common agent and judicial factor to the mode in which the money was applied, do not appear well-founded:—1st, It is said, that because curatorial inventories were not made up in accordance with the provisions of the statute, 1672, the minor, under the authority of that statute, was entitled to object to his curators taking credit in their accounts for any sums they advanced in the management of his affairs. But this is a question not between the minor and his curators, but between an heritable creditor who lent money to the minor, and his other creditors claiming on his estate. Now, although it is possible that the minor might insist on the infliction of the severe penalty provided by the statute, it is a privilege personal to himself, and not transmissible to his creditors who are not entitled to insist in his right that it shall be inflicted. It is no objection to a minor that he refrains from taking advantage of the penal clause against his curators, who have acted bona fide, and, with the exception of one omission, cared and acted diligently in the management of his affairs. That part of the contents of the bond, therefore, which was expended by the curators in paying off debts belonging to the estate, or in reimbursing themselves for the advances which they had made for that purpose, appears to the Lord Ordinary to have been beneficially applied. 2d, It seems no less clear that the curators were entitled to make advances

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Harkness and Ranken reclaimed, and insisted, especially, that the sum set down on account of law expenses should be disallowed.

But, on its being expressly stated from the bar, that, although the note of the Lord Ordinary did not apparently so put it, yet the fact was, that the Accountant had allowed for nothing but outlay, the Court unanimously intimated that the interlocutor should be adhered to.

THE COURT accordingly adhered.

J. RANKEN, S.S.C.—A. CLASON, W.S.—Agents.

ces to the younger children as part of the provisions left to them by their father's settlement. They were creditors to their brother for those provisions—there was no bankruptcy declared or known when those advances were made, and no creditor at that time had done diligence. In such circumstances, it has been found that trustees and executors being in bona fide, are entitled to pay *primis intervenientibus*, and the curators, therefore, were safe in making moderate payments for support of the family. 3d, It is said that the rents of the farms tenanted by Mr. Alexander Smith were paid to the landlords by Mr. Hoggan, the acting curator, and taken credit for in his accounts, although he does not debit himself with the stock upon those farms. But the rents were paid for the very purpose of carrying on the farms, and preserving the stock upon them, the leases being considered as beneficial. 4th, An objection is made to the sum paid for an inventory stamp, because the estate having turned out bankrupt, repetition might have been obtained from the Stamp Office. But it was necessary, under the Statute, to procure the stamp, and the insolvency was not ascertained till after the period when the price of it could be recovered. Lastly, There seems to be no reason why the business accounts of Mr. Hoggan, acting not as curator, but as a professional man, should be excluded from the charge.

“ It is unnecessary to consider the objections to the admissibility of Mr. Hoggan's books and letters, and the letters of the minor, as evidence of the state of Alexander Smith's affairs at the period of the loan, and the prospects then entertained of extricating them. They are plainly the best evidence which the case admits to prove the views which were then entertained, and the reasonableness of those views. The accounts were not framed, nor the letters written *ex post facto*, in reference to this process. Neither party had any interest at that time to misrepresent the facts which they are produced to prove.

“ Without entering more minutely into the details of the Accountant's report, or considering the objections to it by the claimant, which, in point of amount, are unimportant, it is thought that the beneficial application of the contents of the report is clearly established.”

ARQUIS OF QUEENSBERRY and OTHERS, Pursuers.—*Rutherford*—
G. G. Bell.

No. 3

IN WRIGHT and OTHERS (King's Kindly Tenants of Lochmaben,
&c.)—*D. F. Hope*—*Shaw*.

June 28,
Marquis of
Queensberry
v. Wright

Inds—Title to Pursue—Res Judicata—Rei Interventus.—1. In a process of augmentation and locality, decree of augmentation was pronounced, and remit was made to the Lord Ordinary to prepare a scheme of locality; his Lordship, in March, 1810, pronounced an interlocutor, assailing a class of heritors from the process, and holding them not liable in teind; notwithstanding a lapse of nearly twenty years, the interlocutor never was reported to, or approved by, the Court, and no final decree of locality had been made up, when a reduction was raised by the other heritors, of the interlocutor of March, 1810: Held (1.) That the heritors, without the concurrence of either the minister or the titular, had a title to pursue the reduction; and (2.) That as the interlocutor was never approved by the Court, it never became final, and there was no *res judicata*—Question, whether the actings of the Court in a process amounted to a homologation of an interlocutor, so as to bar the pursuers by personal exception, from challenging it.

1792, the minister of the parish of Lochmaben raised a summons for augmentation and locality. A large number of the heritors of the parish, having a rental of nearly one-third of the whole, were small proprietors, termed the King's Kindly Tenants, of the four towns of Lochmaben, Holm, Heitæ, Heck, and Greenhill, in the barony of Lochmaben, which was one of the old possessions of the Royal Family of Scotland. The tenure of their property was, in various respects, peculiar, and they pleaded, in the process of locality, that their lands were proper Crown lands, which, by the consuetude of Scotland, was invariably exempt from teind.

In 1805, a new process of augmentation and locality was brought, in which the first was conjoined, and, thereafter, a good deal of process and discussion took place, at intervals, among the parties to the process, regarding the right of exemption, claimed by the Kindly Tenants. In 1808, the Lord Ordinary appointed parties to prepare opinions on this subject, to be reported to the whole Court. No opinion was lodged, but, in 1810, a minute was put in for the Kindly Tenants, representing that they were ready to obtemper the order, but had been unable to force on the Common Agent with his information, that they “understood from the Common Agent, that he was to desist from any farther endeavour to subject the Kindly Tenants and possessors in payment of any part of the stipend due to the minister. That, under these circumstances, he had enrolled the cause for the purpose aftermentioned, and had duly intimated to the Common Agent the purpose of enrolment. He, therefore, humbly moved the Lord Ordinary to repel the demand made on the part of the Common Agent and heritors for

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1st Div.
Ld. Cockburn
Teind.

THIS INTERLOCUTOR WAS NEVER REPORTED TO, OR APPROVED BY.

It was followed, at intervals, by three interim schemes which were constructed in terms of the interlocutor, as lands of the Kindly Tenants. But no final scheme of augmentation was made on it.

In 1822, a third process of augmentation and localisation and the previous conjoined process, in which no final scheme was made up, was now awakened, and conjoined with the new process. Subsequently to this, an augmentation being obtained, and a petition appointed, he lodged a representation against the interlocutor and craved to have it found that the lands of the Kindly Tenants be localised on along with the other heritors. They lodged a representation tending that the representation was incompetent, both in point of time since the interlocutor of 1810 was pronounced, and the actings of all parties to the process, which in the meantime had been allowed on the faith of it, such as their acquiescence in the interlocutor, based upon it; the tenor of their pleadings, &c.

The Lord Ordinary "having considered this representation complains of an interlocutor pronounced by Lord Polkelly on the 10th day of March, 1810, together with the answers, and having considered the proceedings in this process, before and after that interlocutor was pronounced, refused the petition as incompetent, and the interlocutor represented against."*

* "NOTE.—The interlocutor of Lord Polkemmet was not reported to, or approved by."

This interlocutor was acquiesced in, and a reduction was raised, for the purpose of setting aside the interlocutor of 1810, and declaring that the lands of the Kindly Tenants were liable for teind.

Against this action defences were pleaded, which gave rise to discussion upon various points,* among which were the following :—

The defenders pleaded—

1. That where a heritor obtains a decree of valuation of his teinds, the co-heritors have no title to reduce the decree, even though it causes a larger proportion of stipend to fall on them, because it is only the minister or titular who have a patrimonial interest in the teinds of that heritor; and the present was a similar question, in that respect, as the defenders held a judgment declaring their exemption from teind, and none but the minister or titular had a patrimonial interest in their teinds; the interest of mere co-heritors being comparatively remote and contingent.¹

2. The interlocutor of absolvitor by the Lord Ordinary was competently pronounced, and being long ago final, it was now *res judicata* that the defenders' lands were exempt from teind.²

3. It had been acquiesced in, and acted on, by all parties, for a long term of years. The pursuers were, therefore, barred by personal exception from challenging it.

The pursuers answered—

1. That in the process of locality, in which the interlocutor, 1810, was pronounced, they had both an interest and title to represent against that interlocutor, and so bring it under review: and although, from the lapse of time, and other circumstances, a reduction had been held necessary, in place of a representation, yet they had the same interest and title to pursue the reduction, as they had, in 1810, to give in a representation.

consideration of the merits, the Lord Ordinary does not mean to express any opinion."

* The pursuers attempted to plead, that no Common Agent had been regularly appointed. But the minute was extant of his appointment, on the motion of the heritors; the pleadings had been lodged in his name; a variety of meetings of heritors had been called by him as Common Agent, and his account of expenses had been paid by the heritors.

The Court had no hesitation in dealing with the process on the footing that a Common Agent had been duly appointed.

¹ Bulow, Dec. 4, 1684 (15647); Lamont, June 7, 1797 (15706); Abercrombie, March 5, 1800 (Dict. v. Teinds, App. No. 8); E. of Mansfield, May 21, 1800 (Dict. v. Teinds, App. No. 9); E. of Kinnoull, May 21, 1823; Baillie and Others, Feb. 24, 1822 (ante, I. 363; or new ed. 340); Scott, Feb. 5, 1806 (Dict. v. Teinds, App. No. 14).

² (Pleas 2 and 3)—4 Ersk. 3, 1; Philip, Dec. 1692 (12192); Baillie, Nov. 26, 1766 (12210); Bruce, Dec. 15, 1773 (Bro. Supp. V. 458); M'Allister, June 29, 1827 (ante, V. 871); Lumsdaine, Dec. 18, 1834 (ante, XIII. 215).

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2. The remit to the Lord Ordinary, in the locality, was merely to prepare the cause, and report it to the Court, who alone could competently pronounce an interlocutor disposing of the rights of parties. And no interlocutor of the Lord Ordinary could become final, by the lapse of any length of time, until it was approved by the Court.

3. Though there had been some actings of parties, in reference to successive interim schemes of locality, without challenging the interlocutor, yet nothing had passed to bar the right of challenge,¹ both because they all had reference to mere interim schemes of locality, and also because they could not affect the rights of parties in the new locality of 1822.²

The Lord Ordinary reported the cause on Cases.

The Court intimated they had no doubt of the pursuers' title and interest, but directed a minute to be put in by the defenders, "as to the power of the Lord Ordinary to pronounce the interlocutor or decree sought to be reduced, and as to the finality thereof."

The Court, at the same time, recommended an inquiry into the practice, whether the interlocutor of the Lord Ordinary could become final until reported to, and approved by, the Court.

A minute was accordingly lodged on the part of the defenders,³ after which the cause was advised.

LORD BALGRAY.—Whether the interlocutor of the Lord Ordinary would become final or not, by the mere lapse of time, I think the parties here deliberately consented to that interlocutor, and have since adopted and homologated it. After the lapse of twenty years, without a challenge, I hold them barred *perpetui exceptione* from reducing.

LORD GILLIES.—I consider it to be clear that the Lord Ordinary's interlocutor never could become final until approved by the Court. I thought so before the minute was ordered, and I think so still. The actings of the parties cannot be allowed to have the effect of giving to the interlocutor a legal character of finality, contrary to the law and practice of the Court. The actings of the parties may bind

¹ Millie, Nov. 21, 1801 (12176); Clarke, Nov. 17, 1825 (ante, IV. 182; or new edit. 184); Young, Feb. 10, 1803 (12178); Leith, June 7, 1822 (ante, I. 469; or new edit. 435).

² 4 Ersk. 3, 3; Weatherstone, Nov. 12, 1833 (ante, XII. 1); Horne, Jan. 28, 1835 (ante, XIII. 296).

* In support of the Lord Ordinary's power to pronounce the interlocutor, the defenders referred to the following authorities:—

Milligan, Aug. 4, 1779 (14816); Mitchell, Dec. 1786 (14817); Gillon, June 7, 1825 (1 W. and S., 295); 4 St. 1, 63; 2 Conn. on Tithes, 240, and authorities there referred to; Knox, June 23, 1773 (14809); Dundas, Feb. 13, 1793 (14820); Skene, June 3, 1795 (14822); Heritors of Portmoak, Dec. 9, 1795 (14823); Maxwell, Dec. 5, 1798 (14832); Leslie, Jan. 14, 1800 (Dict. v. Stipend, App. No. 2); Locality of Peebles, Feb. 12, 1800 (Dict. v. Stipend, App. No. 3); 2 Ivory's Form of Proc. 453; Bev. Form of Proc. 723.

mselves, but they cannot alter the essential nature of the interlocutor. Con- No.
 sisting, therefore, that the interlocutor, though properly enough pronounced, June 2
 point of form, by Lord Polkemet, was not final, but was always subject to Marqu
 approbation by the Court, and that there is no *res judicata* in this case, the Queen
 question remains, whether the actings of the parties have barred them from a v. Wri
 right to challenge it. To that extent it is competent to found upon their act-
 ings; but I do not see any such actings of theirs as to infer such a result. I do
 not see here any evidence of their having tied up their hands from challenging
 judgment.

LORD MACKENZIE.—I am of the same opinion. I think there is no finality
 in the interlocutor of the Lord Ordinary. Had it been pronounced subsequently
 in 1825, a different rule would have applied to it, but it was pronounced at an
 earlier period, and at a time when, according to my own recollection, and the
 practice we have as to the practice of the Court, the judgment of the Lord Ord-
 inary never became final, till approved of. And I do not think enough is proved
 against the pursuers to amount to an actual agreement to abide by the judg-
 ment. Nor do the localities, which have subsequently followed, bar the pursuers'
 challenge, for they were merely interim localities. Perhaps it may be true
 enough that at one time the pursuers intended to make no opposition to it; but
 they have changed their mind on that subject before the interlocutor became final.
 At the same time, I am willing to allow the defenders an opportunity still of
 bringing any thing farther which they may be able to instruct in support of their
 allegation of acquiescence and homologation. At present I do not think it made
 out; and the judgment was not carried far enough to become final.

LORD PRESIDENT.—I rather think there is nothing but the lapse of time on
 which the defenders can found, as barring the right of challenge. But that is
 not enough where procedure so irregular has been held. I think there is no *res*
judicata in the case.

THE COURT pronounced this interlocutor:—"Sustain the title to sue this
 action, as an action of reduction of the interlocutor of Lord Polkem-
 met, Ordinary, dated 3d March, 1810; find, that the said interlocutor
 never having been approved by the Court, has not become final; there-
 fore repel the plea of *res judicata*, maintained by the defenders, and
 quoad ultra remit to the Lord Ordinary to hear parties farther, &c. re-
 serving all questions of expenses."

F. FRASER, W.S.—W. MARTIN, S.S.C.—T. JOHNSTONE, S.S.C.—K. THORBURN, W.S.
 —Agents.

No. 315.

MOON'S TRUSTEES, Advocators.—*M'Neill.*

June 28, 1836.
Moon's Trustees v. Carmichael.

WALTER CARMICHAEL and OTHERS, Respondents.—*Sol.-Gen. Cockinghame—Anderson.*

Husband and Wife—Discharge—Clause.—1. A party, by a post-nuptial contract, provided to his wife, in the event of her surviving him, two several sums of £300 each, the second to be paid "from the sums of money conveyed by the contract by her to her husband;" she survived him for eleven years; and, while regularly drawing the interest of the first provision, made no claim for the second; shortly after her death, at a meeting of her husband's trustees and legatees, her representatives, on receiving a sum of £210, agreed to grant a discharge of all claims at that instance;—Held that they were notwithstanding entitled to payment in addition of the second sum of £300, but only with bank interest. 2. Clause which held to be demonstrative and not taxative.

June 28, 1836.

2d Division.
Ld. Moncreiff.
T.

By post-nuptial contract of marriage, entered into in 1816, between Adam Moon and Ann Carmichael, his spouse, Moon bound himself and his heirs to provide her, in case she survived him, in a life rent annuity of £40, and also, in the same event, to pay to her the sum of £200 at the first term after his decease, which provisions, "and the further provision in the event after-mentioned," were accepted in satisfaction of her legal rights by Ann Carmichael, who, on the other part, made over to her husband all the effects belonging to her, or to which she should succeed; and the deed then proceeded,—“But declaring always, as it is hereby specially provided and declared betwixt the said parties, that in the event of there being no child or children procreated of their marriage, or alive at the dissolution thereof, then the said Ann Carmichael shall be entitled to the further sum of Two hundred pounds sterling from the sums of money hereby conveyed by her to the said Adam Moon; which further sum of Two hundred pounds in the event foresaid the said Adam Moon hereby binds and obliges him and his foresaids to content and pay to the said Ann Carmichael, his spouse, whether she survive or predecease him, or to her heirs, executors, or assignees, and that at the first term of Whitsunday or Martinmas after his death, with a fifth part more of liquidated penalty in case of failure, and annual rent of the said sum from and after the term of payment during the not payment: Declaring further, that in the event of the said Ann Carmichael predeceasing the said Adam Moon, it shall be in her power, by a writing under her hand at any time of her life, and even on deathbed, to settle and dispose upon said sum of Two hundred pounds in any way and to whom she pleases.”

Soon after the date of this contract, Moon executed a deed altering and revoking a trust-disposition previously granted, in so far as it should be inconsistent with the contract, and taking the trustees bound to implement to Mrs Moon “the bail obligations incumbent on me, and contained in said contract of marriage.” This deed made no mention in pre-

ar of the second provision of £200. Mr Moon died in 1818, being No. 3
 ived by his wife, who thereafter, till her death in April, 1829, regu-
 received and gave discharges for the interest of the provision of ^{June 28,}
 first mentioned in the above contract, but made no demand for the ^{Moon's '1}
 est or principal of the other sum of £200. There was no issue of ^{tees v. C}
^{michael.}
 marriage.

a meeting of Mr Moon's trustees and legatees in March, 1830,
 er and John Carmichael, brothers of Mrs Moon, appeared as her
 representatives; and of this meeting, the minutes, which were sub-
 id by the Carmichaels, set forth, that "Messrs Carmichael, as
 representatives of the late Mrs Moon, claimed a legacy of £200,
 er with certain sums for taxes and annuity, alleged to be due
 the contract of marriage and deeds of settlement of the late Mr and
 Moon, and after very full discussion, the other individuals composing
 eeting unanimously agreed to offer £200 sterling in full of these
 ; and after consideration, the Messrs Carmichael stated that they
 accept of £210 sterling; and this proposition having been ulti-
 y and unanimously agreed to by the meeting, the Messrs Carmi-
 hereby become bound to grant a full and valid discharge of all
 at the instance of Mrs Moon's executors, on payment of said sum
 10 sterling, with interest from this date; and Mr Duncan, as agent
 trustees and parties interested, was directed to settle the same from
 ist funds accordingly."

reditor of Walter Carmichael's having used arrestments in the hands
 trustees, they brought a process of multiplepoinding, in which
 ated the fund in medio to be £210, as set forth in the minutes of
 eting. The Carmichaels objected to this statement of the fund,
 embracing the whole sum due to them under the post nuptial con-
 and, after some procedure in the multiplepoinding, they raised an
 against the trustees before the sheriff of Fife, with which the other
 was conjoined, founding on the provisions of the contract, and
 ling that the trustees should be ordained to pay to them, as repre-
 ; their sister, both the sum of £210 already mentioned, and the
 e sum of £200, as under the additional provision in the contract,
 é legal interest thereof from the date of her husband's decease.

upport of their action the Carmichaels maintained, That under a
 instruction of the contract, they were entitled to both the sums of
 expressly provided thereby to Mrs Moon; that the obligation on
 their claim to the second provision rested was onerous and pure,
 t depending on any quality or condition touching the cause of
 g, or the funds from which payment thereof was to be made; that
 iulation as to a discharge, contained in the minutes of the meeting
 ch, 1830, referred only to the first provision, and at all events was
 der the circumstances, exclusive of the present claim.

sheriff having decerned in terms of the libel, Moon's trustees ad-

No. 315.

June 28, 1836.
Moon's Trustees v. Carmichael.

vocated; and alleging, as they had before done Mrs Moon had never brought any goods or furniture of the contract, they pleaded, That, as it is a contract, that the £200 in question was to be paid by funds; and as there was no evidence of Mrs Moon while the presumptions were all the other way, that this was evidently the understanding of the trustees, Moon having made no demand for the money which elapsed from the death of her husband and his representatives, till a considerable time after the trustees were bound, in respect of the minute particulars, grant a full and valid discharge of all claims at the hands of the executors, on payment of the sum of £210," from demanding the additional £200.

The Lord Ordinary repelled the reasons of the trustees simpliciter to the sheriff, issuing the subjoined

* " It is very clear, that there is nothing in the trusts and the relations of Mrs Moon, which can be taken to discharge, the legacy here claimed. It is evident of £200, and the arrears of the annuity, taxes, and other charges, to the very utmost that can be made of it, therefore, is an understanding in regard to the construction of the settlement, standing, however clear, could be of any avail, to claimants of their legal rights, even though it were aware of the facts at the time. Parties like these cannot be allowed to construe clauses in a technical deed, which is not authorized authoritatively, and the same is to be said of Mrs Moon making the claim, even if it were clear that she did so, but only a very loose idea on the subject.

" The real question therefore is, what is the legal effect of the clause, taken in connexion with the rest of the deed? It is not to say that the question does not admit of argument, but that, in the particular case, he has been struck by the particular place of the clause, after the conveyance of the debts, goods, &c. as a certain colourable probability to the idea, that the effects derived from her. But even though this were the case, from settling the question in favour of the advocate, the clause so taken ought not also to be held as probable by agreement, as a fact not to be redargued, that the clause is at least equal in value to £200? The respondents state, in their defence, Answer to Art. 3), that she actually had effects to the value of £200. But it rather appears that the clause, if it could be held by the advocates, must be held to assume it as a fact to both parties, that there were such effects sufficient to £200.

" But, 2d, This appears to be far too limited a construction in respect of this provision, as well as the rest, renouncing the event of her surviving her husband, and in that case the second provision is the only one by which any part of the estate comes to her representatives in the latter case; and this is confirmed by the statements in the record, and the facts appearing, that at the date of the contract, the husband

he trustees reclaimed.

No. 3

LORD JUSTICE-CLERK.—I have no doubt on the merits, and am for adhering. June 28,
Moon's T
tees v. Ca
michael.
Reading the contract, it appears to have been the express will of Mr Moon to
make two several legacies under different circumstances. I agree with the

Ordinary that the clause in which it is stated that Mrs Moon is to be en-
titled to the further sum of £200 “from the sums of money hereby conveyed by
the said Adam Moon,” are to be held not as taxative but demonstrative.
The fact so concludes for the sum in question “with the legal interest thereof,”
I do not think the Carmichaels are entitled to such a rate of interest.

LORD MEADOWBANK concurred.

LORD MEDWYN.—I have doubts, but I agree that there were two provisions
of £200. The Lord Ordinary has put his interlocutor on two grounds, viz. that
the clause, mentioning the source from which the payment of the second provision
is to come, is to be considered as demonstrative, not taxative, and that, at any
rate, it is to be held that goods equal in value to £200 were brought by the wife.
I do not agree with his Lordship on the first ground; and there is a case of For-
bes against Forbes,¹ where a clause more nearly resembling the clause in question
occurred in the cases he has quoted, was held to be taxative. If I could
show that an amount of funds equal to £200 had been brought by the wife, this
would be sufficient, and I could concur with the interlocutor; but there are pre-
sumptions on the other side against this. The subsequent trust-deed making
reference to the second provision of £200, and Mrs Moon herself never claiming
the conduct of her brothers after her decease, all tend to show that no
sum was brought by her, and that these parties knew that the £200 was
not.

LORD GLENLEE.—I think the case not unattended with difficulty, but am in-
clined to go along with the Lord Ordinary. There is no doubt there were two
provisions, the last being indicated to arise from a separate fund. Now at the
time the contract was made, the man must have known what he got with his
money and unless he had got a sum equivalent to what he gave, one does not see
how he should make the provision in question. And what sort of investigation
could now be instituted into the amount of funds which she brought? These
funds have long ago been mixed with his own funds. I see no specific averment
that the wife brought nothing, and if there were, the provision in the contract

of which the wife must have been entitled, if this post-nuptial contract had
been voluntarily executed by her. It was therefore a very onerous contract
on her part, in construing which every presumption ought to be given against the
validity of any of the provisions made by the husband being dependent, as a con-
dition, on its being proved that he had derived funds from the wife to that amount.
The provision is, indeed, so far conditional, that it would not have had effect,
if he had been children. But otherwise, the Lord Ordinary is clearly of
opinion that there is no condition, and the principle by which he thinks that the
contract once resolved is, that the words, ‘from the sums of money hereby con-
veyed by her,’ are not taxative, but demonstrative only. Similar cases have oc-
curred; and the principle of construction is well established, wherever the scope
of the settlement will admit of it. The Lord Ordinary observes two old cases,
in point of principle, appear to be applicable.—*Drummond*, January 22d,
(*Morr.* 2261), and *Douglas*, February 2d, 1830 [1730] (*Morr.* 2262).”

¹ 21, 1673 (2263).

Diligence—Sequestration.—After a minute by the Commissioner of the sequestered estate, ascertaining the net proceeds realized by the trustee of division, acknowledging that amount to be in his hands, he then paid the creditors of their respective dividends due out of it; he then, before paying the dividends, and a new trustee was appointed, the new trustee to register the bond of caution of the ex-trustee for the net amount contained in the minute, and relative to respect that the amount of the debt charged for was thereby

June 29, 1936. A TRUSTEE on a sequestered estate realized funds a dividend to the creditors. The Commissioners and
1st Division. and, in terms of the Act, minuted, in the Sederunt-B
Ed. Cockburn. net proceeds thereby appearing to be in the trustees' basis, the trustee, who acknowledged the amount to be
pared a scheme of division of these proceeds among
gave the creditors due advertisement that their dividend
accordingly; but he became bankrupt, and his own estate
trated before paying away the dividends. He resigned
and a new trustee was appointed in his place, who, as to
the dividends was now past, registered the ex-trustee's
and gave the obligants a charge for payment of the proceeds
ceeds which the minute of the Commissioners, and the
of division by the trustee, had liquidated as in his hands

LORD GILLIES.—The obligation is recorded; the sum due is liquidated; where is the ground of doubt that a charge for that sum may be given?

LORD PRESIDENT concurred.

THEIR LORDSHIPS directed the Lord Ordinary to refuse the bill.

—Agents.

ANDREW ZUILL, Pursuer.—*D. F. Hope—A. M'Neill.*

HENRY GORDON, Defender.—*Rutherford—Speirs.*

This was a special question as to the construction of a road act (1st Jan Geo. IV. c. 67), in which the Lord Ordinary decided in favour of the defender with expenses, and

THE COURT adhered.

E. and A. M'MILLAN, W.S.—**HOPKIRK and IMLACH**, W.S.—Agents.

GEORGE TURNBULL, W.S. Pursuer.—*Rutherford—Anderson.*

RICHARD HAY NEWTON and JAMES RENTON, Defenders.—*Sol.-Gen. Cuninghame.*

Entail.—An heir in possession under a strict entail conveyed the estate to himself in liferent and to his eldest son in fee, by a disposition bearing express reference to the original entail, to which it was substantially conform, though varying in certain points, particularly in so far as the fetters were not applied to the institute nominatim; the disposition was not recorded in the register of tailzies,—Held, after the decease of the granter, that this disposition was not to be considered as a new entail of the lands, requiring to have been registered in the register of tailzies, and to have the fetters laid on the disponent nominatim, but was merely an instrument for propelling the tailzied fee to the next heir,—and therefore, that an adjudication for a debt of the granter was ineffectual to attach the estate.

In the year 1724, Sir Richard Newton executed an entail of his lands and barony of Newton, by a procuratory of resignation for new infeftment to himself and the heirs-male of his body, and a series of substitutes. The entail contained prohibitions against altering the order of succession, and against selling the estate and contracting debt; which, alongst with other conditions and limitations specified in the deed, were fenced by potent and resolute clauses, and the entail was duly recorded. Under the entail, the heirs called to the succession continued to make up their titles to and enjoyed the estate.

In 1816, William Hay Newton, an heir in possession, and regularly infeft under the entail, disposed the estate to himself in liferent and to

No. 318. his son, Richard Hay Newton, the defender, in of his body, whom failing to the other substitut under the reservations, burdens, &c., after ex obliged himself, his heirs and successors, to giv " but always with and under the reservations, visions, restrictions, limitations, and irritancies contained in a deed of entail made and granted Richard Newton of Newton, in favour of him; and above mentioned, dated the 18th day of Ju expressed." The deed also declared, " that tl enjoy, brui, and possess the said lands and est said deed of entail executed by the said Sir Ri and the infestments, rights, and conveyances to no other right or title whatsoever." On severa was in like manner made to the original enta applied to the institute nominatim, but general The deed was not recorded in the register of t

June 29, 1836.
Turnbull v.
Hay Newton.

The deed of 1816 was drawn substantially There were two variations, however, exclusive necessary by the difference of the parties, and changes: in the former deed the word *after* w by mistake, for *above*, in the irritant clause, wh ing hereby, as it is by the said deed of entail p if any of the said heirs of tailie shall act and particulars *above* mentioned, or any of them, o ditions after specified, or any of them, then an conditions here referred to, were specified in deed.

Again, by the original entail, the heirs were adjudications that might be led against the lanc (i. e. the entailer), or any of my predecessors." deed of 1816, the analogous clause had " for as by any of my predecessors," the disponent, Wil himself one of the substitute heirs of the orig fetters thereof applied.

After the date of the disposition in 1816, Willi ed a debt of £268 to the pursuer Turnbull, and debt Turnbull brought an adjudication of a po ed in the deeds above mentioned against Ric ing in support of his action—

The entail of 1816 is not valid and effectual creditors, 1st, Because the prohibitory, irrita were not directed against the defender nomin institute in the deed; 2d, Because the irritant c the prohibitory and resolute clauses; 3dly, B

register of tailzies as a new entail.¹ Then on the supposition of No. 318
 sposition of 1816 having been merely granted for the purpose of June 29, 18
 ling the estate, its provisions were so materially different from those Turnball v.
 old entail, that the defender, by completing his titles under it, had Hay Newton
 ed an irritancy, but the estate was nevertheless liable to be attached
 diligence of the creditors in terms of the statute 1685.

as pleaded in defence against the action, that the disposition in
 could not be regarded as constituting a new entail, but was a mere
 al of the investiture for the purpose of propelling the fee of the
 from William Hay Newton to his eldest son, and bore in gremio
 reference to the entail of 1724; the defender, therefore, was not
 situation of an institute, or party succeeding as such in virtue of
 sposition, but the fetters of the entail must, under the terms of the
 be held to be expressly directed against him as an heir-substitute
 g in under the original deed of tailzie.

Lord Ordinary pronounced the following interlocutor, and added
 ojoined note: *—"The Lord Ordinary having resumed considera-

les or Broomfield v. Paterson, June 29, 1784 (15618).

The only authority relied on by the pursuer, on the first branch of his
 nt, was the case of Eccles or Broomfield v. Paterson, 29th June, 1784
 15618), in which the Court, no doubt, found a deed executed with re-
 and conformably in many points, to a former entail, to be substantially a
 tlement, and ineffectual against creditors, from not being inserted in the pro-
 ister. But that case was most essentially different from the present, and
 d Ordinary, approving entirely of that decision, has not had the least diffi-
 to this part of the interlocutor. The case of Broomfield was twice
 d to the House of Lords, having been remitted for farther enquiry after the
 lgment (which is the only one reported) of the Court here. It was de-
 second time to the same effect as at first, but with a strong additional
 for the judgment, on the 11th March, 1786, and finally affirmed on a
 appeal. Both sets of appeal cases have been examined, and several mate-
 n, tending to support and explain the judgment, have been ascertained
 to not appear in the report. The points chiefly to be attended to are

1743, Sir John Paterson made an entail in a procuratory of resignation
 infestment to himself, 'for all the days of his life, and after his decease
 grandson, John Paterson,' and other substitutes. But there was no express
 a of the fee to John Paterson; and, as the deed contained the most
 powers to the granter, not only to revoke and alter, but to sell, burden
 his, and do every thing that he could have done, had the right been con-
 in favour of himself, and his heirs and assignees whatsoever, it appears to
 be held that the fee truly remained with Sir John, and that, though sasine
 on the deed, his grandson, on his death, must have made up his titles
 as heir of provision; and it was partly to obviate this necessity that the
 deed was made in 1758. In the mean time, however, and with a view to
 the age of his grandson, Sir John executed, in 1755, what was termed an
 re and amendment of tailzie, by which, after some slight variations, he re-
 the farther power of altering and burdening reserved by the original deed
 but the instrument containing this renunciation, though recorded in the
 of tailzies, was not inserted in the register of sasines, so that any person
 with the heir in possession and consulting that register, would find there



alteration in the destination and series of heirs contained forth distinctly that it was executed for the very purpose of alterations, one of which, at least, was plainly incompetent, who still possessed a power to revoke and alter. The first was the first time in the person of the grandson, and to restrict the liferent, which was probably allowable as a mere act of propell was actually to dispense with the radical prohibition against a to enable the grandson to dispose as much of the entailed afford two freehold qualifications; while the change on the other hand, was no less than a total omission of James Pi second son) and the heirs of his body, for which heirs come after the remit from the Lords, and their existence, and the of their existence, fully established before executing the deed mate judgment of the Court, therefore, in March 1786, for respect of the alterations in that last deed, 'and in particular called by the entail 1743 are omitted in the disposition 1758, is to be held as a new settlement of the estate, and not being of tailzies, is not effectual against creditors.

"Coupling the extent of these alterations, therefore, with looking into the record of sasines, Sir John must have appeared creditors in 1758, still to have full power to revoke and alter at his pleasure, it is apprehended that no doubt can be entertained of the soundness of this judgment or of its being quite inapplicable of a case like the present.

"The alleged variations in this case are of the most misdescription; and indeed the pursuer scarcely founded at all entirely on the general form and style of the deed of 1816, in ment, that it was to be regarded as a new settlement. He is as such imperfections in the recital of the burdening clauses, as of creditors, under the special provision of the statute, refer cator, even on the supposition that the deed itself was not a only a propelling of the tailzied fee. But in either view the Ordinary entitled to no serious attention.

"They are but two in number. and the first consists in this

and July thereafter), was granted by the late William Hay New- No. 318
 heir in possession, and regularly infest under the original entail
 1, and that the said disposition was, in all substantial points, con- June 29, 16
 le to the said original entail, and could in no sense be regarded as Turnbull v.
 ng an alteration thereof, but, on the contrary, recognised and Hay Newto

ially absurd clause, endeavouring to extend this declaration of nullity to omissions or neglect of what was enjoined, that the verbal blunder referred to was committed; the clause continuing, 'or shall neglect to fulfil the conditions specified,' to which unmeaning reference (in such a place) there is in the sequel in the rest of the deed, there not being, as in fact there could not be, a declaration of nullity, except of the facts and deeds already correctly referred to. The Lord Ordinary apprehends it to be clear that the proper and only prohibitions of the irritant or annulling clause are prohibited acts and deeds that admit of recall, and that as it is a mere absurdity to reduce or declare null a neglect or omission, so any reference to such neglect or omission in the clause is entirely out of place, and being without any possible effect or result, is mere surplusage, that may be held as non scriptum, and any verbal error in the expression of which is, therefore, of no consequence. The only clause which can operate as to omissions is the resolute, and in that clause the facts to which it refers are in this case correctly described as above mentioned. It is a separate and independent clause, and bears, that heirs either contracting or failing to fulfil the conditions above mentioned, shall amit, lose and forfeit right,' &c. It is humbly conceived, therefore, that both clauses are fully engrossed and repeated in the instrument in question.

Other alleged variation is of still less importance. It is said to consist of a competent addition, made to the provision of the original entail, and is of this nature. By that original deed, the heirs are taken bound to purge any adjudication that may be led against the lands 'for debts due by me (that is, the entailer or any of my predecessors.' Now the alleged blunder here has arisen from the granter of the deed 1816 copying these words too literally, and forgetting, he, though the maker of that deed, was not the entailer, thus taking the heirs bound to purge any adjudications for his debts or those of his predecessors, that is, for debts contracted previous to 1816 instead of debts previous to 1758. There is little doubt that the hasty adoption of the very words of the original deed has given rise to this possible variance in the meaning. But the Lord Ordinary conceives that it can be of no avail to the pursuer for the three following reasons—1st, He apprehends that the unwarranted adjection of an additional condition to the provisions of a former entail will result merely in the nullity of the addition, and will not let in creditors under the special enactment of the Act of 1707, provided all the original conditions be fairly and fully engrossed in the deed; 2d, If the entail was otherwise unexceptionable (and if it was not in question), it is plain there could be no adjudications after those of the original deed, all debts subsequently contracted being null as against the estate, under the Act of 1707, against contracting debt duly fenced by the irritant and resolute clause; and, 3d, Which is conclusive per se, it appears on reading on, both in the original and propelling deed, that the clause objected to in the latter, however idle or superfluous it may be, is truly warranted by, and comprehended in the sequel clause in both deeds, which extends the obligation to purge, in express terms, to all adjudications that may be led 'for any other debts whatever,' a description which unquestionably includes the debts of the successive heirs from the original entailer to that of the maker of the deed 1816. The Lord Ordinary is of opinion, therefore, that there is nothing in this objection. In the case of Broomfield, in which there was a separate finding as to this clause of the deed, the whole irritant and resolute clauses were omitted in the deed 1758, and contained only a general reference to the original entail."

Finda, 2do, That the pursuer in this case can take no provision in the act 1685, which declares that the omissio and resolute clauses in the titles of an heir of entail inf though inferring a contravention on the part of such heir tate against his bona fide creditors, in respect, 1st, Tha tant and resolute clauses, and all the prohibitions and c original entail are, in point of fact, fully and sufficiently titles of the defender; and, 2d, That the slight verbal tions alleged by the pursuer to exist in the recital or exp of the said conditions, do none of them occur in any of t ing to the contraction of debt, on which alone the right must depend, and that the true meaning and effect of th in the statute, is only that creditors shall not be affecte which, if inserted, would have excluded their claims, t with whom they contracted may have been forfeited, an ried to the next substitute, in consequence of his omission and that the said provision does not import that the limitation whatever will relieve such creditors from the o clauses as are duly fenced and inserted in the infestment and therefore sustains the defences, assoilzies the defe whole conclusions of the action, and decerns."

Turnbull reclaimed against this interlocutor, but

THE COURT, looking to the express reference whi the deed of 1816 to the tailzie of 1724, adhere but recalled as unnecessary the second reason

WILLIAM DAUNEY and JOHN SCOTT RUSSELL, Pursuers.—*D. F. Hope* No
—*Robertson.*

SIR JOHN MAXWELL and OTHERS, Defenders.—*Sol.-Gen. Cuninghame*—*June*
Rutherford—M'Neill—Ivory—Napier. *Daun*
Maxw

Process—Jury Trial—Issue—Reparation—Road Trustees.—In an action of damages for the proprietors of a steam-coach for injury done in consequence, as was alleged, of certain operations by the trustees on the road on which it ran, repeatedly stated in the summons and condescendence to have been done by the trustees maliciously as well as with the purpose of injury—held that it was not necessary to insert malice in the issue on which the cause was to be tried, and that the intent to injure might be proved under an issue, whether the defenders performed the operations wrong-ly.

THE pursuers, Daunev and Russell, raised action against Sir John June
Maxwell and Others, as trustees on the Three-Mile-House road between 2d
Glasgow and Paisley, and against their clerk and overseer, setting forth, Ld. M
inter alia, that Russell had taken out a patent for certain valuable inven- Jur
tions in regard to the application of steam to locomotive purposes, and that
Daunev had engaged in company with him in an undertaking for the
establishment of steam-carriages to run on common roads—that they had
accordingly constructed, at a large expense, four steam-coaches, which
commenced plying, at first experimentally and afterwards regularly for
hire, on the road between Glasgow and Paisley—that they met with
great opposition from the road trustees and their clerk and overseer, who,
about the time when the coaches commenced to run regularly for hire,
did wantonly, unnecessarily, and maliciously, for the purpose of im-
peding, injuring, and endangering the safety of the said coaches,” accu-
mulate on the road, at different places, and more particularly at certain
points where the carriages were observed to labour, large heaps of metal
and rubbish, so as to impede their passage, and notwithstanding of remon-
strances, “did, in wilful disregard and violation of their duty, illegally
and maliciously persist” in continuing and increasing the masses of stones,
&c. so as to cause great straining and labour to the carriages, in conse-
quence of which, on the 29th July, 1834, the wheel of one of them gave
way, and the coach was overturned, whereby four passengers were killed
and others seriously maimed and bruised—that by this event the pursuers
were constrained to desist from their undertaking, and have in conse-
quence incurred great loss and damage, besides being required by the
offerers on the above occasion and the relatives of the deceased, to make
satisfaction for the injuries then sustained: The summons concluded for
£6000 as the specific loss incurred, and £30,000 of indemnification and
reparation for the loss and damage which the pursuers sustained “by and
through the illegal, wrongful, and malicious conduct of the defenders,”

them, the defenders, or any of them, by themselves, or any acting under his or their authority, wrongfully performed

* "This issue is reported on account of a question which it is a the parties to have settled without delay, in order that the cause and which cannot be settled without the opinion of the Court.

"The action is an action of damages by the proprietors of a injury done in consequence of certain circumstances in the state which it ran, and is directed against the trustees of the road. The to have been broken and overturned, and several people killed and

"The summons libels, that the acts or operations which are induced the mischief, were done by the defenders maliciously, and of injuring the steam-carriage, or preventing it from travelling it condescendence the same facts are set forth for inferring the pu and in two places, though not throughout, the word malicious still

"The Lord Ordinary understands that, in preparing the issue, whether this is a privileged case to render malice essential as a in the issue, and that the issue clerks, conceiving that it is not, ma as it stands, with the word wrongfully only, and not putting it on prove malice positively.

"The defenders say that, from the nature of the case in the su descendence, it consists essentially in an averment of malice, as pursuers are bound to take an issue of that nature.

"The pursuers state distinctly that they do intend to prove the that the operations on the road were performed for the express pu ing or injuring the steam-coach, and not for the fair purpose of rej But they say that they are not on that account bound to take an because the case is not privileged; and proof of any wrongful act, v ing to positive malice or not, is sufficient to entitle them to a ver state also, that, if the Court were to hold that they would not be the issue now proposed, to prove the direct intention to injure t

all or any part of the road leading from the city of Glasgow to a No. 319.
 led the Three-Mile-House, on the road from Glasgow to June 29, 1836
 whereby, on or about the 29th July, 1834, a steam-carriage, the Dauney v.
 of the pursuers, was injured, to the loss, injury, and damage of Maxwell
 ers."

Defenders contended, that, looking to the manner in which the
 as laid and malice averred, no issue should be granted, unless
 en with *malice*; and that, from the peculiar situation of the
 as trustees under a road-act, this must be regarded as a privi-
 e, in which malice requires to be proved.

Pursuers answered, that although malice was averred in the sum-
 l condescendence, it was not on that account requisite to insert
 ssue;¹ that the object of its being so averred was, that the pursuer
 safe in the event of the Court considering the case to be one
 malice required to be proved, as he could not go beyond his
 , and must fail in his action, if the Court should think proper
 dlice in the issue, it not being previously averred; that an act
 elled to have been done maliciously, as well as wrongfully, ad-
 f an issue as to the larger quality of maliciousness as well as
 r quality of wrongfulness, but the pursuer was not, therefore,
 take an issue as to malice, but might confine himself to the
 at the question of privilege, depended either on the position of
 iders, or on the nature of the act alleged to have been done;
 er the character of the defenders as road-trustees, nor the sub-
 er of the action, made the present a privileged case; there was
 d, therefore, for objecting to the proposed Issue.

JUSTICE-CLERK.—I cannot lay it down that this is a privileged case, so
 ire malice to be inserted in the issue. To give the pursuers a verdict
 word "wrongfully," it must be proved that the act was done illegally
 essly.

GLENLEE.—I agree. The act in question is stated to have been done
 fenders maliciously, but it is also stated to have been done illegally,
 y were versantes in illicito. If amongst their pleas in law the pur-
 put in one as to malice, then I should have thought they meant not
 sist in their plea of versans in illicito, but also in their plea of ma-
 might have been inclined to hold that they should also take an issue

MEADOWBANK.—I have some difficulty in going along with the argu-
 the pursuers. The defenders are public trustees, and have a duty im-
 them of repairing the roads, with reference to carriages in common use.
 Ituation, I could suppose it to be their duty to repair the roads in such
 if carried into effect, would be a wrong in regard to steam-carriages;

summarily into the issue.

LORD MEDWYN.—I concur with the view of the Lord Justice-Ch

THE COURT accordingly approved of the Issue.

SMITH and KINNEAR, W.S.—ALEX. DOUGLAS, W.S.—HOPKINS and IMEL

W. A. G. and R. ELLIS, W.S.—Agents.

No. 320.

A B, Petitioner.—*Mure.*

JUNE 30, 1836.
1st DIVISION.

Poor's-Roll—Process.—Where there were no elders in a p
certificate could not be procured by an applicant for the po
terms of the Act of Sederunt, which requires such certificate t
by the minister and two elders, the Court remitted to the Sh
the applicant's declaration.

—Agents.

No. 321.

SIR THOMAS J. J. COCHRANE, Raiser.

HON. MRS CAROLINE COCHRANE, and OTHERS, Claimants

Rutherford—W. Bell.

MRS VERNOR, Claimant.—*D. F. Hope—Mibee.*

Competing.

debt and decree to another party in security of £3700; after his death, the assignee made notarial intimation to the next heir succeeding, and claimed preference on the rents, as holding the first completed right: Held (1.) That the designations related to different subjects, and that it was immaterial, as between whether intimation was made or not: (2.) That the debt against the next heir was created, so soon as the expenditure was made in terms of the statute, might be effectually assigned by the heir-disburser, before taking decree of debt for its amount: and (3.) That as the expenditure and relative debt, contained in the first assignation, exhausted the whole debt chargeable against the heir, the subsequent expenditure was nugatory as a means of rearing up any claim against the next heir, and the assignee thereto could not compete with the first heir. Question, if an heir-disburser assigns the same sum of expenditure, and a relative debt, to two several assignees, what are the criteria of preference, between such assignees?

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June 30, 1839

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10 Geo. III. c. 51, § 9, on the preamble that it is proper to enable the heirs of entail to make improvement-expenditure on the estate, requiring the heir-disburser, "his executors and assigns, in recovering reasonable satisfaction for the money, &c. from the succeeding heir, it is enacted that an heir "who lays out money in enclosing, &c. for improvement of his lands, &c. shall be a creditor to the succeeding heirs of entail for three-fourths of the money laid out." The act, § 10, that the improvement-expenditure of any one heir in possession "shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail, for more than four years' free rent of the said entailed estate," &c.:—(§ 13). "When a sum equal to four years' free rent shall have been laid out in manner above mentioned by one or more heir or heirs of entail, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for the subsequent heir to lay out any more money under the authority of this act:—" "The executors, or assignees, or other person having right to the recovery of money expended," &c. may sue the next heir, after taking decree, "to pay such part thereof as is due by the authority of the court, and, on obtaining decree may use all diligence thereon, except in relation to the entailed estate:—(§ 16). The heir succeeding may be discharged upon "effectually conveying to the creditor one-third part of the rents of the entailed estate during his life," &c.:—(§ 26). To prove the expenditure of evidence of expenditure, and to ascertain in due time the money expended, it is made lawful for the heir in possession, after having completed the improvement of all or any part of the estate, to sue for satisfaction," &c. and obtain decree for "such part of the sum expended, by the true intent and meaning of this act, is intended to be a charge against the succeeding heirs in the said entailed estate." The act also provides provisions requiring the annual production of vouchers of expenditure, and recording them in the Sheriff Court books; which record is to be sent, on a charge of sixpence for each inspection.

June 30, 1839

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1817, Sir Alexander borrowed £2903, 18s. 4d. from of Stonefield, and granted a bond for the amount, position of the entailed estate, so far as consistent with security, 1st, Of a sum of £444, 8s. 10d. (8000 merks) entitled to borrow under permissive powers on the sum of £2459, 9s. 6d. being three-fourths of the i The bond narrated that Sir Alexander had obtained a declarator already mentioned, and then proceeded, " That I assign, transfer, convey, and make over from me, my heirs, and all others, to and in favour of the said Alexander foresaid, all and whole the foresaid principal sum of £444, 8s. 10d., and the whole interest to fall due thereon; together with all vouchers, documents, and evidents whatsoever, of and in relation to the said sum, and specially, without prejudice to the foregoing, the foresaid decree of declarator, obtained as aforesaid, in and to the intent to follow thereupon." In the same month, Waddell executed the disposition in security. As the irregularity of the first was presently soon discovered, another process of declarator was obtained against Alexander, and decree was regularly obtained on 1st December 1817 for the same sum contained in the first decree, and as to the expenditure prior to 12th November, 1816, as to the balance on 10th October, 1821, Waddell received payment of the same from the Hon. Basil Cochrane, and executed a declaration in his favour. On 30th October Sir Alexander gave evidence of corroboration in favour of Basil Cochrane, and

5s. 3d., being three-fourth parts of £9486, 15s. 4d. &c., all conform **No. 321**
said act," &c.

820, Sir Alexander borrowed £3700 from Major Vernor, and
a bond, with an assignation, in security, of "the foresaid prin-
um of £7115, 5s. 3d. sterling, and the whole interest to fall due
, together with the whole vouchers, documents, and evidents
ver of and concerning the said sums, and specially without preju-
the foresaid generality the foresaid decree of declarator obtained
said itself." Sir Alexander also granted a disposition of the
estate in security as before. In January 1821, Major Vernor
eftment.

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lexander died in 1832, and was succeeded by his son Sir Thomas
chrane, to whom Mrs Vernor, as in right of the now deceased
ernor, caused notarial intimation to be made of the assignation
avour, and she then raised an action against him for payment of
of £3700. He brought a process of multiplepoinding, alleging
years' free rent of the estate amounted only to £1454, and that
eady to surrender one-third of the free rents in terms of the
and calling Mrs Vernor, and the trustees of the now deceased
chrane, to debate their preferences on the inadequate fund.

ed by Mrs Vernor.

the expenditure of improvement money, if made according to
of the statute, the heir-disburser became creditor of the
g heir for three-fourths of the amount. If the fund to pay this
ed inadequate, and if the creditor had assigned separate portions
parate creditors, the creditor who first completed his assignation
tion to the debtor, ought to be preferred, as the subject assigned
and the same personal claim of debt against him. But such
a could only be made to the heir after succeeding, because he
ebtor till then. And as the assignation in the claimant's favour
ated to Sir Thomas in April 1832, after he had succeeded, she
first complete right to the debt exigible from Sir Thomas on
f improvement-expenditure.

claimant was also first assigned to any effectual decree of
under the statute. The decree of 1817, assigned to Waddell,
ilar; and the decree of 11th February, 1818, was never assign-
ddell at all. It was only conveyed to the counter-claimants in
821, being subsequent to the date of the claimant's assignation
lid decree of 7th July, 1818. At the date of the claimant's
that decree, no one but Sir Alexander held a prior decree; and
, nor any subsequent assignee of his, could use such prior decree
ition with the claimant.

ny event, the claimant should be ranked *pari passu* with the
claimants on the fund in medio, and each should draw a dividend
f their debts.

the statutory proportion of debt was created, was nug
rearing up any debt against the next heir. It therefo
assignee to that expenditure, which alone created de
must now alone be entitled to insist in enforcing it.

2. The debt equally existed, whether decree of d
during the lifetime of the heir-disburser, or not. It
terial to the party, who was assigned to the first sta
whether any other party was, or was not, first assign
declarator relative to subsequent expenditure. But
truly in right of the first regular decree of declara
nounced on 11th February, 1818, for their debt. So
it must be held to have been effectually assigned, jure
author, Waddell. And independently of this, the d
it to their author Basil Cochrane in October 1821, '
related to the earliest statutory expenditure, and was
able to any decree for subsequent expenditure. The
a rule of preference did not expose the counter-claim
as she might have seen on the record of the Sheriff C
expenditure. But the refusal of such a preference
greatest injustice to the claimants as the debt assign
fectly good at the date of assignation; and if it coul
paired whenever the heir-disburser chose to make fa
and assign them away, the necessary result would b
entail from ever using such improvement-debts as a fi
even to a legitimate extent, as no person could trus

the sum of £3700 sterling, the debt in security of which the assign-
in her favour was granted; and decerned accordingly, but found
ences due."*

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NOTE.—This is a multiplepinding brought by Sir Thomas Cochrane, the
r of his late father, Sir Alexander Cochrane, in the entailed estate of
ton. The fund in medio consists of such sums as are due by the raiser,
s of the 10 Geo. III. c. 51, for improvements executed on the entailed
r his predecessor Sir Alexander: in implement of which obligation he pro-
assign, in terms of the statute, one-third part of the free rents of the estate.
ect of the action is to determine the claims of preference respectively
ed by two parties, who each hold an assignation to a certain extent of the
pended in improvements by Sir Alexander. Upon considering these
and the terms of the statute, the Lord Ordinary cannot perceive any
f preference on either side. The late Sir Alexander executed certain im-
ts between Martinmas 1815 and Martinmas 1816, the amount of which,
as transmissible against the subsequent heirs of entail, was ascertained by
ees of the Court—the one of the 8th March, 1817, and the other of 11th
, 1818—to be £2459. This sum, as well as the decrees ascertaining it,
by assignation in the person of claimants, the trustees of the Honourable
chrane. Farther improvements were executed by Sir Alexander between
as 1816 and Martinmas 1817; and the amount of these, in so far as
ible against the succeeding heir, was ascertained to be £7115, by decree
on 7th July, 1818; and this sum, with the decree, was assigned to the
the other claimant, Mrs Elizabeth Vernor, in security of a sum of £3700
from her by Sir Alexander Cochrane. Sir Alexander Cochrane died in
1832, and the last-mentioned assignation was intimated notarially to the
successor. The assignation held by the other competing party was not
ally intimated, though it is averred by them that intimation was actually
l that their rights were recognised by the raiser. The claim of preference
by the Honourable Basil Cochrane's trustees is founded on the priority
provements, to which the sum assigned to them relates, and of the decrees
it was ascertained. The Lord Ordinary is not aware of any such ques-
ig been raised till now, and it does not seem to him that there are any
or sustaining such preference. The statute permits the heir in possession
obligations good against succeeding heirs, to the extent of a certain num-
ars free rent, and it also enables any succeeding heir to be discharged of
s, on assigning one-third of the free rents of the estate during his life, or
money be paid. Each person then, to whom the heir, executing the im-
ts, has assigned any part of the sum so expended, becomes a creditor, to
it, of the succeeding heir, under the conditions and qualifications of the
But the Lord Ordinary sees nothing in the statute to distinguish such
ignations from assignations of any other personal debts, or to warrant, in
tion between such partial assignations, a claim of preference on the mere
f the constitution of the debt.
he other hand, it appears to the Lord Ordinary that the claim of pre-
maintained by the other claimant, Mrs Vernor, is equally unfounded.
mainly on the alleged priority of the intimation of her assignation to the
sir in possession, Sir Thomas Cochrane. But it will be observed that
ere no proper competition of assignations, such as might have arisen, if
had held an assignation to the same debt. Here, on the contrary, each
an assignation to a separate debt, though originally due by the same
the same creditor. If a creditor assigns the same bond successively to
s, the first intimation will of course establish the preference, though in
the last assignee. But if the creditor holds two separate bonds for dif-
ts due by the same debtor, and grants separate assignations of each, the
can have no greater effect in each case than that of completely vesting

in the party by the law itself, and there is no need of intimation of the statute is this. It directs the heir-disburser, with each year, to produce and record in the Sheriff Court the vouchers. These are afterwards returned to him by the sheriff to rear up his personal claim against the next heir who shall assign his claim and the vouchers if he chooses. There is no ascertaining by declarator the amount of his claim before he assigns the whole, or part of it, his assignee will be entitled when duly ascertained. So far I do not feel that there is any then it is the improvement-debt arising from the disbursement which is assigned to Cochrane's trustees, and the improvement-debt subsequent period which is assigned to Mrs Vernor. And whether the assignee holding a good right to the first improvement-debt affected by the existence of a second debt conveyed to a second assignee come to the opinion that the assignee to the second debt is prior to the assignee to the first. If one acquires from the heir-disburser by reference and assignment to the first improvement-debt before the second improvement-debt is created and assigned, I do not think it touches the first at all in competition.

LORD GILLIES.—I have arrived at the same conclusion. It is not difficult in this case to do so, provided that we take into account the expenditure which is not necessarily in the case. One competitor holds a right to the improvement-debt arising out of the expenditure subsequent to Martinmas 1816; another competitor holds a right to the improvement-debt arising out of the expenditure subsequent to Martinmas 1816. These are distinct subjects; as much so as two bonds for different debts. It is as if there were two separate bonds, and having also two separate creditors. If one creditor holds one bond and another creditor holds another bond, it is of no consequence, as between

they intimate their assignation or not, for they do not compete inter se. In **No. 32**
 as Cochrane's trustees hold a good assignation to the improvement-debt **June 30, 1**
 to Martinmas 1816, and to a relative decree. And how are they to be **Cochrane**
 satisfied by procedure altogether subsequent, consisting of expenditure after **Cochrane**
 Martinmas 1816, and a relative decree for improvement-debt assigned to Mrs
 ? As mere assignations, both rights appear to be good ; but they do not
 the same subject. They convey different subjects, and the assignation
 Cochrane's trustees cannot be impaired, I conceive, by any subsequent assign-
 of a different subject which their cedent could make. Suppose that an
 entail had a right to create a debt to the extent of four years' rents, or
 £100, in building two bridges ; that he builds one, in terms of the entail,
 spends £3000 on it, which sum he assigns to one party ; and afterwards he
 builds another, and expends £3000 on it, which last he assigns to a second
 party. It may be very true that this second party may be unable to make good
 the debt assigned to him, because his author could only create a farther
 debt to the extent of £1000 at the time when he disbursed £3000 ; but why is
 it to produce any effect whatever upon the first assignee who received a valid
 assignation to an amount of debt, connected with a different subject, the whole
 of the debt the heir of entail could effectually create and convey ? The assign-
 ations here convey separate subjects, and each separate subject is effectually
 assigned to the assignee. But the result is that the debt first created, and con-
 veyed to Cochrane's trustees, cannot be impaired by the subsequent conveyance
 to the second party. **Vernor.**

MACKENZIE.—I am of the same opinion. It appears to me that the
 intention of the statute is decisive. It provides that the improvement-
 debt " shall not, in any case whatever, be effectual to constitute a claim
 against the succeeding heir of entail, for more than four years' free rent of the
 entailed estate," &c. This, by certain and inevitable implication, gives
 power to constitute a claim which shall be good against the next heir to the ex-
 tent of four years' free rents. And I may notice in passing that this debt does
 not properly form a real burden on the estate, but merely subjects the succeed-
 ing heir to liability in a peculiar way. In this case an heir of entail had the
 power to create that amount of debt against the next heir, and he exercised the
 power. He regularly expended, in terms of the statute, a sum sufficient to
 constitute that debt, and apparently more than sufficient. He constituted the claim
 by the statute, and he assigned that claim to the party in whose right Cochrane's
 trustees now stand. Such assignation is expressly contemplated and sanctioned
 by the statute, which contains no clause prescribing any special form of intima-
 tion being necessary to complete it, nor do I well know what form it would
 be proper so to prescribe. But the assignation as sanctioned by the
 statute here took place, and was, I apprehend, complete to convey the subject
 to the assignee. And what was it that followed upon this ? After the heir-disburser
 had paid out the whole sum which it was competent for him under the statute to
 constitute as a means of rearing up any debt against the next heir, he did not stop
 there, but entered on a fresh course of expenditure, the whole of which could not
 constitute any additional farthing of debt against the next heir. And having done
 so, he obtained a declarator of the amount of it, which would have been good
 to the statutory extent of debt had not been previously exhausted, he assigned to
 the second party this last decree, with the relative claim of improvement-debt, and

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expenditure and vouchers. But all this took place, only after an assignation had been effectually made to the first assignee of the whole debt which he could rear up under the statute. At least I am not disposed to hold that the first assignation was incomplete merely because some unknown species of intimation is said to have been wanting to complete it. And the question is whether the second assignee can cut out the first, as to the whole or any part of the improvement-debt which was effectually constituted and validly transferred to him, before the second assignation was made. I cannot see that the second assignation is entitled to produce any such effect. The full power to rear up a debt against the next heir was first exhausted, and the whole debt was onerously transferred to Cochrane's trustees. The subsequent expenditure did not create any additional debt whatever, and neither the heir who disbursed it, nor his assignee, seems entitled to compete with them for any part of the rents liable to that debt.

LORD PRESIDENT.—I am entirely of the same opinion. If Sir Alexander had assigned to two different persons the claim of debt arising out of the same expenditure, viz. that prior to Martinmas 1816, a competition might have arisen between these two assignees, and the question would then have been raised whether intimation, or any other mode of completion, was necessary in order to give one of these assignees a preference over the other, because they would then have been competing on the same subject. But there is no such question here. And I may add farther, that, though no decree of declarator for the improvements prior to Martinmas 1816, had been taken by Sir Alexander in his lifetime, his assignation of the debt, arising out of that expenditure, would have been just as good as it was after taking declarator. That decree ascertains the extent of the liability: but the liability is created first, and exists independently of any declarator in the heir's lifetime.

LORD BALGRAY.—The assignation is just as good before declarator as after. And it often happens that no decree of declarator is taken during the life of the heir-disburser.

THE COURT pronounced this interlocutor:—"Alter the interlocutor of the Lord Ordinary reclaimed against; find the trustees of the Hon. Basil Cochrane entitled, hoc statu, to be preferred on the fund in medio, and decern; quoad ultra, remit the cause back to the Lord Ordinary to proceed farther as shall be just; and find no expenses due to either party."

T. PAUL, W.S.—J. R. SKINNER, W.S.—Agents.

RIGHT MURRAY and MANDATARY, Pursuers.—*D. F. Hope* No. 322.
—*H. J. Robertson.*

ROTHES and OTHERS, Defenders.—*Rutherford—Tait.*

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Earl of Roth

He and Moveable—Husband and Wife—Foreign—Succession.—A Scottish lady, her younger brothers and sisters, had right to a share of a Scottish estate of £10,000, left by her mother, and payable to her on her marriage; or, at her father's death, to a share of two Scottish heritable bonds for sums amounting to the same. The father, under a trust-settlement, which referred, in gremio, to a will, and declared the bonds to be conveyed for the same purposes as the said estate falling under the will; the will contemplated investments in the said public funds, and directed a daughter's share to be paid at her marriage. The Scottish settlement contemplated the investment of the said £9000 on her marriage: the lady, by antenuptial contract with a gentleman domiciled in England, conveyed the whole estate, heritable and moveable, belonging or which should belong to her during the marriage, to trustees, for the purpose of paying yearly proceeds of the sums thereby conveyed, to the spouses or to their children, and thereafter, of paying the said sums to the children of the lady in such proportions as should be specified by the spouses; failing children, the trustees were to pay the said sums to the heirs and assignees of the lady: the lady was domiciled in England, but without leaving issue of the marriage, and executed any testamentary deed; the above heritable bonds remained in the hands of the trustees. It was admitted that the husband was her heir and representative under the law of England: Held, 1. That as she died domiciled in England, the law of that country must regulate her intestate moveable succession, and she was entitled thereto; 2. That in so far as her succession consisted of heritable estate, the law of Scotland must point out the heir to whom it descended. That as the share of the Scottish heritable bonds was a heritable estate, it must descend like Scottish heritage, notwithstanding certain provisions (but without any injunctions to sell) which were contained in the conveyances affecting them, and notwithstanding the terms, and the provisions of her father's English will and Scottish settlement.

George Leslie of Leslie, husband of Henrietta Countess of Rothes, executed a will in the English form, in 1817. He directed his executors to collect his whole personal estate, and convert it into annuities, debts and legacies, and hold the residue, investing it "at three per cent in three per cent consols, and with the dividends, after deducting the annuities, to hold the stock "in trust for all and every the children of my body (except the heir-presumptive to the title) living at the time of my decease, to be divided between them equally and alike." The share of a son was "to be paid and transferred to him at majority; the share of a daughter was "to be paid or transferred to her" at majority or marriage, whichever should first happen. As long as a share was not payable, the interest, dividend, or produce thereof, was to be applied for the maintenance of the child; if any surplus of such produce existed, it was to be invest-

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No. 321. expenditure and vouchers. But all this took place, only after an assignation had been effectually made to the first assignee of the whole debt which he could rear up under the statute. At least I am not disposed to hold that the first assignation was incomplete merely because some unknown species of intimation is said to have been wanting to complete it. And the question is whether the second assignee can cut out the first, as to the whole or any part of the improvement-debt which was effectually constituted and validly transferred to him, before the second assignation was made. I cannot see that the second assignation is entitled to produce any such effect. The full power to rear up a debt against the next heir was first exhausted, and the whole debt was onerously transferred to Cochrane's trustees. The subsequent expenditure did not create any additional debt whatever, and neither the heir who disbursed it, nor his assignee, seems entitled to compete with them for any part of the rents liable to that debt.

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ine 30, 1836.
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LORD PRESIDENT.—I am entirely of the same opinion. If Sir Alexander had assigned to two different persons the claim of debt arising out of the same expenditure, viz. that prior to Martinmas 1816, a competition might have arisen between these two assignees, and the question would then have been raised whether intimation, or any other mode of completion, was necessary in order to give one of these assignees a preference over the other, because they would then have been competing on the same subject. But there is no such question here. And I may add farther, that, though no decree of declarator for the improvements prior to Martinmas 1816, had been taken by Sir Alexander in his lifetime, his assignation of the debt, arising out of that expenditure, would have been just as good as it was after taking declarator. That decree ascertains the extent of the liability: but the liability is created first, and exists independently of any declarator in the heir's lifetime.

LORD BALGRAY.—The assignation is just as good before declarator as after. And it often happens that no decree of declarator is taken during the life of the heir-disburser.

THE COURT pronounced this interlocutor:—"Alter the interlocutor of the Lord Ordinary reclaimed against; find the trustees of the Hon. Basil Cochrane entitled, hoc statu, to be preferred on the fund in medio, and decern; quoad ultra, remit the cause back to the Lord Ordinary to proceed farther as shall be just; and find no expenses due to either party."

T. PAUL, W.S.—J. R. SKINNER, W.S.—Agents.

DAVID R. KNIGHT MURRAY and MANDATARY, Pursuers.—*D. F. Hope* No. 3
—*H. J. Robertson.*

EARL OF ROTHES and OTHERS, Defenders.—*Rutherford—Tait.*

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at—Heritable and Moveable—Husband and Wife—Foreign—Succession.—A Scottish lady, along with her younger brothers and sisters, had right to a share of a Scottish heritable bond for £10,000, left by her mother, and payable to her on her marriage; she also had right to a share of two Scottish heritable bonds for sums amounting to £10,000, left by her father, under a trust-settlement, which referred, in gremio, to a Scotch English will, and declared the bonds to be conveyed for the same purposes as the moveable estate falling under the will; the will contemplated investments made in the public funds, and directed a daughter's share to be paid at her marriage; but the Scottish settlement contemplated the investment of the said £9000 on her Scottish heritage: the lady, by antenuptial contract with a gentleman domiciled in Scotland, conveyed the whole estate, heritable and moveable, belonging or which should belong to her during the marriage, to trustees, for the purpose of paying the interest or yearly proceeds of the sums thereby conveyed, to the spouses or surviving spouse, and thereafter, of paying the said sums to the children of the marriage in such proportions as should be specified by the spouses; failing children, the trustees were to pay the said sums to the heirs and assignees of the lady: the lady died, domiciled in England, but without leaving issue of the marriage, and without having executed any testamentary deed; the above heritable bonds remained unapplied; it was admitted that the husband was her heir and representative in Scotland by the law of England: Held, 1. That as she died domiciled in England, the law of that country must regulate her intestate moveable succession, and her husband was entitled thereto; 2. That in so far as her succession consisted in Scottish heritable bonds, the law of Scotland must point out the heir to whom it descended; and, 3. That as the share of the Scottish heritable bonds was a heritable right in itself, it must descend like Scottish heritage, notwithstanding certain clauses of sale (but without any injunctions to sell) which were contained in the trust-conveyances affecting them, and notwithstanding the terms, and the intention of the father's English will and Scottish settlement.

The late George Leslie of Leslie, husband of Henrietta Countess of Rothes, executed a will in the English form, in 1817. He directed trustees to collect his whole personal estate, and convert it into stock; to pay debts and legacies, and hold the residue, investing it "at their discretion" in three per cent consols, and with the dividends, after the death of Lady Rothes, hold the stock "in trust for all and every the children and children of my body (except the heir-presumptive to the title) who shall be living at the time of my decease, to be divided between them and share alike." The share of a son was "to be paid and transferred to him" at majority; the share of a daughter was "to be paid or transferred to her" at majority or marriage, whichever should first happen; and so long as a share was not payable, the interest, dividend, or annual produce thereof, was to be applied for the maintenance of the child, and if any surplus of such produce existed, it was to be invest-

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Ld. Full
S.

No. 322. ed in the public funds, or on real security in England, for behoof of the child, out of whose share the surplus had arisen.

—
in 30, 1836.

urray v.

rl of Rothcs.

In 1817, at the time of executing this will, Mr Leslie and the Countess of Rothcs were domiciled in England, and Mr Leslie's whole funds and property were situated there. In that year they removed to Scotland, and afterwards resided there, on the Rothcs family estate. In 1820, Mr Leslie, who had now acquired other funds, including two bonds for £5000 and £4000 secured over heritage in Scotland, which was an unentailed portion of the Rothcs estate, and under which bonds he was indebted, executed another trust-settlement in favour of the same trustee named in the English will, narrating the decease of Lady Rothcs; "and considering that it has been found necessary to bring to sale the unentailed part of the estate of Rothcs; and considering that it is my will and intention to purchase all or a part of the said unentailed estate, and to settle it upon my eldest son, the Earl of Rothcs, and his heirs, burdened with provisions to my five younger children; and that, with this view, I have purchased or acquired right to two heritable debts, amounting to £9000 of principal, affecting said unentailed estate, which I intend shall go as part of the purchase-money of these lands so to be purchased by me; therefore it is my will, and I hereby give, grant, assign, dispose, and convey to the said Abraham Henry Chambers, and the other trustees to be named by him, the said two debts due by bonds over said unentailed estate, and all my other estate and effects of every kind in Scotland, in trust, for the uses and purposes contained in my said last will, with power to them, and the survivor of them, to receive and discharge all sums of money, and goods, estate, and effects due and belonging to me in Scotland at the time of my decease, to lay out the same in the purchase of said unentailed estate, or part thereof, and to settle it upon my said eldest son and his heirs, burdened with the purchase-money to be paid for the same, in favour of my said five younger children; and I do hereby ratify and confirm my said last will and testament," &c.

In 1826, Mr Leslie added a legacy of a small annuity by way of codicil to his disposition and settlement, which he described as "a codicil to my will in the English form, bearing date the 9th June, 1817, and to my deed of settlement, bearing date the 5th June, 1820." Some time before his death, which happened in 1829, Mr Leslie purchased a part of the unentailed estate of Rothcs, for a price of about £14,000; but the price remained unpaid at his death, and the bonds of £5000 and £4000, which were meant to form part payment, under burden of provisions to that amount to the younger branches of the family, remained uncompleted.

The Countess of Rothcs, who died in 1819, executed a heritable bond of provision for £10,000, in favour of her younger children, *equally among them, five in number. Each share was payable in two equal*

a half at majority or marriage, and the other half “ at the No. 322
 Whitsunday or Martinmas after the death of the longest ^{June 30, 183}
 said Countess and George Leslie, with one-fifth part more ^{Murray v.}
 principal sum of £10,000 of liquidate penalty in case of ^{Earl of Roth}
 annualrent thereof from the first term of Whitsunday or
 after the death of the said Countess, until payment of the

of payment the Countess bound herself to infest the chil-
 annualrent of £500, or other annualrent effecting to £10,000,
 out of the lands and barony of Leslie, and also in the lands
 themselves. It was provided that during the minority of the
 the lifetime of the Countess and her husband, no annual-
 become due to the children, if suitably maintained.

Charles Knight Murray, barrister-at-law, married Lady Hen-
 Leslie, the eldest child of the Countess and Mr Leslie. By
 contract he conveyed two policies on his life, amounting to
 trustees, for behoof of Lady Henrietta and the children of the
 and also one half of his plate and furniture, to Lady Henrietta
 : and her Ladyship conveyed to trustees “ all and sundry
 sums of money, and debts, heritable and moveable, of every
 presently belonging, or that shall pertain and belong to her
 subsistence of the said marriage ; and particularly without
 the generality foresaid ; ” — “ all and whole a fifth part of
 sum of £10,000, or such part thereof as the said Lady Hen-
 Leslie may be found entitled to, contained in and due by an he-
 of provision, granted by the said deceased Countess of Rothes,”
 Henrietta also disposed and assigned to the marriage-trus-
 only all and whole her share or proportion of the aforesaid
 of £500, or such part thereof as she may be found entitled
 uplifted out of the lands contained in the heritable bond of the
 but also the lands themselves, “ in real security of the said
 etta Ann Leslie’s share or proportion of the foresaid principal
 0,000, annualrents thereof,” &c. Lady Henrietta also as-
 e trustees the bond of provision itself, with the unexecuted
 and precept therein, “ that they may be infest and seised in
 annualrent and lands and others in security as aforesaid.” Power
 to the trustees to uplift her Ladyship’s share of the bond,
 that this assignation is granted in trust only for the purpose
 of the said Charles Knight Murray, and Lady Henrietta Ann
 to the survivor of them, the interest and yearly profits of the
 assigned and made over by the said Lady Henrietta Ann
 l, after the death of the survivor of the said Charles Knight
 l Lady Henrietta Ann Leslie, to pay the said sums hereby
 the child or children to be procreated of this marriage, in
 as and proportions as after specified ; whom failing, to the

No. 322. heirs and assignees of the said Lady Henrietta Ann Leslie." Power was given to Mr Murray to divide among the children of the marriage, their provisions, in such proportions as he thought proper, and the same power was given to Lady Henrietta, if surviving him, unmarried, in the event of his not having made such distribution; "and failing of such division, then the said provisions shall belong to and divide equally among them, share and share alike."

June 30, 1836.
Murray v.
Earl of Rothes.

Mr Murray and Lady Henrietta continued domiciled in England till her Ladyship's death in 1832. There was no issue of the marriage, and no testamentary deed was left by her Ladyship.

In 1834, Mr Murray raised an action against Lord Haddington and others, the trustees of Mr Leslie, who had been assumed by the original trustees in virtue of powers in the trust; against Lord Rothes, the heir in possession of the entailed estate burdened with the £10,000 bond, and also the Scottish heir of line and of conquest of Lady Henrietta; and against her other brother and sisters, her next of kin; libelling, that, by the law of England, he was the representative of his wife in all her moveable estate, and that he had accordingly taken out letters of administration in England as her executor; and concluding for declarator that the deceased Lady Henrietta had right to £2000, being one fifth part of the heritable bond by the Countess for £10,000, and that £1000 thereof was payable at Lady Henrietta's marriage, and £1000 at Whitsunday, 1834, being the first term after the decease of Mr Leslie, with corresponding interest; that by the will of Mr Leslie in 1817, combined with his disposition in 1820, Lady Henrietta had right to one fifth part of his whole estate, heritable and moveable, falling under these deeds, and that her right was of a moveable nature; that by virtue of the marriage contract of the pursuer and Lady Henrietta, and also by virtue of his representing his deceased wife in mobilibus, and being her administrator by the law of England, which was Lady Henrietta's domicile, he had now right to the whole of the foresaid sums and provisions which his said wife was entitled to by and through the said bond of provision by the Countess, her mother, and by the settlements of her father. He concluded for payment accordingly. The conclusions as to the fifth part of the heritable bond for £10,000 were directed solely against Lord Rothes.

Defences were lodged, and the questions in dispute ultimately came to embrace solely the effect of the conveyance, in the marriage-contract, of Lady Henrietta's share in the £10,000 bond, and her share of her father's succession, so far as consisting of the heritable bonds for £5000 or £4000. As to the whole interest accruing during the life of the pursuer, and as to her share of her father's executry, it was admitted that the pursuer, under the contract, and as heir in mobilibus by the law of England, was entitled to be preferred.

Pleaded by the Pursuer—

1. As to the share of the £10,000 heritable bond. The whole of that

000, fell due during the marriage. It was effectually No. 322
 marriage trustees, who were not only empowered to up-
 directed to pay the interest to the spouses or survivor, June 30, 18
 “to pay the sums hereby assigned to the children of the Murray v.
 whom failing to the heirs and assignees of Lady Hen- Earl of Ro
 direction left no heritable estate in her ladyship, and no
 e jus crediti against the marriage trustees who had an ab-
 ver the fund, and who must have made it moveable before
 t in the proportions allotted to the children of the mar-
 been any who became entitled to demand it. And, as
 ould only have had a jus crediti against the marriage trus-
 at the parties who were called, on the failure of such
 e heirs and assignees of Lady Henrietta. The right,
 clearly of a moveable nature, and as such, it fell to the
 representative in mobilibus of his wife by the law of Eng-
 was domiciled, and which law must consequently regulate
 accession.

to the £5000 and £4000 bonds. By Mr Leslie's Eng-
 7, he had conveyed his moveable estate to trustees, direct-
 est it in the public funds, and hold it for behoof of his
 on. The share of a daughter was made payable at her
 whatever share accrued to her under this will was clearly
 rest. But the Scottish settlement in 1820, executed after
 acquired heritable bonds in Scotland, was a trust-convey-
 by him on the English will, so as to make every interest
 partake of the same nature with the effects originally
 at will. He had disposed the two bonds to the same trus-
 ed in the English will, “in trust, for the uses and pur-
 l” in the English will; and though power was given to the
 t the bonds and apply their proceeds in purchasing heritage
 it with provisions to his younger children, it was never
 oy to make it rest on the discretion or pleasure of the trus-
 ng these funds, whether the share of a child therein should
 moveable in that child's succession. The whole interest
 lie to his younger children, under the combined effect of
 ll and the Scottish subsidiary settlement, was therefore of
 ure, and, as such, fell to the pursuer.

the Defenders—

1,000 bond was heritably secured; the marriage-trustees
 to a precept and procuratory, in order to be infest in secu-
 lenrietta's share. Her interest was as distinctly Scottish
 t had been Scottish land; and it continued so at her death.
 marriage trustees possessed a power (but without any in-
 plift the share of the bond, that did not make it moveable,
 a mere power to sell a land estate conveyed to them in

o. 322. trust, would have rendered such estate a moveable interest. But as the interest of Lady Henrietta in the £10,000 bond, was of a heritable nature, that part of her succession must be regulated by the law of Scotland, and it accordingly fell to Lord Rothes, as her heir at law.

30, 1386.
Murray v.
of Rothes.

2. In regard to the £5000 and £4000 heritable bonds; Mr Leslie had expressly declared in his settlement of 1820, in reference to his contemplated purchase of part of the Rothes estate, that he intended to purchase the unentailed part of the Rothes estate, and to settle it on his eldest son, burdened with provisions to his younger children; that with this view he had acquired these two bonds, "which I intend shall go in part of the purchase-money of those lands so to be purchased by me." Relative to this intention, he empowered his trustees to apply the proceeds of the bonds towards that purchase, and to burden the lands for that amount, with provisions to his younger children. This was quite inconsistent with the direction in the English will to make an investment in the public funds; it showed Mr Leslie to have contemplated a provision of a heritable nature for his children, under the settlement 1820; and though the estate falling under that settlement was conveyed in trust for the same purposes with the English will, that merely meant that it was equally for behoof of the younger children, without regarding whether it was moveable or heritable. But as these heritable bonds continued as they were left by Mr Leslie, down to the death of Lady Henrietta, her share in them was of a heritable nature, and did not pass to her representative in mobilibus, or fall under the English law of succession.

The Lord Ordinary pronounced this interlocutor:—"Finds that, by a marriage contract of the 15th day of December, 1827, in the Scotch form, between the pursuer and the late Lady Henrietta Ann Leslie, the latter conveyed to certain trustees, 'all and sundry goods, gear, sums of money, and debts heritable and moveable, of every description, presently belonging, or that should pertain and belong to her, during the subsistence of the said marriage;' and without prejudice to the foresaid generality, her share of the heritable bond for £10,000 sterling, granted by her mother, the late Countess of Rothes, over the estate of Rothes, in favour of the said Lady Henrietta and the Countess' younger children: Finds that the conveyance to the trustees in the marriage-contract was made for the purpose of paying to the pursuer, Charles Knight Murray, and Lady Henrietta Ann Leslie, and to the survivor, the interest of the said sums, and of paying after their death the said sums to the children of the marriage; 'whom failing, to the heirs and assignees of the said Henrietta Ann Leslie:' Finds that Lady Henrietta Ann Leslie died on the 14th day of April, 1832, without leaving children, and having been domiciled in England during the subsistence of her marriage: Finds that George Leslie, the father of Lady Henrietta, died in the year 1829, and that by his settlements, viz. a will of date the 8th day of June, 1817, and an additional deed of the 16th day of January, 1820, Lady Henrietta Leslie was, amongst with

her younger children of her said father, entitled to an equal share, No. 322
 of two heritable bonds of £5000 sterling and £4000 sterling, over cer- June 30, 18
 nds in Scotland; and, secondly, of the whole residue of his personal Murray v.
 : Finds that the said property and effects carried by the will of Earl of Roth
 e Leslie are now vested in the defenders, the Earl of Haddington
 thers, as executors and trustees of the said George Leslie: Finds
 ie present action is brought by the pursuer in the character of heir
 representative of his foresaid wife, Lady Henrietta Ann Leslie, by
 v of England, and as such entitled to the said Lady Henrietta Ann
 's share of the said sums of £10,000 sterling, as also to her share
 terest under the foresaid settlement of her said father: Finds that
 ion is directed against the executors and trustees of George Leslie,
 t the Earl of Rothes his eldest son, and against his other surviving
 er children: Finds that the summons concludes against the defend-
 Earl of Rothes, for Lady Henrietta's share of the heritable bond
 0,000 sterling; and, secondly, against the other defenders, the
 s of George Leslie, and his surviving younger children, for Lady
 etta's share of the whole property carried by the said George Les-
 tlements above-mentioned: Finds that, by the terms of the mar-
 ontract between the pursuer and Lady Henrietta Ann Leslie, the
 ty and effects falling under the destination to her heirs and assign-
 ailing children of the marriage, became at her death, without
 ; any settlement, subject to the ordinary rules of intestate succes-
 Finds that, agreeably to those rules, her personal succession must
 ulated by the law of England, where she was domiciled at the time
 death; and, in respect of the admission that the pursuer is, by the
 England, her representative in mobilibus, Finds that he is entitled
 y Henrietta Ann Leslie's share of the moveable property of her
 George Leslie—To that extent repels the defences, and sustains
 laratory conclusions of the action, and appoints the defenders to
 a state of their intromissions with the said George Leslie's move-
 ans and estate; quoad ultra, and in regard to Lady Henrietta's
 share of the heritable bond for £10,000 sterling, claimed from
 ender, the Earl of Rothes, as well as her share of the heritable
 or £4000 and £5000 sterling, now vested in the defenders by the
 ents of George Leslie, Finds that these being secured over landed
 in Scotland, must descend according to the law of Scotland, and
 , in virtue of the destination to Lady Henrietta's heirs and assign-
 the marriage-contract, devolve upon the pursuer, who is not Lady
 etta's heir in heritage, according to the law of Scotland; and
 re assoilzies the defenders from the whole conclusions of the
 n regard to the said bonds of £10,000 sterling, £5000 sterling,
 000 sterling: Finds no expenses due to either party, and de-

and the estate in marriage or assignation by the law of the country the heritage was situated. I conceive, therefore, that no right to the fee of Lady Henrietta's share in these bonds.

LORD PRESIDENT.—I am of the same opinion. Under the heirs and assignees, the subject in question could not be carried off by virtue of the assignation implied in marriage, because it will not carry heritable rights. The right in her ladyship was nature.

LORD GILLIES.—I am of the same opinion.

LORD M'KENZIE.—I also concur.

THE COURT therefore adhered, and found no expenses.

J. HOPE, Jun., W.S.—TAIT and YOUNG, W.S.—Agents.

No. 323. WILLIAM BECK (Judicial Factor on Burgh of Lochmaben
—Hunter.

Burgh—Judicial Factor.—Where the estates of a royal burgh were and a judicial factor appointed, in terms of 3 Geo. IV. c. 91, a petition of the judicial factor, with consent of the Magistrates as empowered their authority to a sale of the feu-duties of the burgh (as procedure under 3 Geo. IV. c. 91), and granted warrant to distribute of the sale among the creditors of the burgh.

June 30, 1836. In 1824, the estates of the royal burgh of Lochmaben were
1st Division. B. ted, and a judicial factor was appointed under 3 Geo. IV.
Magistrates and Council afterwards raised a multiplepoint

petition was now presented by the judicial factor, with consent of No. 323
Magistrates and Council, stating that it appeared to all concerned June 30, 183
the sale of certain feu-duties, amounting to about £100 per annum, Burness.
to be an advantageous proceeding for extinguishing, pro tanto, the
that an Act of Council had accordingly been passed, and the
the notices given, in terms of 3 Geo. IV., c. 91, but, as the estates
burgh were under sequestration, it seemed to be necessary to have
action of the Court for the sale, and also to have a warrant to dis-
the proceeds among the creditors. The petition, therefore, pray-
Court to interpose its authority "to a sale of the feu-duties of the
burgh of Lochmaben to be made by the Magistrates and Council
aid royal burgh, in terms of the 3 Geo. IV. c. 91, as specified in the
of Council, above referred to, with the consent of the petitioner,
judicial factor upon the sequestrated estate of the said burgh, and of
creditors, and to authorize and direct that the proceeds of the said
shall be distributed by the petitioner, for payment of the just and
debts of the said burgh, as before specified, among the creditors,
according to their respective rights and interests therein, he finding suffi-
cient before extract."

THE COURT, after intimation, granted warrant as craved.

W. MARTIN, S.S.C.—Agent.

JAMES BURNES, Petitioner.—*Monro.*

No. 324.

Loco Tutoris.—Circumstances in which the Court granted authority to a
factor loco tutoris (on a summary petition, which was not opposed), to make up
the titles to heritage, and sell by public roup, or private sale, such parts as
necessary to pay the ancestor's debts.

JAMES BURNES, S.S.C., factor loco tutoris of Robert Elder, presented June 30, 183
petition, stating, that the pupil was heir-apparent in several heritable
estates, including the lands of Spencerside, which had been bought for
in 1804, and on which a sum of £150 of principal, with a heavy
interest, remained due; that these lands had much increased in
value and it would be highly beneficial to the pupil to pay up the price,
to complete a title to them; that the pupil's ancestor had left other
debts and the creditors were proceeding to adjudge the whole heritage;
that the pupil had no available funds, except by making up titles to
the heritage, and selling the requisite portions of it. The petitioner
prayed for authority to serve the pupil heir-at-law, &c., and upon the
title being completed, "to authorize the petitioner to sell and

1st DIVISION
D.

No. 325.

ANDREW MACLEOD, Advocate.—*Rutherford—J.*
GEORGE TOSH, Respondent.—*M'Neill—Mack*

Obligation—Partnership—Novatio Debiti.—Circumstances which
That a certain debt was not the debt of a company, but of a partner
acknowledgment thereof was signed in name of the company firm;
it to have been a company debt, novation had taken place.

June 30, 1836. THE respondents, George Tosh and John Tosh, his
2^d Division. business, in Glasgow, as calenderers, under the firm of G
Lord Jeffrey. Son. In February, 1826, the following acknowledgme
R. to the advocate, M'Leod :—

“ Glasgow, 9th Feb
“ Borrowed from Mr Andrew M'Leod £40 sterling.
(Signed) “ GEORGE TOSH

This document was in the handwriting of John Tosh,
stamped. John Tosh was on terms of intimacy with M
in the practice of having money transactions with him.

In August, 1828, the firm was dissolved, and the
announced in an advertisement, which stated farther th

n Tosh with a memorandum, in which this money was No. 325.
individual debt, and, at the same time, Tosh stated himself,
a letter prefixed to this memorandum, to have borrowed June 30, 1831
the sums therein specified. Macleod v.
Tosh.

In October, John Tosh granted to Macleod a bill for £172,
10 months, which was declared by the former, in a letter
to, to include the £40 of February, 1826. In November,
de of John Tosh, whose affairs had become embarrassed,
died. On the 1st December, Macleod ranked as a cre-
ditor, emitting the following oath:—"That John
Tosh, in Glasgow, is justly indebted and owing the deponent
£128, 0s. 11d., being the balance unpaid (including interest
to the 23d day of November last) of a promissory note for £172
granted by the said John Tosh to the deponent, dated the 28th
of October, 1829, and payable two months after date, all as shown in
the bill dorsed on the other page: That no part of said sum of
£172, is paid or compensated; nor is any security held for
any part thereof, save and except the promissory-note
granted; all which is truth, as the deponent shall answer to

oath was ever made by Macleod to George Tosh, who con-
fessed for payment of the £40, as a company debt of the firm of
Tosh and Son.

1833, Macleod raised action before the Sheriff of Lanark-
shire against George and John Tosh, libelling on the acknowledgment
of the bill of 1826, and stating that the sum of £40 therein contained
was owing, with the exception of two small dividends,
£6, 1s. 8d. drawn from the sequestrated estate of John
Tosh, including for payment of the balance with interest. The
fact that the debt sued for was no longer due, in respect of the
time between Macleod and John Tosh, when it was included in
the bill of 1826, by which Macleod accepted the latter as his sole
obligation in question being thus extinguished by novation.
In the procedure, the Sheriff (8th July, 1835), chiefly on the
ground of Macleod's oath in the sequestration affording decisive evi-
dence of the debt having taken place, assoilzied.

Macleod brought an advocacy, and pleaded, inter alia—
that the action libelled on being ex facie a company debt, and the
law being against novation, the circumstances of the case
afforded sufficient evidence of Macleod having elected to rely solely
on the solvency of John Tosh, and to abandon the credit of the
firm; the bill of October, 1829, is not evidence of
the debt, and the oath in the sequestration cannot be construed to
show Macleod considered no other person than John Tosh his

terms of the bankrupt act, was such as to counteract against novation, and to show that Macleod, by the £172 from John, had abandoned and discharged the company.³

The Lord Ordinary remitted simpliciter to the Sheriff respondent entitled to expenses ; adding to his interloc note.*

¹ Ballie v. Young, Feb. 14, 1835 (ante, XIII. 472).

² Buchanan v. Adam, June 20, 1833 (ante, XI. 762).

³ Buchanan v. Somerville, Feb. 19, 1779 (F.C.)

* " The Lord Ordinary concurs generally in the views expressed though he does not, perhaps, attach so much importance as they have done, to the terms of the complainer's oath in the several events, the Lord Ordinary does not consider that oath as impugning or abandonment of the claim on the respondent, if such claim is of its date. He views it merely as an ingredient in the mass of evidence, which seems to him clearly to establish either that the debt was from the beginning a private debt of John Tosh, and was referred to a more appropriate document, when the bill of £172 represented the whole sum of his private debts, or, being originally a Company debt, converted novation into an individual debt of the younger partner. In either view, that oath is a most important piece of evidence ; and that it was done, and all that was not done by the complainer's sequestration, seems really to relieve the case of all difficulty. After that event, it was evidently hopeless to look for full payment as the party appointed to pay the Company debts ; and if this, regarded by the complainer as truly a debt of that description, is receivable that he should not have applied instantly to the solvent partner. One of the cases where the question of novation has been raised

leod reclaimed.

No. 325.

JUSTICE-CLERK.—I am quite prepared to keep in view the rule of law June 30, 1836.
 ration is not to be presumed; but, looking to the whole matter as in a Macleod v.
 of evidence, I cannot but arrive at the conclusion, even though we hold Tosh.
 Company was originally liable, that Macleod took the son for his debtor.
 subt whether the obligation in question was ever a company debt. It was
 undwriting of John Tosh; he and Macleod had many transactions; there
 at intimacy and familiarity between them; accounts were prepared in
 his debt was set down as a private debt; there was also the transaction
 bill, and the oath, which shows, with reference to that bill, that Mac-
 ight he had no other debtor to look to than John Tosh.

MEDWYN.—I have doubts. The case of Buchanan against Somerville
 somewhat affected by the recent case of Buchanan against Adam. I am
 re by the circumstance of John Tosh being the person who was to settle
 for which the Company were bound; and when he undertook this obli-
 1828, I do not see why Macleod must be held to have given up his
 inst the Company. His stating it as a debt against John Tosh was just
 out George Tosh's mandate, in the advertisement of the dissolution of
 ip. As to the sequestration and affidavit in 1830, I rather think the
 emitted as under the 24th section of the Bankrupt Act, and cannot hold
 ectly clear as to infer novation.

GLENLEE.—On the whole, I am inclined to concur with the chair. Even
 satisfactory evidence that this was really a Company debt, the question as

If spontaneously entered it as an individual debt in various memoranda
 himself, and furnished to his individual debtor with a view to a settle-
 their transactions. He draws out in his own hand, and transmits to John
 is copied and returned to him as a voucher, a state in which he makes
 say, 'I have borrowed from you the following sums at the several
 tioned,' and then follows a list of seven several sums, including this £40,
 ry, 1826. All the rest (some of an earlier date, and some of a later
 ing, confessedly, and without doubt, sums due by John Tosh as an indi-
 there is nothing the least like this in any of the cases where the plea of
 as been repelled.

Lord Ordinary has no doubt that the complainer was bound to have specified
 any other security he held for the debt, and any other co-obligants bound
 ing with the bankrupt. This is expressly provided by the 53d section of
 , and without reference to valuing or deducting; and it is in vain to
 e complainer took the oath only under the 24th section, and with a view
 nly, for it is the oath under which he actually drew his dividends; and,
 comparison of dates, it rather appears that he never could have voted at all.
 f it had been under the 24th section, the Lord Ordinary is of opinion,
 he was not within the exceptions there mentioned; and, 2d, That the
 bligation for the £40 ought to have been valued and deducted (if held worth
 llings in the pound) from the £172 in the bill. Looking at the oath,
 is a mere piece of evidence, it is not necessary to discuss these questions.
 Ordinary's own opinion is, that, at the date of the sequestration, the
 thought that the receipt under the Company firm had been given up
 £172 bill was granted; and that it was its accidentally coming to his
 e years after, that tempted him to try this way of getting full pay-

that I trenched at all upon the doctrine that novation is no
should have hesitated.

THE COURT accordingly adhered.

JAMES FRODIP, Jun., W.S.—W. B. CAMERON, W.S.—

No. 326. JOHN GRAY and OTHERS, Pursuers.—*Sol.-Gen. Currie*
WALTER SMITH and OTHERS, Defenders.—*Ivo*

Corporation—Proof—Prescription.—In the earliest existing
joint Corporation of Wrights and Coopers in Aberdeen, a
poration was, of date 1694, "homologated and approved," w
of two of the Bailies of Aberdeen, it had been statute an
monally by the whole trade, that a Wright with a Cooper sh
con alternately, each year, and that a certain order should s
to the Councillors; both prior and subsequent to 1694, a usag
this regulation prevailed down to 1833, when, by a vote of the
solved that the rotation in question should no longer continue
resolution an election took place;—Held, that such resolution v
majority of the Corporation, and that the election following on

June 30, 1836. ABOUT, or previous to the year 1527, the crafts of
2^d DIVISION. and masons, in Aberdeen, were associated together as
Ed. Cockburn and of that date they obtained a Seal of Canae from

June 30, 18
Gray v. Sm

the earliest record or minute-book of the corporation now in existence which is recognised as authentic, a collection of laws is engrossed—“ Acts and Statutes made be the Deacons, Maisters, and members of the Wright and Cooper trade in Abdn., Recorded in their Court books, and nowe Revised, Homologat, and Approven the _____ day of _____ 1698 (sixteen hundred) and ninty-eight, and ordeaned to be insert. Regd. and Recorded in this Court The Court being lawfully fenced and affirmed in presence of _____ Mark, Deacone.”

the year 1616 to 1833, the mode of electing office-bearers, in observance, has been, that the deacon was chosen one year from the shoemakers, and the next year from the coopers, alternately, and that these branches of the corporation furnished every year an equal number of the masters or councillors, the box-master being also, alternately a shoemaker and a cooper. The only exception to this rotation, was in the years 1715 and 1716, when the records of the corporation bear that illegal elections took place in consequence of the corporation being then "under the power and impression of the great plague," so that they could not act or do any thing in their affairs belonging to the corporation in a legal manner."

and within the power of a majority of the members present No. 326.
 the meetings to enact and give effect to ; that, in the absence June 30, 183
 of a charter or seal of cause, giving a specific constitution to Gray v. Smith
 the corporation, and having regard to the repeated acts of the body mo-
 nition and regulating the mode of election from time
 the corporation was entitled, of itself, by the vote of a majority,
 to model the rules for the election of its office-bearers.
 The Lord Ordinary "sustained the defences," but found no expenses
 to be paid to his interlocutor the note below.*

no authentic written constitution of the corporation, by mere re-
 sult of this question can be settled. What is termed the seal of cause
 to the corporation in its pre-existing condition, and not to its actual
 law, and at any rate, does not touch the case which has arisen ; and
 the act of the corporation of 1694, cannot, in the circumstances,
 bind. In this situation, the case must depend on the general principles
 of law.

the masons and coopers, so far as is known, never formed separate corpora-
 tions. They did not unite on the principle of each retaining distinct and in-
 dependent privileges. It has always been one corporation, though formed of men
 in different trades. It anciently admitted masons, who however
 died out, and now consists of coopers and wrights alone. Being thus
 only two classes of tradesmen, it was natural that they should choose
 officers from both equally, whether by rotation or otherwise. Accord-
 ing to the general, though not absolutely the invariable practice for a
 long time, it is needless to examine the exceptions critically, for the general
 rule is that the election of a cooper and of a wright alternately, has
 been the prevailing usage, and that it has been the uniform
 practice, for at least 40 years prior to the institution of this action.
 This is the basis of the pursuer's case. They infer from it that the prac-
 tice is the rule, and that whatever may be the disproportion of num-
 bers must be an equality in the office-holders. But the Lord Ordinary
 says this does not follow.

The inherent right of all corporations to elect any member an office-bearer,
 is not restricted to a particular rotation of persons, merely because it has been
 the custom to follow such a course in time past. Such schemes for avoiding
 discussion are extremely common in many societies, but mere usage
 does not make them obligatory. A practice plainly implying the adoption of a
 particular rule is liable to be challenged, may often have this effect ; be-
 objected to, it may justly be held to be meant to be acquiesced in.
 Here, the usage could not have been legally prevented, and may be
 resolved into the mere periodical pleasure of the body, it cannot
 amount to a permanent restriction of the general powers of the society.

The rotation, and the occasional deviations from it, have always been in-
 at least sanctioned by the act of the corporation itself, flowing from
 the fact that both its component parts, on the principle that it had power to re-
 gulate its own matters. Accordingly, important changes have been made by this
 corporation, in so much, that the pursuers, as their summons shows, were on
 no occasion favourable to the abolition of leets, though these had been im-
 posed.

It is contended for by them might have some foundation in justice, if
 there were any original and separate corporate powers, or paid different fees, or
 peculiar privileges. But they are in all respects the same as the other
 corporations, except that the trades which they profess to practice when they enter are

homologated by subsequent meetings of the trade, and literally observed for nearly two centuries, the rule of election of office-bearers is firmly established, and cannot be changed at the pleasure of one of the constituent branches of the corporation.

3. The uninterrupted usage of the corporation, for many years, is equivalent to an express constitutional regulation followed as implicitly as if it had been enjoined in the charter; for it has been repeatedly held that prescription, or long use, is sufficient to establish a corporation, an implied title for the exercise of exclusive privileges;¹ and it se fortiori, that it should be sufficient to establish the intent of a corporation.²

4. The effect of the defenders' plea would be to unsettle the title of all corporations which have been established, with a view to the regulation of their elections, as it would forbid the bodies possessed an inherent right of subverting the rule which they have from time immemorial acted, and would thus be to the vote of a majority to depart from the rule of annual election, and diminish the number of their office-bearers at pleasure, and annihilate the corporation altogether.

In support of their pleas, the defenders contended—

The wrights and coopers being members of one incorporation, the same rights and privileges, and in every matter regard

management of the corporation, voting indiscriminately on individual equality, such a rotation as that contended for by ^{No. 326} though it may have been resorted to for a series of years ^{June 30, 18} ^{Gray v. Smi} event disputes, is essentially a departure from the natural on, and the broad principles of constitutional law on which ons are founded. The pursuers are in no condition to regular vote or resolution of the society to the effect they ven if the entry in 1694 could be taken as evidence of any ous that a rule, flowing only from the vote or resolution of elf, was liable to be revoked, altered, or amended by any te of the same society as represented by the majority of

But, if a corporation is not prevented by a former vote a contrary resolution, it can make no difference that the as been acted upon for a series of years. Usage can at ly the existence of a resolution of the society carried into l effectual till altered; but if the resolution be not binding ety in perpetuum, the usage following thereon cannot make Although the mode of election in a burgh or corporation, en at first prescribed by a higher authority, may be altered y a contrary usage, on the principle of acquiescence in the at party from whom the constitution flowed, as well as by arested, this doctrine can have no application to the present he society must have had, from the first, within itself the elating as to the election of its office-bearers, and where, in at power, it does no more than *uti jure suo*. The coopers a inferior to the wrights in number, and they may become or disappear altogether; but the rule of election contended essentially inherent in the constitution of the corporation, ety may, from accidental circumstances, be totally deprived of reducing the rule to practice, and yet continue to hold existence.

CH-CLERK.—I have come to be of opinion that we ought not to Lord Ordinary's interlocutor. Looking to this ancient record of , we cannot treat it as undeserving of attention. As an ancient document, it is impossible to disregard it; and there had evi-rior record. If we were to shut our eyes to the evidence afforded t writings, upon what would the old established institutions of the l? Having regard to the seal of cause and the lists of deacons, 1616, there is evidence that, previous to 1694, the elections d alternate; and it is incontestable that, for a period far beyond ecription, the uniform usage has been to elect the deacons alter- wrights and coopers. Looking to the old state of the law as to : have always understood that the opinion of Lord Chancellor Fremy case, as to a usage for 40 years operating a modification

o. 326. or alteration in the set of a burgh, was sound law—and which, indeed, in pursuance of the remit from the House of Lords, was acted on by the First Division of this Court, when their Lordships sent the question of usage to be tried by jury. Now, supposing the deacon of this corporation had been a member of the town-council, and the wrights had elected one of their own body to be deacon, when, according to the customary mode of election, he ought to have been a cooper,—had this election been challenged under the former state of the law, we would have reduced it. But though corporations are now upon a different footing, we must decide as to the rights of parties according to the same principles as before. The deacon is an important office in the corporation, and we are not to overturn the old rules of law which regard his election. I cannot, therefore, agree with the Lord Ordinary, when he admits that there has been a usage, but holds that it is changeable at the pleasure—one might say rather the arbitrary will—of a majority for the time being.

LORD MEADOWBANK.—I entirely concur.

LORD GLENLEE.—I also concur in the opinion given. I hold that this old law existed, and has been considered, in conformity with the usage of electing the deacons alternately, as the law of the corporation. I do not say there may not be an alteration made by authority of the magistrates; but here there was no such thing proposed, and there appears to have been great precipitancy. There is a certain degree of formality required in making a new law, especially where it touches the constitution of the corporation. From an old case reported by Lord Hailes, it would appear that a regulation or bye-law enacted by a corporation must not only have the authority of the magistrates interposed thereto, but be formally recorded in the books of the corporation.¹ It would be odd, therefore, if a mere minute were to be held sufficient. It would just amount to saying that the subsisting laws of the corporation are of no avail at all, if a majority should have the power of changing in this way the mode of electing the chief officer.

LORD MEDWYN.—I concur generally. It is important to observe that the seal of cause in 1527 was addressed to the deacons of the wrights, coopers, and masons. This had just been a private association of craftsmen, such as those which used to be formed in Germany and the Low Countries before the introduction of regular incorporations. The seal of cause was quite sufficient to constitute these craftsmen into a corporation. After the masons left the body, two deacons appear at first to have been annually elected, but this had probably created dispeace, and from 1616 downwards, one only had been appointed, and that, with almost no variation, alternately from the wrights and coopers. As Lord Glenlee suggests to me, the old book containing the act of 1694 is like the Pandects, narrating, confirming and renewing ancient laws; and it shows that a previous rule had existed as to the matter of alternate election. I incline to hold that the usage itself was sufficient; and when I see such a course of practice, founded on reasonable considerations, and sanctioned by the written laws of the corporation, I think it would require very strong grounds indeed to justify our breaking in upon it. I am, therefore, for altering the interlocutor.

¹ Tailors of Canongate v. Milroy, Aug. 6, 1777, Hailes, IL 775.

and accordingly altered, and decerned in terms of the libel, finding **No. 326.**
due.

July 1, 1838.
Blair v.
Taylor.

and MORTON, W.S.—SCOTT and BALDERSTONE, W.S.—Agents.

BLAIR (Treasurer of Bank of Scotland), Pursuer.—*Keay*— **No. 327.**
Walker.

or TAYLOR, and OTHERS (Durie's Trustees), Defenders.—
Sol.-Gen. Cuninghame.

MISS MARION AITKEN, Defender.—*Wilson.*

ratio Debiti—Bond—Co-obligant.—Two parties along with a third
ad to a bank for a cash-credit of £1000, to be kept in name of B;
lied, and their representatives, along with B, and a fourth co-obli-
and of corroboration; B died, at which time a sum of £695 was
ie cash-account; the son of B wished to continue to operate on the
following letter, framed by the bank, was signed by him, and by
three surviving co-obligants, and was addressed and delivered to
request of the bank, that the credit of £1000, in name of B, &c.,
ay be continued thereon, in name of his son, &c. in terms and to
ld bonds, which shall continue in full force for all such sums, &c.
n like manner with any sums, &c. due from his father in terms of
he son was allowed by the bank to operate on the credit for several
ch he failed, the whole sum being drawn out:—Held that the two
ligants who signed this letter were jointly and severally liable to
e whole sum due under the cash-credit, although they alleged that
igned on the faith that their letter imported nothing more than a
heir liability under the bonds; that under the bonds they had had a
t, against whom, if he had signed the letter, they would have had a
and that the bank were not justified in giving credit to the son, on
letter, unless it was first signed by all the surviving co-obligants in

Robert Mudie of Balmule, Henry Aitken of Lochhead, and July 1, 1838
Flockhart of Annafreck, on the narrative that the Bank of Scot-
ed to allow them a credit on a current account, to be kept **1st DIVISION**
f Mudie, to the extent of £1000, granted bond, conjunctly **Ld. Corehouse**
to the bank, for the sum of £1000, or such part thereof as **S.**
advanced to Mudie. Mudie operated on the credit, and, after
Aitken and Flockhart, the bank, in 1820, obtained a bond
from Miss Marion Aitken of Lochhead, the representa-
of the deceased William Flockhart. Along with
the parties, Robert Durie of Craighluscar, granted a bond
previous bond, and cash-credit, “and whereas the Bank
willing to continue the said credit on our becoming prin-

wished to continue to operate on the cash-credit, the
of obligation, which was in the handwriting of one
ficers, was signed by Mudie, by Miss Aitken, and
the trustees of Durie, now deceased, and was placed
the bank :—

“ Dunfermline, 27th

“ To the Treasurer of the }
Bank of Scotland. }

“ Sir,—We request of the bank that the credit of £
Robert Mudie of Balmule, with the bank at its Dunf
our bonds, may be continued thereon, in name and u
his only son, Mr Robert Mudie, now of Balmule, in te
of our said bonds, which shall continue in full force fo
balances due, or to be due from him to the bank, in
any sums or balances, if any due to the bank, from his f
these bonds. We are, Sir, your mo. ob. st.”

The following memorandum was subjoined to the let
officers of the bank :—“ Henry Aitken, Lochhead, and
hart of Annafreck. Corrobd. by Miss Marion Aitken,
of Annafreck, and Robert Durie, Younger of Craiglusc

There were crosses (thus X) affixed to the bottom of
signatures are usually adhibited. Henry Flockhart, on

f £524, 12s. 3d. from Miss Aitken, and raised action against No. 327.
 Durie's trustees for £524, 12s. 4d. as still due, with certain in-

July 1, 1838.

Blair v.

Taylor.

aking up a record, the bank averred that, though they framed er, they took no concern whatever in procuring subscriptions to that after the defenders had subscribed the letter, it was delivered ank, and Mudie, junior, was allowed, on the faith of it, to open the cash-credit. They also averred that the crosses, for signature had not been affixed by them, or with their knowledge.

defenders averred that the letter, being prepared by the bank, was presented to them for signature; and that they signed on reliance on the fact that the bank was also to sign before it could be used. But they did not state whether the letter was presented to them for signature by the officer of the bank, or by Mudie, junior, or by what other indi-

as stated by the Defenders—

the letter of obligation, they requested the continuance of the credit to Mudie, junior, “in terms, and to extent, of our said obligation which shall continue in full force for all such sums, &c. due from him in like manner with any sums, &c. due from his father, in terms of the said obligation.” This letter expressly contemplated a continuance of liability according to the subsisting bonds, and nothing else. Though only one obligant therefore had signed it, he would have been entitled to say that he had bound himself to no greater liability than the continuance of the bonds themselves would have created. But had the bonds been taken up, the defenders would have had a right of relief to the extent of one-third, against Henry Flockhart; and as he was liberated, by the bank, in not requiring his subscription to the letter of 1829, must, in any event, relieve the defenders of one-third of their liability. The position of the defenders was truly that of cautioners, and they were entitled to a favourable interpretation of their obligation.

as the letter, in gremio, contemplated the concurrence of all obligants, both from its tenor, and from the crosses affixed at the bottom to their subscriptions, the bank had no right to give a credit to Mudie, junior, upon the faith of that letter, while still incomplete, and while only of the signatures had been obtained. The letter therefore was not binding to any extent, and the bank could only found on the bonds of 1813 and 1820, against which there were various sufficient grounds if the claim of the bank should be restricted to them.¹

as stated by the Bank—

the bonds of 1813 and 1820, all the co-obligants were jointly and severally bound, to the extent of £1000. It was in this sense that the

¹ Feb. 19, 1825 (ante, III. 558; 385, New Ed.); Hume, Jan. 12, 1830 (ante, IV. 295); Padon, Dec. 21, 1826 (ante, V. 175).

defenders reclaimed.

No. 327.

GILLIES.—In this case, though a shareholder in the bank, I am not to decline myself as a Judge. But I should wish to hear the opinions of the Lordships before I deliver mine. July 1. 1836.
Blair v. Taylor.

PRESIDENT.—I think the interlocutor is perfectly right. It is a misapprehension that the obligatory letter was ex facie incomplete until Flockhart signed it. It is a letter commencing "We request," &c., and it does not require a number as concurring in the request. It is signed by several persons, though it is plain that there was imprudence somewhere, in allowing it to pass out of the custody of the defenders, before Flockhart signed it, which meant only to become binding when he did sign, yet the Bank are not responsible for the imprudence of the defenders. If the Bank chose to be satisfied with a smaller number of names, and consequently with less security than they had, that was the Bank's own affair. But if the defenders wished to make a third co-obligant, and a right of relief against him, under the letter they should have taken care not to allow that letter to be delivered to Mudie as a fund of credit to Mudie, junior, until Flockhart had signed it. They neglected this, and the loss must fall on themselves.

M'KENZIE.—I am of the same opinion. This is a case of hardship, and I do not see enough to warrant me in altering this interlocutor. There are facts which might have been more specifically stated in the record, respecting the precise manner in which the subscriptions were procured to the letter, which is itself in the handwriting of an officer of the Bank. The Bank of Mudie procured the subscriptions as they now stand, and brought the letter in its present form, and delivered it to the Bank, who thereon allowed it to operate on the credit. And, on the other hand, there is nothing by the defenders on the record, that the letter lay constantly at the Bank for the purpose of being there subscribed by the obligants, calling for the signature. I take it, therefore, that the account given by the Bank as to the obtaining signatures is substantially correct, and that Mudie had done no wrong. On the whole, I think the interlocutor of the Lord Ordinary should stand.

GILLIES.—I am of the same opinion. The question is, whether the co-obligants are to be responsible for the non-subscription of Flockhart. I think the Bank were not bound to procure it; and the co-obligants, they should have done so, if they wished not to be bound without having a co-obligant under the letter of 1829.

obligants inter se, except that they were bound to give every facility for the defence.

Defence, that the bank has given time to Flockhart to the prejudice of the creditors, is plainly unfounded, for it was by their own consent that the credit was advanced to Mudie, junior. If the bank has any claim against Flockhart in respect of his being a party to the bond of corroboration to the extent of the advance to Mudie, senior, they are entitled to an assignation to that claim. It is a hard one, and not unattended with difficulty, no expenses have been paid.

Right in Security—Personal Objection.—1. A party granted three for borrowed money and executed a trust-disposition of a certain special purpose of securing the creditors and cautioners in those the trustees were duly infeft; having borrowed another sum of money fourth personal bond, whereby the creditor was declared to be as full benefit of the trust created by the former conveyance, and intimated made to the trustees; thereafter, in security of another loan, he granted to the same estate on which the creditor was duly infeft—held, in that the declaration and assignation in the fourth bond were ineffective security preferable to the last creditor's infeftment. 2. Circumstances ineffectual to bar the last creditor's claim.

July 1, 1836. In 1822, Mr M'Culloch of Ardwall obtained three loans in all to £3800, for which he granted three personal bonds to other parties as cautioners. For the purpose of securing and cautioners in these bonds he conveyed in trust to Mr J W.S., and other trustees, his interest in the entailed estate and two statutory claims for improvements already constituting together to £5500. Under this disposition the trustees infeft.

Besides this infeftment in security, the Ardwall estate stood on the records with annuities payable out of it to the North Insurance Company, amounting to £1131 per annum.

In 1824, M'Culloch borrowed from a Mr Wardrope a sum for which his brother, David M'Culloch, became cautioner bond granted by them for the amount. In this bond referred to the trust-conveyance above mentioned, the terms of which

of this bond and assignation to the said trustees, or to any No. 3:
 he said trust and the whole conditions and provisions there-
 eld to extend, and apply equally to the sums due under July 1, 18
 as to those due under the three securities above narrated, Nairne v.
 under them being always preferable upon the said trust Douglas.
 sums due under this security."

was intimated to two of the trustees, and it was subsequently
 e M'Killop, as executor of David M'Culloch.

of 1827, the claimants, Barbara and Mary Douglas, and
 Joseph Douglas of London, advanced to M'Culloch a sum
 redeemable annuity, for which he granted a bond and dis-
 curity, of his whole interest in the estate of Ardwall. On
 ce, infestment was taken and recorded 30th January, 1828.
 g this advance the lenders applied to the parties in right of
 above mentioned, on the footing of their all holding pre-
 ies, to restrict their securities over the rents as to the prin-
 e to them. To this application the parties consented, and
 deed of restriction, reciting the four loans and the assign-
 enefit of the trust contained in Wardrope's bond, was exe-
 ne and the other trust-disponees, whereby it was declared
 at, to the extent of the principal sums due to the creditors
 the annuity in favour of the Misses Douglas should be pre-
 he rents of the estate.

28, on the narrative, inter alia, that doubts had been enter-
 r the bond in favour of Wardrope was effectually compre-
 the trust held by Nairne, &c., M'Culloch granted a sup-
 ast-conveyance, of new disponsing to the same parties the
 ined in the original deed, in security of the sums due by the
 onds, and particularly by that to Wardrope, of which
 now in right. Under this disposition infestment was taken
 following.

M'Culloch's affairs having become embarrassed, the inte-
 r bonds fell into arrear, and a process of mails and duties
 gainst him at the instance of Nairne and the other trustees.
 edings were adopted by the Norwich Insurance Company
 ir preferable security, and rents were recovered to a greater
 the annuities due to them. With the view of settling the
 arious creditors, processes of multiplepointing, which were
 onjoined, were raised in name of the Ardwall tenants and
 Company, and of Mr William Gordon, who had been
 icial factor on the estate. Mr Nairne and the trustees, as
 t of the creditors in the four bonds, the Misses Douglas and
 Company appeared as claimants. In the early part of the
 ie agents for the Misses Douglas acted under the impres-
 e understanding that Wardrope's security, as well as those

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—
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Misses Douglas.

of the three prior creditors, was preferable to that of their clients, and an interlocutor was concerted on that view, but having subsequently been otherwise advised, they intimated (10th February, 1834) to the agents of the other claimants, their intention of objecting to any proposal of ranking upon that footing.

The Norwich Company having been preferred of consent *primo loco* to the fund in medio, and proceedings to reduce their security, at the instance of the trust-dispensee under a *cessio* which had been sued out by M'Culloch having proved ineffectual, the question came to be whether, admitting the creditors in the three first bonds to be preferable to the Misses Douglas, M'Killop, as in right of the fourth bond, should be preferred to these ladies.

In support of M'Killop's claim of preference it was maintained—

The creditor in the fourth bond was effectually adopted into the benefit of the trust granted by M'Culloch in virtue of the bond and assignment duly intimated and recognised by the trustees previous to the constitution of the Misses Douglas's security, and is thus entitled to be preferred equally with the three other creditors. Further, the Misses Douglas are personally barred from competing with M'Killop, in respect, 1st, That the deed of restriction whereby the trustees, as authorized by the creditors in the bonds, departed from their securities for the principal sums in competition with these ladies, must be held to have proceeded upon the understanding that the trustees' preference for the interest due upon the whole bonds was to be conceded, upon which assumption arrangements were entered into, the Misses Douglas being fully aware of the different circumstances under which the bond to Wardrope stood with reference to the other bonds; and, 2dly, that, in the present proceedings, the Misses Douglass' agents had admitted M'Killop's preference to its full extent.

The Misses Douglas, on the other hand, pleaded—

The original trust-conveyance having been granted and infeftment taken with reference specially to the three bonds therein mentioned, and as a security for the creditors and cautioners in those bonds, no competent real security could afterwards be created with reference to Wardrope's bond, by merely assigning the parties therein concerned into the benefit of the former trust, and the infeftment of the Misses Douglas being prior to the supplementary conveyance and infeftment relative to Wardrope's bond, is preferable thereto. Nothing that has passed in the course of the transactions in question or the present proceedings affords any ground for depriving the Misses Douglas of the preference legally belonging to them in a competition of securities.

The Lord Ordinary pronounced the following interlocutor, and added the subjoined note : * —“ Finds the claimants, Misses Barbara and Mary

* “ 1. The Lord Ordinary is of opinion that the attempt made to add the

and Mr Joseph Douglas, preferable by their infestment over the estate of Ardwall, for the annuities due or to fall due to them in question with Mr James M'Killop, as in right of Mr John Ward-Nairne v. Douglas. No. 328
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assignment, or the trustees of Mr M'Culloch, claiming for his Finds, that the said Misses Douglas and Mr Joseph Douglas are

Mr Wardrope to the trust, by means of the declaration in the bond to him, in relation to the trustees, was not effectual in law to create a security preferable to the infestment of the Misses Douglas, &c., and that it can make no difference on the extent of their right, that they may have believed at the time that Wardrope's security was preferable. The competition supposes that there is enough for both claimants, and in that case, upon bankruptcy, each party is entitled to resort to all his legal rights, but the original trust was definite and specific, confined to the three first securities, and the Lord Ordinary has no power to give the force of the infestment for such limited purposes could be extended in operation as that attempted, so as to be preferable to a regular disposition by infestment, completed before the supplementary trust was executed.

The Lord Ordinary thinks it very clear, that there is nothing in the conduct of the agents in this process, or with regard to the reduction of the share of the Norwich Insurance Company, which can bar the present claim. It is not that, for some time the agents of the Misses Douglas, &c., were under the impression that Wardrope's security was preferable. But notice of the objection was distinctly given in the letter of Messrs Gordon and Stuart, of the 10th Feb-
1834, and repeated in various subsequent letters down to 11th June, when was stated the precise ground of objection, as advised by counsel. The Lord Ordinary's interlocutor in the case of the Norwich Union Company was not pronounced till July, 1834; and if the trustees acquiesced in it, in the belief that the fourth security would be good, it was in the face of distinct notice that it was not admitted.

The only difficulty which the Lord Ordinary feels is, with regard to the arrangement, by which, before the loan was made by the Douglasses, the four parties in the previous loans consented to restrict their securities, in assumption of all being effectual to the interest of their debts: That the fact that Wardrope consented to such a restriction appears to afford no ground for the preference of the Douglasses, because if he held no preferable security, there was nothing to restrict, and his consenting to do so could not give him a security which he had not. If there is any difficulty, it is occasioned by the fact that the other three creditors to restrict; and it is said for M'Killop, that he was required to hold by the security for the principal, and thereby to give the security to him over the improvements, and that he could have admitted this. But this appears to be quite fallacious. There was no competition between the fourth creditor and the three prior creditors, at any rate none to the Misses Douglas were parties. Each of them gave his own consent to the restriction for his benefit, without which the Douglasses would not have lent their money. How, then, can they be barred, in a case of bankruptcy, from resorting to their legal rights, whatever they are, merely because each of these parties consented to make the restriction of his own security? The Douglasses are now to do with the considerations on which each of the parties might have made their determination, and if Mr M'Killop, relying on the strength of his security, abstained from any measures which might have been competent to prevent the mistake; but this cannot alter the legal rights of the parties.

There seems to be doubt enough created, at least in a great part by the Douglasses, to justify the trial of the question, and prevent a finding of

No. 328. not barred from insisting in this claim by any of the transactions founded on in the record: Prefers them accordingly, and decerns to this effect. Appoints the cause to be enrolled, in order that this interlocutor may be correctly applied, and that the remaining points in the competition may be disposed of. Finds no expenses due."

July 2, 1836.
Tweedie v.
Beattie.

The trustees reclaimed on the merits, and the Misses Douglas on the point of expenses.

THE COURT adhered on the merits, but found expenses due.

WILLIAM RENNY, W.S.—GORDON and STUART, W.S.—Agents.

No. 329. LAURENCE TWEEDIE and OTHERS, Petitioners.—*Keay—More.*
EBENEZER BEATTIE, Respondent—*Rutherford—J. Anderson.*

Sequestration of Lands.—Held incompetent to sequester lands, there being no competition.

July 2, 1836.
2^D DIVISION.
F.

THIS was a petition on the part of Tweedie and Others, heritable creditors of the respondent, Beattie, setting forth that he was proprietor of the lands of Dalgliesh and Ettrickhall, which had been purchased at a price of £20,450; that the amount of heritable debts and interests burdening them was £23,823, and that they were affected by inhibitions to the extent of upwards of £5000; that two of the creditors had raised processes of poinding of the ground, and obtained decreets and warrants of sale, but that the proceedings therein had been opposed by a daughter of Beattie, who alleged that she had bought the stocking and obtained a tack of both the properties. In this situation of matters, the petitioners prayed the Court to sequester the lands, and to appoint a judicial factor, referring as a precedent to the case of the Thistle Bank, v. Steven, December 19, 1834 (ante, XIII. 219).

Answers were given in for Beattie, who, without admitting the correctness of the petitioners' statement as to the amount of heritable debt affecting the lands, maintained that the application was fundamentally incompetent, as there was no controversy or competition among the creditors; that sequestration of landed estates was essentially an incidental process, and was a mere interim assumption of the subject, with a view to its being duly administered, for behoof of the party who should be ultimately preferred in a depending competition of rights.¹

LORD JUSTICE-CLERK.—We have no authority to interfere, as there is no

¹ *Erskine*, II. 12, 56; Blackwood, July 24, 1781 (F. C.); Robertson v. Earl of Fife, July 2, 1825, ante, IV. 133, (new edit. 186); and F. C.

petition. The only possible ground on which we could interfere No. 329
 at expediency, which is a very unsafe ground.

July 2, 183
 Carnegie v.
 Mactier.

Judges having concurred,

THE COURT refused the petition, with expenses.

JOHN BROWN—MACINTOSH and GEMMELL.—Agents.

CARNEGIE, Complainer.—*Rutherford*—*H. J. Robertson*. No. 330
 MACTIER, Respondent.—*D. F. Hope*—*Ivory*—*Girvan*.

—*Interdict*.—A party having applied for interim interdict against proprietor for shooting on certain lands, which, although not dis-
 a the bill, were alleged to be included in the party's seisin there-
 interdict granted as to tenements nominatim set forth in the

CARNEGIE, of Southesk, presented a bill of suspension, July 2, 183
 that he was "proprietor of certain portions of the lands 2d Division
 Strachan and Culpershaugh, lying in the parish of Stra- Bill-Chamber
 ty of Kincardine, conform to his sasine, dated 3d Novem- Ld. Cockburn
 ber 1823, herewith produced;"—that this property compre- T.
 hensible portion of muir and hill-ground, abounding with
 he had of late been troubled with repeated trespasses and
 , made upon his hills and shooting-grounds of Strachan,
 dent, Anthony Mactier of Durris, his gamekeeper, and
 e accordingly applied for letters of suspension and inter-
 ve Mactier and his gamekeeper interdicted in the mean-
 trespassing upon the complainer's property and estate of
 in the parish of Strachan, by coming themselves, or send-
 ing others to shoot or hunt upon the said property."
 s presented 4th April, 1836, when Lord Moncrieff, Ordi-
 nary, ordered answers, but reserved the question of interdict
 mentioned in the subjoined note.*

were given in for Mr Mactier, who did not admit that Sir
 gie's property included the hills of Strachan, on which the
 re said to have been committed, and averred that they
 of his own estate of Durris, but was willing that the bill
 should be granted, to try the question. In regard to the interim interdict,

Ordinary does not grant the interdict at present, because there
 is no shooting of game, and to grant it would imply that the respon-
 sible trespassing, but shooting out of season, which is not alleged."

similar application at his own instance (*Carnegie v. Lord* 15, 1829, ante, VIII. 251), that it was sufficient to refer the titles of the lands as to which interdict was craved.

THE COURT, having in view the case referred to, interlocutor of the Lord Ordinary, in so far as it but quoad ultra remitted to grant interdict as to nominatim set forth in the complainer's seisin.

THOMAS MACKENZIE, W.S.—GRAHAM and ANDERSON, W.S.—

ROBERT OGILVIE, Pursuer.—*Rutherford*—Rob
PETER SCOTT, Defender.—*Maitland*.

No. 331. *Proof—Process—Jury Trial*.—1. In an action for slander charging the pursuer with an act which "deserved the gallows," if in his defences adhered generally to the substance of the charge, instances which went not properly to justify, but only to palliate the letter,—Held, That evidence of those circumstances was admissible was no issue in justification. 2. (Note) Question, Whether a bill as to the admissibility of evidence ought to set forth the whole evidence?

July 2, 1836. In the case of *Ogilvie v. Scott* (reported ante, 729, with exceptions was taken by the pursuer to the admissibility of the witness, Elizabeth Binnie, and supported stated at the trial. that with reference to the defences. he

2d DIVISION.
Jury Cause.
R.

JUSTICE-CLERK.—A statement was made at the trial that the jury considered that in the present instance no issue in justification could have been. **No. 331.**

July 5, 1836.
Railton v.
Watson.

THE COURT disallowed the bill of exceptions, with expenses.*

WOTHERSPOON and MACK, W.S.—**THOMAS RANKEN, S.S.C.**—Agents.

MR. RAILTON, Pursuer.—*D. F. Hope—Rutherford—M^cNeill.* **No. 332.**
JAMES WATSON, Defender.—*Keay—Anderson.*

on—Jury Trial—Magistrate.—A summons of damages against a Sheriff, alleged that a criminal complaint by a private party, with concurrence of procurator-fiscal, was presented to him, on which he granted warrant to cite before him for a precognition, without any notice to the party accused; refused to attend the examination of the witnesses, and that the examination directed by the agents of the accuser, and before an under clerk in the clerk's office, without any magistrate being present; that the declarations of the witnesses were never authenticated; that the Sheriff-Substitute, upon this summons, granted warrant to apprehend the party for examination, and the party having taken his declaration, and being ignorant of the manner in which the precognition was taken, committed him to jail till liberated in due course if the party was innocent of the accusation, and those proceedings of the Sheriff-Substitute were irregular, oppressive, and malicious; Held, in making up the jury-trial, that "malice" must be inserted in the issues.

MR. RAILTON, law-agent and notary public in Glasgow, raised an action for damages against James Watson, advocate, sheriff-substitute of Glasgow, and John Love, formerly provision merchant in Glasgow, **1st Division.** **Ld. Corehouse** with that Love, with concurrence of the procurator-fiscal, had presented a petition and complaint against him, charging him with the falsehood, fraud, and wilful imposition; that Watson, before answer, granted "warrant to cite James Crum, &c., witnesses to appear before him, to be examined in precognition," &c.; that witnesses were named, but Watson refused to attend the examination, though that no magistrate or official person was present at it; and that the witnesses refused to be examined unless he attended; that the jury-trial was conducted through the medium of an under clerk in the

All of exceptions in this case set forth the whole parole evidence which was at the trial. Mr Rutherford having suggested that bills of exceptions, as of the present, ought not thus to contain a statement of the whole of the evidence the Court were understood to concur in this observation. Compare the subject as laid down by Lord Pitmilley in *Earl of Fife v. Duff*, Dec. 1842, ante IV. 842, N. E. 347), with Adam on Jury Trial (p. 384, et

“ Having again considered the foregoing petition, so far as taken,—Grants warrant to officers of Court ward Railton, complained upon, and to bring him before the Sheriff of Lanarkshire, or any of his substitutes, for examination on the charge made against him in said petition.

(Signed) “ J

That the pursuer was apprehended under this warrant before the late Mr Sheriff Robinson, who next day thereon, and, on the application of Love, granted warrant to issue till liberated in due course of law; that in granting the warrant Robinson rested mainly on the precognition, not knowing the manner in which it had been taken; that the pursuer was taken under this warrant, and had given intimation under the warrant, but the period of sixty days had elapsed without any further proceedings, and no farther procedure had since been resorted to; that these proceedings of Watson were grossly irregular, malicious, and adopted without probable cause, particularly that the precognition of witnesses should have been held before the pursuer came to the terms of their citation, and the necessity in giving evidence, as well as protecting the party requiring evidence was taken; and that both Watson and Love were liable to damages.

Railton concluded against each for £1000 damages.

Besides pleading defences on the merits, Watson claimed to be acting officially as the Sheriff Substitute of the county of Lanarkshire.

nd detained, to the loss, injury, and damage of the pur- No. 332.

er, on or about the 21st day of August, 1834, the defender ^{July 5, 1836.}
A B v. C D,
maliciously, and without probable cause, wrongfully
suer to be imprisoned and detained in the jail of Glasgow,
ry, and damage of the pursuer?"

Ordinary "appointed 'malice' to be inserted in both
aimed.

MENT.—There was a written complaint by the private party,
of the fiscal, presented to the defender, as Sheriff-Substitute.
instantly granted warrant to apprehend the pursuer for examina-
king any preliminary precognition at all. And, even if irregu-
in taking the precognition, I hold it clear that the defender was
ne officially, and within his jurisdiction, and is entitled to the
statutes. If it was only regular judicial procedure which these
eant to cover, they would be of no avail whatever; for any pro-
regular, does not require their protection. The interlocutor of
ary ought to be adhered to.

RAY and MACKENZIE intimated that they concurred in this

THE COURT accordingly adhered.

CULLEN, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

A B, Pursuer.—*Robertson.*
C D, Defender.—*Whigham.*

No. 333.

ccess.—After the last day has elapsed which the Court had duly
ted, for giving notice of trial at the ensuing jury sittings, the Court
notice to be given, although there were still fifteen free days to
xpiry of the sittings.

or the pursuer of an action in which issues had been finally ^{July 5, 1836}
that it was not in the pursuer's power to give notice of
sues were finally engrossed and placed in the Register ^{1st Division}
fore this was done, the last day fixed for giving notice of
ing sittings had expired; but, as there were still fifteen
before the expiry of these sittings, he moved the Court
rm for giving notice in this case, and to allow it yet to be

the defender, objected, that such a course would be irre-
petent. The pursuer of this action must just wait till

THE COURT refused the motion.

—Agents.

No. 334. WILLIAM GEDDES and OTHERS, Petitioners.—*D. F.*
ARCHIBALD WADDELL, Respondent.—*Rutherford*

Bankruptcy—Provision to Children.—A father, while solvent, provided for his children by a first marriage, to pay them the net amount of £1000 from heritages which had belonged to their deceased mother, which should yet be uplifted by him, during his life; these real and personal absolute property, in virtue of the settlement of his deceased wife, narrated that it originated in the father's "own free motion; to the father to distribute the amount of its contents, in such shares as he chose, and no part of them was payable until the father was interested to begin to run till after that event; the bond of registration for execution: the father, some years after, became bankrupt, and the children were not creditors of his, under the bond, and with his creditors.

July 5, 1836.

1st Division.
Ld. Cockburn.
D.

ON the death of Mrs Robertson or Geddes, wife of James Verreville, in 1812, she left a deed of settlement by which the whole of her heritages was conveyed to her husband, and the said James and William Geddes and others. John Geddes married a second time, and some discussions subsequently arose between him and the said James, in the course of which he intimated his wish

Submission was entered into between Mr Geddes and two of his No. 334.
 William and Archibald Geddes, in which, by minute in 1824, they July 5, 1836.
 y agree and mutually consent, that the rents of the heritable pro- Geddes v.
 which belonged to the late Mrs Geddes, and the interest of the Waddell.
 such part as had been sold, shall be placed to the debit of Mr
 eddes in his books, from the death of Mrs Geddes, and that Mr
 shall be bound at the sight of the arbiter in the said submission,
 ute a deed, conveying said rents and interest at his death, in
 oportions as he may think fit, among the members of his

subsequent submission the arbiter, in reference to this minute,
 John Geddes to execute a bond in terms thereof, and, in 1828,
 uted a bond narrating, "That by a minute of agreement of
 consent, entered into between me and the said William and
 d Geddes, bearing date the 13th day of February, 1824, I agreed,
 in free motion, to debit myself in my books with the rents of the
 property which belonged to the said Mrs Christian Robertson,
 the interest of the price of such part thereof as had been sold,
 divide the same after my death among her children in such pro-
 as I might think proper," &c. and that he had been appointed
 biter to execute the bond in terms thereof, "Therefore I here-
 nd oblige myself and my heirs, executors, and successors whom-
 content and pay the net amount of the said rents hitherto up-
 d to be uplifted, by me, at and previous to the period of my
 der deduction always of what I may have disbursed for repairs,
 these on or before the expiry of twelve months after my death,
 legal interest of the amount of the said several sums as the same
 d at my death, from and after that event, and until payment of
 " &c. to William Geddes, &c. (my children), "in such shares
 ortions as I may hereafter fix and declare by any deed or writ-
 : my hand, without prejudice to any power that I might have
 estrictions or limitations with reference to the shares of the said
 in the same way as I might have done before granting these

Failing a deed of distribution by him, the children were
 qual shares. The deed contained a clause of registration for
 on and execution, if needful.

the estates of John Geddes were sequestrated, and Archibald
 accountant in Glasgow, was appointed trustee for the creditors.
 Geddes and the other children by the first marriage claimed as
 in the sequestration, 1st, For £2108 as the amount of rents
 in the heritage of Mrs Robertson or Geddes, and interest on
 of the portion sold, accruing prior to Whitsunday 1834; and,
 he share of the late Mrs Robertson or Geddes in the goods in
 n at her death in 1812, with subsequent interest. The trustee
 aliverance on the first branch of the claim, refusing effect to it,

No. 334. *in respect the claimants were not creditors of their father, but merely of his heirs for the amount. The claimants presented a petition and complaint against this judgment, alleging that their father was solvent at the date of granting the bond, and pleading, That there was an agreement between their father and them to enter the sum as an actual and subsisting debt in his books; that this was a contract, not with children nascituri, but with children nominatim, and, being part of a general arrangement of matters between them, must be viewed as an onerous transaction; and that the clause in the bond, consenting to registration for execution, afforded clear evidence of the intention to make it a binding obligation constituting the granter a present debtor to the grantee.¹ The trustee answered, that the provision of the rents to the petitioners was purely spontaneous on their father's part, as appeared from the narrative of the bond itself, and was gratuitous, as appeared from the settlement of their mother, because the whole rents thereby were given absolutely to their father the bankrupt till his death; that the obligation in the bond had reference solely to the regulation of the bankrupt's succession, reserving right to him to distribute the amount in such proportions as he chose among his children; and neither the principal sum, nor any interest thereon, was to become due or exigible till after the bankrupt's death; it was fixed therefore, in terms of various decisions, that such an obligation did not constitute the granter a debtor to his children, or entitle them to compete with his onerous creditors, but merely rendered them creditors of his heirs. And the clause of registration did not alter the nature of the bond registered. In these circumstances, it was immaterial whether the bankrupt was solvent at the date of the bond or not, as the petitioners were not constituted creditors of his by the bond.²*

The Court disposed of the case (being reported by the Lord Ordinary on petition and answers.

LORD BALGRAY.—The father of the petitioners was under no obligation originally to grant the bond in question. The rents were his own absolute property. Had they been liable to a claim at the instance of the petitioners, they might have been something to say for them: but they were part of the father's estate. The father was therefore under no debt to them, independently of the bond, and the bond did not make him debtor to them, either for the principal sum, or for any interest which might accrue during his life. The sum was to bear interest only after his death, and the sum itself was not exigible till then. In short, there was no obligation till after his death. In a competition with

¹ *M'Kenzie's Children*, Feb. 2, 1792 (12924, and *Bell's Cases*, 404); *Malcolm*, Jan. 20, 1781 (12914); *Chalmers*, Jan. 23, 1771 (13054); *Gordon's Children*, Feb. 9, 1833 (ante, XL 368); *Bushby*, June 23, 1825 (ante, IV. 112).

² 3 *Ersk.* 8, 3; 1 *Bell*, 639; *Brown*, Feb. 1, 1820 (F.C.); *Grierson*, May 16, 1820 (ante, I. 18; or new ed. 9); *Bruce*, June 9, 1831 (ante, IX. 695); *Peck*, Feb. 1834 (ante, XIII. 481).

that bond cannot be sustained, and I never saw a clearer case of the No. 334

other Judges concurred, and

July 5, 1836
Miller v.
Wright.

THE COURT found that the petitioners were not creditors of their father; and refused the petition, but found no expenses due to the respondent.

W. CRAIGS, WARDLAW, and DALZIEL, W.S.—DAVIDSONS and SYME, W.S.—Agents.

MILLER OF MORRISON, and OTHERS, Pursuers and Suspenders.— No. 335

D. F. Hope—H. J. Robertson.

WRIGHT, Defender and Charger.—*Rutherford—Handyside.*

apt—Sequestration—Provisions to Wives and Children—Representation.—A father, by a settlement, disposed an estate to his son, under the burden of certain provisions as to his wife and daughters, which were declared real burdens; after the son entered into possession, but made up no titles, and in a few years he became bankrupt: the trustee gave him a special charge to enter heir of his father, passing by the settlement, when his proceedings were challenged by the family of the deceased: Held that it was the right and the duty of the trustee to make up a title to the heritage, passing by the settlement, and leaving the estate of the deceased on the footing of mere personal creditors for their provisions, as they were at the date of the bankruptcy.

late James Miller of Milton, writer in Cupar-Angus, who died July 5, 1836, left a family consisting of a widow, two sons, and four daughters.

1ST DIVISION
Ld. Corehouse
S.

He had executed a general disposition and settlement of his estate in Milton, and of his whole heritable and moveable estate, in favour of his eldest son, James Miller, junior, with the exception of certain provisions, and other provisions, in favour of his second son. The disposition of James was granted "with and under the burden, provisions, debts, and faculty after mentioned, and which must be insert in the documents to follow hereupon. In the first place, That the said James Miller, my son, shall be bound and obliged, as by acceptation hereof he has obliged himself, his heirs and successors, to pay to Delvina Miller, my spouse, during all the days of her lifetime, in case she shall survive me, a yearly free annuity of £100 sterling," &c. James Miller, was similarly bound to pay £1000 to each of the testator's four daughters. "Which several provisions and sums of money, with the interest that may be due thereon, hereby provided to my said spouse and daughters, shall, and are hereby declared to be real burdens affecting the estate of the said James Miller, and others above disposed, and as such to be insert in the instrument of sasine to follow hereon," &c. The deed contained a precept of resignation, and a precept of sasine, both of which were executed under these burdens and provisions, and with a declaration that the same should be inserted in the infestment. The conveyance of the



ON MAY 10, 1835, when was proceeding to take up the lands of Milton, &c., when a bill of suspension was presented at the instance of the widow and the daughters on the ground that the trustee was bound to make up a bankrupt, under his father's settlement. The bill, of 1835, of consent, passed the bill, to the effect of trying refused the interdict, reserving all questions as to the The suspenders raised a declarator of their rights, in process of suspension, with which it was conjoined; and petition for special adjudication was advised, the following interlocutor was pronounced:—"The Lords adjudge, in terms of the prayer of the petition: But in respect for Mrs Miller, and others, founding upon a disposition of the bankrupt's father, which is said to convey the said the burden of real rights in their favour, reserve to rights in the said lands now adjudged, as the same shall a process of declarator which has been raised against the bankrupt, at their instance, and in a process of suspension." instance."

In the conjoined process of declarator and suspension issue whether James Miller, senior, died solvent or not decided on the assumption of his solvency.

Pleaded by the pursuers and suspenders—

1. The late James Miller, senior, being solvent, and in fee simple, could have deprived his eldest son of his and, a fortiori, could impose such burdens on it as he

of defeating these provisions, without committing a fraud. The No. 335.
ould not effectually charge him to do so; and without such charge,
ication could follow. July 5, 1836.

it would have been a fraud in James Miller, junior, to pass by
r's settlement, the trustee could not avail himself of such a pro-
savouring as it did of fraud, but must be liable in reparation to
iers, who suffered by his wrongous act.

Miller v.
Wright.

the bankrupt act, § 31, it was specially enjoined, That, where
upt's titles were not so made up as to vest the right properly in
ie trustee shall take the most safe and eligible method of com-
ie bankrupt's title, in such way and manner as the law requires."

an injunction to make up a title in the person of the bankrupt,
nly lawful and proper mode of doing so, was under his father's
t.

and by the Defender and Charger—

creditors of James Miller, junior, took nothing under the settle-
ames Miller, senior, and were not bound to implement any of
ons or provisions.

ames Miller, junior, had made up titles as heir of line, prior to
y, the sequestration and adjudication would have carried the
o the defender, as trustee, leaving the pursuers mere personal
or their provisions. But as his titles were not made up, the
is entitled, by special charge, in the usual form, to make up a
h would be attended with the same effect as if James Miller,
d been infest as heir of line at the date of his bankruptcy.

ough the omission of the pursuers, they had allowed themselves
mere personal creditors of James Miller, junior, for their pro-
the date of the bankruptcy; and it was the right and the duty
tee to administer the whole available estate of the bankrupt so
ent any personal creditors from acquiring a preference.

bankrupt act did not ordain a title to be made up, in the per-
bankrupt; it merely enjoined the trustee to complete a title to
ty according to the forms of law; and, in this instance, "the
und eligible method" of doing so was that which the charger
d.

rd Ordinary, "In the declarator, assoilzied the defenders from
ions of the action, and decerned: and in the suspension, Re-
nterdict; found the letters orderly proceeded, and decerned;
the pursuers and suspenders liable in expenses."*

suers and suspenders reclaimed.

GRAY.—At the date of the bankruptcy, the suspenders were mere

It is the duty of a trustee on a sequestrated estate to take measures
the whole heritable property, to which the bankrupt has right, and
preferable securities have not been completed previous to the bank-

trary, he is bound to avoid any such proceeding. The bank his engagements, and neither he nor his trustee can take any advantage is given to one creditor over another. If some of their own hands of gaining such an advantage prior to the neglected to use them, it is their own fault.

"The pursuers and suspenders in this case might have which Mr Miller, senior, intended to create in their favour ways; but they neglected to do so, and therefore they cannot from any other personal creditor. It follows, that the trustee the bankrupt to enter as heir of line to his father, and to adj him in that character, instead of completing his title under the father, in which the real burdens intended to be created in him are specified. The principle is so fully illustrated in the case head, 22d February, 1765, and that of the creditors of Ross ary, 1792, that it is unnecessary to say more upon the subject the point as settled in the case of a trustee upon a sequestra

"The bankrupt statute declares that 'the trustee shall take the eligible method of completing the bankrupt's title in such way as law requires.' But this certainly does not import that the trustee the title in the bankrupt's person, for this would make way the jus accretionis, which it is a main object of the equalization of the trust to avoid. He is in right of the bankrupt, and therefore his title is to be completed in his, the trustee's person, when the object requires it.

"The pursuers refer to the case of Tatnal, 2d February, 1765, in their remarks, the merits of the question were not there at issue. If it had been 'time to enter into them, it would not appear that there was room for doubting the right of the creditors and their trustee to complete the title, whatever effect it might incidentally produce in favour of the creditor.' Reference is also made by the pursuers to a case, M'Kenzie's Trustees, decided in the Outer-House in 1836, which is plainly inapplicable. Kenneth M'Kenzie of Dundonald bequeathed to his heir, with certain provisions in favour of his sister and children, a trust deed to make his settlement effectual, and it

other and sisters of the bankrupt, but it is not a case in which I enter-doubt at all. The interlocutor must be adhered to on the merits, but, there might be an alteration as to expenses.

No. 335.

July 5, 1836.

Earl of Caithness v. Eaton

PRESIDENT.—Had the bankrupt himself, made up his title as heir of his father, passing by his father's settlement, the heritage would have been vested in him in fee simple, and the supervening bankruptcy and administration would have conveyed the heritage to the charger, free of the burdens and provisions in favour of the suspenders. The bankrupt's title was not of that form, but it remained competent to the charger to give him a title to complete it, and, on his failure, to adjudge. That is precisely the title which he is adopting, and I have never been able to see any ground for his right to do so. Had the bankrupt's father wished to secure the heritage to his family, against the hazard of his son's bankruptcy, he should have made them real creditors for their provisions, by infesting them in security. But he made them mere personal creditors, and they must suffer along with the personal creditors of the bankrupt. Their case, however, is one of hardship. I think the interlocutor might be altered as to expenses.

MILLIES.—I am of the same opinion, and I think we must adhere. In a considerable time elapsed, during which the suspenders might have been making their rights real. But even had there not been this feasibility, and had Mr Miller, junior, become bankrupt within a week after his death, I do not see any ground on which a different judgment could be pronounced, though that would have been a case of much greater hardship to the suspenders.

ACKENZIE.—I concur. There is no question here of any competition between the creditors of the father and those of the son: all parties are equally competent to sue the Court as creditors of the son only. In these circumstances, the mode of making up titles which the trustee has adopted is precisely that which was the most eligible for the personal creditors at large, for whom he acts. He has followed the course which it was his duty to do. The case, however, is one of hardship for the suspenders, and I think the Court might alter as to expenses.

COURT adhered on the merits, but altered as to expenses, and found no debt due to neither party.

MILLER and FORBES, W.S.—J. CHRISTIE.—Agents.

CAITHNESS, Petitioner.—*D. F. Hope—Rutherford—Robertson.* No. 336.
HAMMOND, and SON, and MANDATARY, Respondents.—*Keay—Buchanan.*

—Letters of inhibition and arrestment on a depending action having been granted at the instance of a party in England,—held no objection to the diligence mandate to the party's agent in Edinburgh was dated posterior to the bill, being prior to the signeting of the letters.

July 5, 1836.

Respondents, Eaton, Hammond, and Son, bankers in Newmarket,

2D DIVISION.
F.

[Illegible text]

The case was put out for advising on the 4th June.

Mr Keay for the Respondents.—If the Court were disposed we should restrict our demand for caution to £1500.

The other judges concurred in holding that the prayer of to be refused, but in respect of the proposal to accept £1½ judgment.

PROFESSOR FORBES and OTHERS, Petitioners.—M^cNeill.
IN CUNINGHAME and OTHERS, Respondents.—D. F. Hope.

No. 337.

July 5, 1836
 Forbes v.
 Cuninghame.

tion of Lands.—Circumstances in which the Court, at the instance of the creditors on the entailed estate of a party erroneously supposed to have died, and to whom titles as heir had been made up by his son, granted decree of the unuplifted rents of his estates, past, current, and future, and a judicial factor thereon, reserving all questions as to rights of prefe-

PROFESSOR FORBES and other creditors heritably infeft in the entailed July 5, 1836.

William Davidson of Muirhouse, presented a petition, setting forth that in autumn, 1834, accounts reached Scotland of the supposed death of Mr Davidson, who was represented as having been drowned at sea on the coast of Kent: That, after a scrutiny into the circumstances, the Insurance Companies, from whom the petitioners held policies of insurance on Davidson's life, assigned by him as additional security for their debts, agreed to make payment to them of the sums therein due, on condition of receiving an obligation for repayment thereof, in case the supposition of Davidson's death should prove to be erroneous: That the petitioners had recently received information of his being still alive; that, in the mean time, Thomas Davidson, his son, aged nine years, had been served heir to him, and had, with consent of the respondents, granted securities over the heritable property for debts of Davidson. That, previous to his supposed death, Davidson had executed a deed for behoof of his creditors, but to which the petitioners had not assented.

2D DIVISION.
 F.

In these circumstances, on the ground that it was most essential to secure the rights of the petitioners and of all parties interested, that the proceeds of Davidson's estates should be withdrawn from the immediate possession of his son and his son's creditors, and should be placed under the management of a judicial factor, until the rights of all parties shall have been ascertained and determined, the petitioners prayed the Court “to sequester the whole unuplifted rents, feu-duties, casualties of superiority, and annuities, due, past, current, and future, during the lifetime of the said Thomas Davidson, of his entailed lands and estates of Muirhouse, Hatfield, &c., and to appoint a factor thereon with the usual powers.”

The petition having been served on the curators of Thomas Davidson, who returned answers, in which, neither expressly admitting nor denying the death of Mr Davidson's being still alive, they stated, that under their management the rents of the entailed lands had been drawn and distributed in full account of the presumed heir in possession, according to the best of their judgment, and optima fide; that large disbursements were to be made in anticipation of rents, from which, and other

No. 337. causes, the respondents were considerably in advance both in cash and in personal obligation undertaken by them with the view of facilitating the management of the estates; that, while entertaining great doubt of the competency of this application for sequestration, they did not object to it, as it was a measure which might be for the ultimate advantage of all parties; but that hereafter it might be a matter of serious consideration, what were the rights and preferences of the various parties interested, and whether the rents and duties past due and now current were not vested in Thomas Davidson under his bona fide, and as yet unchallenged title, so as to be available to the respondents for their onerous and bona fide claims against him, arising since the reputed death of his father; and thus, the respondents submitted, that if the Court should grant the prayer of the petition, it ought to be understood that this was done only under a reservation of the rights of the respondents and all other parties, as the same may be ascertained in the course of any competent process to that effect.

THE COURT granted the prayer of the petition, reserving all questions as to the rights of preference of every party whatsoever.

FOTHERINGHAM and LINDSAY, W.S.—ANDW. DUN, W.S.—Agents.

No. 338. CHRISTIAN STEWART and OTHERS, Pursuers.—*Sol.-Gen. Cunningham-Patton.*

JOHN MENZIES, Defender.—*Whigham.*

Process—Consistorial—Record.—In an action concluding alternatively for declarator of marriage and legitimacy, or for damages on account of seduction, a record having been closed, and a proof taken before the Commissaries, by remit from the Court, and an interlocutor thereon pronounced, assoilzieing the defender from the conclusions as to marriage and legitimacy;—Motion by the pursuer to have the record opened up and a new record prepared on the conclusion for damages, and to have the cause remitted for trial by jury, refused.

ly 5, 1836.) IN the case, mentioned ante, 427, and XII. 179 (which see), the Lord Ordinary, after the record had been closed and a proof taken before the Commissaries, assoilzied the defender Menzies from the declaratory conclusions of marriage and legitimacy; and this judgment was adhered to by the Court. Thereafter, without alleging *res noviter veniens ad notitiam*, the pursuer, Christian Stewart, moved to have the record opened up, and a new or additional record prepared on the remaining conclusions of the summons for damages on account of seduction, and also to have the cause remitted to the jury roll, maintaining that, in regard to this branch of the case, the present was an action appropriated for *trial by jury*, by section 28 of the Judicature Act; that if a second ac-

l been brought as for seduction, there was no doubt it must have No. 338.
 tried, and that it made no difference that the two actions were
 together in one summons. July 5, 1836

Stewart v.
 Menzies.

Lord Ordinary pronounced the following interlocutor and note : *
 e Lord Ordinary having made avizandum with the debate and
 rocess, in respect that the existing record was made up on the
 rocess, and embraces both the alternative conclusions thereof;
 re is no allegation of *res noviter veniens ad notitiam* ; and that
 rly competent for the pursuer to prove her alleged seduction,
 e record as it stands, refuses to allow any new or additional re-
 r to be made up, or to report to the Lords of the Second Divi-
 h a view to making up such a record ; and in respect that the
 ibelled alternatively, as the pursuer chose to libel it, was a pro-
 istorial cause, and must have gone to the Commissaries while
 rt subsisted, for decision on both alternatives ; that the original
 tor of the former Lord Ordinary (8th March, 1833), remitting
 ommissaries ‘ to take the proof of the parties,’ necessarily im-
 remit to take their proof upon both the said alternative conclu-
 d that it appears to have been so held and understood by the
 ersonself, inasmuch as the report (or interim report) of the proof
 ommissary (3d July, 1835) proceeds upon a minute by the pur-

ere is more authority than the Lord Ordinary (looking at the terms of
 tute Act) could have expected, for allowing a record regularly closed in
 to be opened up, or added to, though it does not clearly appear whe-
 these cases, this was not done substantially, of consent ; at least not in
 e opposition, or in face of a plea of incompetency seriously maintained
 erse party. For the reasons stated in the interlocutor, however, this is
 very clearly to be a case not fit to be added to those exceptions from
 f the statute, independently altogether of the peremptory *renitentia* of
 er.

the suggestion that the case should now go a jury, there is no doubt
 rate and independent action of damages for seduction must have gone
 unal ; and that it is in itself the fittest and best tribunal both for de-
 ther damages are due, and especially for assessing their amount. But
 e reasons stated in the interlocutor, which seem legally conclusive, it is
 idered that, even on a view of mere equity and expediency, such a course
 liable to great practical objections. The pursuer by no means proposes
 e the witnesses already examined, and the documents already produced
 interim report of the Commissaries. But she wants to enlarge and add
 of she has thus already obtained, to re-examine before the jury such of
 ing witnesses as she may select, and to read at her pleasure from the
 s of those who are dead, and to produce *de novo* the writings already
 together with any other she may still be able to make furthcoming ; in
 se the proof taken by the Commissaries, under the general remit already
 a precognition for a jury trial upon one branch of the cause then gene-
 ted to the Commissaries for probation, and partly proved in relation to
 s as well as the other.

needless to point out the hazards and abuses to which such a course of
 ; must be liable ; and the Lord Ordinary is not aware that it has ever
 ioned."

Commissaries, or a commission to some other proper per
The pursuer reclaimed.

THE COURT, agreeing with the view of the Lord
looking to the circumstance of the pursuer havin
to make this a consistorial cause at the first, adhe

GREIG and MORTON, W.S.—JAMES FERGUSON, W.S.—/

No. 339.

ROBERT GRANT.—*Keay—Anderson.*

JAMES SHEPHERD, W.S.—*D. F. Hope—Rutherford*
Competing.

Service—Process.—In a process of competition of brieves, adv
of Session, a question of law having occurred as to the constr
entail, under which the competitors severally claimed to be a
it was expedient to have the question of law decided before
to the jury.

July 5, 1836.

2d Division.
1d. Cockburn.

MR GRANT of Druminnor, and Mr James Shepherd,
took out brieves for obtaining themselves served heir in
late Alexander Shepherd, under a deed of entail execut
ancestor. The brieves were directed to the Sheriff of
whose authority a proof was taken on commission, and
advocated to the Court of Session, and remitted to the
dinary. A question of law having occurred as to the co

struction would be raised in the course of the trial, and No. 339.
 could be dissatisfied with the decision of the judge, he
 omitted to review. July 7, 1836.
 Brodie v.
 Cawdor.
 linary reported the matter to the Court, whereupon

ships found that it was expedient that the question of
 the construction of the deed should be settled in the
 .

L. STORIE, W.S.—JAMES SHEPHERD, W.S.—Agents.

No. 340.

WILLIAM BRODIE, Pursuer.
 CAWDOR and OTHERS, Defenders.—*Sandford*.
 COLONEL GORDON, Defender.—*Neaves*.
 JOHN PARKER, Compeerer.—*D. F. Hope*.

ly—Expenses.—Where a proof was led, and the term was circum-
 of division of commony, and the clerk to the process drew up
 common form, under the instructions of one of the parties to
 that he was entitled to decree for his account, against all the
 es, conjunctly and severally, reserving to them their relief, in-
 was alleged by some of the parties, that, in the special circum-
 ppear that no part of such expense should be ultimately laid on

s of division of Harmuir commony, pursued by Brodie July 7, 183
 t Lord Cawdor and Others, a proof was led, and cir- 1st DIVISION
 pronounced in February, 1825. The action was then
 ie office of John Parker, Assistant-Clerk of Session, in
 e might be prepared in common form. Parker did not
 reparation of this till November, 1825, when he was in-
 agent of Colonel Gordon of Cluny, who was one of the
 ocess, to do so. The proof consisted of from 1200 to
 manuscript, which Parker very considerably reduced in
 e. The state was printed, and the printer's account was
 arker's account for preparing the state was £78, 13s. 6d.,
 it to the several parties concerned, charging each in pro-
 terest in the commony. The agents for Brodie, and
 or, refused to pay any part of the account of Parker; the
 lar alleging that his Lordship was quite satisfied with the
 oy the sheriff, and that any subsequent expense related to
 een the other parties, in which he had no concern. After
 July, Parker put the cause to the roll, along with a note,
 circumstances, and stating that he, as an officer of Court,
 reprepare the state when called on by any party to the pro-

340. cess. He craved the Court to decern, ad interim, for the amount of his account, against all the parties to the process, conjunctly and severally, reserving to them their relief inter se ; or at least to decern against Colonel Gordon, his direct employer, reserving to him his relief.

LORD BALGRAY.—The division of a commonty is a process of general concernment to all the parties. The expense of leading the proof, and of preparing a state thereof seems to me to fall on the parties to the process, in proportion to their interest in the common which is divided.

LORD GILLIES.—But it is disputed, in point of fact, whether the expense of preparing this state was an expense incurred for the general behoof, or whether it arose merely out of a dispute between one set of the heritors, with which dispute the others have no concern. I do not think the facts are sufficiently before the Court to enable me to decide that all these parties are conjunctly and severally liable for this expense, even in the first instance.

LORD PRESIDENT.—I look on the expense of preparing a state of the proof, to be in the same position with the expense of leading the proof, or the expense of the summons itself. It is a common expense ; and the sum which is due to the commissioner for leading the proof, and to the clerk for preparing the state, ought to be laid, in the first instance, on all the parties to the process, conjunctly and severally, reserving to them their relief inter se.

LORD MACKENZIE.—I do not consider the expense of preparing the state to be exactly in the same situation with the expense of the summons. But there are not materials at present before the Court for extricating the precise proportions of this expense which ought ultimately to fall on the several parties to this process ; and, in the meantime, the clerk who prepared the state must be paid. I think we should give decree against the parties to the process, conjunctly and severally, reserving their relief inter se. Even if it shall turn out that one of the parties has been an unreasonable litigant, so as to affect the ultimate apportioning of the expenses, that is no ground for delaying the payment of the Clerk of Court in the meantime.

LORD BALGRAY intimated that he took the same view.

THE COURT found all the parties to the process to be conjunctly and severally liable to John Parker, Assistant-Clerk, for his account, and found him entitled to the expenses of his appearance ; reserving to the parties all questions of relief inter se.

TOD and ROMANES, W.S.—J. BOWIE, W.S.—MACKENZIE and SHARPE, W.S.—Agents.

No. 341.

July 7, 1836.
Warrender v.
Warrender.

GE WARRENDER, Pursuer.—*D. F. Hope—Anderson.*

IN WARRENDER OF BOSCAWEN, Defender.—*Rutherford*
—*H. J. Robertson.*

—*Proof—Adultery.*—A husband raised an action of divorce, on the 1833; his wife, besides denying her own guilt, inserted in her recriminatory charges of adultery against the husband; in 1836, an action of divorce on the head of adultery, after which, her husband, in the meantime, the record was closed, moved for a commission and diligence to be held, 1. That the wife was not entitled, *hoc statu*, to a proof of her charges, in that action; 2. That she was not entitled to have her husband delayed, until the report of her oath *de calumnia* should be returned, from the place where she resided abroad; and, 3. After the report was returned, that, as her husband refused to close the record in the meantime, on summons and defences, it must proceed and be prepared without allowing her, *hoc statu*, a proof, and without delaying the action at her husband's instance; it being Observed, however, that that action be ultimately disposed of, until she had full opportunity to adduce her proof.

The case reported ante, June 28, 1834.¹ A record was made July 7, 1836, of the action of divorce, on the head of adultery, raised in the instance of Sir George Warrender, Baronet, against Lady ^{1ST DIVISION} Fullerton. Besides denying the guilt imputed to her, her Ladyship, in the meantime, facts, inserted recriminatory allegations of adultery against him. In April, 1836, she also raised an action of divorce on the head of adultery against him. She resided abroad, and a commission was granted for her oath *de calumnia*. Before the report of the oath was returned, Sir George applied for a commission and diligence to lead a proof in his action. Her ladyship opposed this, unless she was allowed a proof of her recriminatory charges; or at least until Sir George's proof was assisted till the report of her oath *de calumnia* was returned, and a record made up in her action, so that her proof might go on at the same time with Sir George's proof. The Lord Ordinary "appointed the pursuer (Sir George) to print the copies thereof in the boxes of the Lords of the First Division, that the Lord Ordinary may report verbally to the Lords, 1st, Whether the defender is entitled, in *hoc statu*, to a proof of the articles in her statement of facts, containing recriminatory charges against the pursuer; and 2dly, Supposing the former to be decided in the negative, Whether the defender, having raised an action of divorce, which is now awaiting the report of a

No. 341. commission to take her oath de calumnia, is entitled to demand that the order for proof in the original action at the instance of her husband shall be sisted until her counter action admits being proceeded in, to the effect of allowing her a proof."

7, 1836.
Warrender v.
Warrender.

The cause was then reported orally by the Lord Ordinary.

LORD PRESIDENT.—Lady Warrender is not entitled in hoc statu to a proof of her recriminatory charges in her statement of facts; and the action at her instance is not in such a state as to admit of a proof being allowed. It is impossible to allow a proof in it before the oath de calumnia is taken and reported. But in the meantime, when Sir George is allowed to lead his proof, Lady Warrender will be allowed a conjunct probation in common form.

LORD BALGRAY.—I am of the same opinion. The action at the instance of Sir George has been long in Court, and his proof ought not to be delayed. But after it is taken, ample time and opportunity will be allowed to Lady Warrender to lay all competent proof before the Court, and the Lord Ordinary will take care that this is done before he disposes of Sir George's action.

LORD GILLIES.—I see no ground stated to warrant us in delaying the proof at Sir George's instance. And it is premature to allow a proof in the action of Lady Warrender, while her oath de calumnia is not reported, and the Court do not even know if, in point of fact, it will be taken by her Ladyship.

LORD MACKENZIE.—I am of the same opinion.

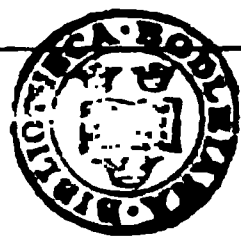
The Court then (23d June) pronounced an interlocutor, allowing a proof of Sir George's allegations, and granting a commission in the action at his instance.

The report of the oath de calumnia, in the action by Lady Warrender, was afterwards returned to the Court, and her Ladyship offered to close the record on summons and defences, in order to obtain a proof in her action. Sir George refused to close the record, and referred to the previous decision¹ in the action at his instance, as having fixed it to be the absolute and statutory right of either party to refuse this.

The Lord Ordinary orally reported this cause, and was instructed by the Court to allow it to be prepared in common form, and to refuse to allow her Ladyship a proof, hoc statu.

J. MURRAY, S.S.C.—A. MACBEAN, W.S.—Agents.

¹ July 5, 1834 (ante XII. 885).



No. 342.

July 7, 1836
Pitcairn v.
Fraser.

ROBERT PITCAIRN, Pursuer.—*M'Neill*.
HEN FRASER, Defender.—*D. F. Hope—Robertson*.
GE WOOLLEY POOLE, Defender.—*Maidment*.

Judicial Admission.—In a process of forthcoming, one of the de-
e, admitted that he had funds in his hands at the date of the
leged that, subsequently, the common debtor had discharged all
and had taken a new debtor in his place : arrestee found liable,
ia) that he failed to prove that allegation.

CAIRN, W.S., obtained decree in the Court of Session, July 7, 1836
Woolley Poole, solicitor in London, for £400, together ^{1st Division}
ld. as expenses of process, and £1, 3s. 9½d. expense of ^{Ld. Fullerton}
e dependence of the action he had used arrestments in
nes John Fraser, W.S., besides several other parties, as
D.
He now raised an action of forthcoming against Poole
ser pleaded in defence, that the debt which he owed to
of Poole's agency for the trust estate of George Pentland,
Perth, on which estate Fraser had been trustee ; that,
the arrestments, that trust-estate had been transferred,
probation, to other trustees, whom Poole had consented
btors in place of Fraser, and against whom, therefore,
uld make his claim. The record was closed on summons
gether with a denial of the defender's averments by the
Lord Ordinary pronounced an interlocutor, allowing Fra-
allegation that the trust-estate of Pentland was trans-
ole's consent to new trustees, and that Poole had agreed
his debtors in place of Fraser. Fraser failed to adduce
ne Lord Ordinary thereon "decerned in the furthcoming
ohn Fraser, for payment of the sums concluded for in
he principal sum of £400 sterling, with legal interest
e 31st day of October, 1828, and till paid, with the sum
sterling, as the expense of process libelled on, and the
9½d., the dues extracting said process : Decerned of new
principal debtor for his interest ; and found the said James
ble in the expenses of the debate."
ned.

y,—I think the interlocutor is right. Fraser admits substan-
e time, he was indebted to Poole in the amount now decerned
upon a transaction posterior to the arrestments of Pitcairn that
ce. He alleges that Poole consented to accept of a new debtor
; at the time when the trust-estate of Pentland was passed to
it there is no proof of that averment, and, of course, the defence

No. 342.

y 7, 1836.
lding v.
vrie.

LORD GILLIES.—I concur. The whole defence of Fraser before the Lord Ordinary was rested on his allegation that Poole had consented to take a new debtor in place of him, in consequence of the trust-estate of Pentland having been transferred from Fraser to the party who was so to be taken as new debtor. That is an averment which is denied, and which it lay with Fraser to prove; but he has adduced no proof of it. Indeed, his defences are not at all of that articulate description which is required under our present forms of process. The Lord Ordinary has pronounced a correct judgment, and we must adhere.

LORD MACKENZIE.—I think the defence is substantially an admission of the debt, except for that allegation which Fraser has failed to prove, after being allowed an opportunity of doing so.

LORD PRESIDENT.—I am of the same opinion.

THE COURT adhered, and awarded additional expenses against Fraser.

AINSLIE and MACLELLAN, W.S.—J. J. FRASER, W.S.—J. G. BARR, S.S.C.—Agents.

No. 343.

WILLIAM SPALDING, Pursuer.—*Wilson*.

GEORGE LAWRIE and OTHERS, Defenders.—*Monteith*.

JAMES DENHAM, Compearer.—*D. F. Hope—Rutherford—Maitland*.

A and B, Compearers.—*Keay*.

Administration of Justice—Process.—The agents of one of the parties in a process, wrote a letter to the Assistant-Clerk of the process, accusing him of having twice altered and distorted the interlocutors of the Lord Ordinary, especially the last, which had been just pronounced, and calling on him to exhibit a corrected interlocutor within twenty-four hours, under a threat of removal from office, and complaint to the Court; this being brought under the notice of the Lord Ordinary, and by him reported to the Court, the agents were allowed to lodge a minute of retraction of the charge against the Clerk, and of apology to the Court, and to the Clerk; in respect of which all farther procedure against them was dispensed with.

y 7, 1836.

DIVISION.
Corehouse.
S.

IN a multiplepinding raised in the name of William Spalding, S.S.C., against George Lawrie of Lappie, and Others, the Lord Ordinary, on 22d June, 1836, repelled objections to the competency, and ordained claims to be lodged in ten days; on 28th June, his Lordship ordered consignation of the admitted sum, in Bank, within ten days. The money was consigned very shortly after the date of the interlocutor, but the agents of one of the claimants, on the same day that the interlocutor was pronounced, wrote a letter to James Denham, the assistant-clerk to the process, impeaching him of having wilfully altered and distorted the interlocutors of the Court, in writing them out, both on 22d and 28th June; particularly in the latter, in allowing ten days to consign, in place of requiring instant consignation, which they said the Lord Ordinary had found the raiser bound to make. The letter threatened to have *Denham removed from his office*, unless he exhibited a corrected inter-

clock next day ; and it also threatened a complaint to the No. 343.
 a laid the letter before the Lord Ordinary, stating that
 were framed precisely in terms of his Lordship's deli- July 7, 1836
 instances, and claiming the protection of the Court, from Spalding v.
 the discharge of his official duty. An opportunity of Lawrie.
 apology was afforded to the agents, at his Lordship's bar,
 tory statement was made, his Lordship ordered the inter-
 and 28th June, together with the agent's letter, to be
 before the Court. In reporting the matter orally, his
 that, both in reference to the entries in his own note-
 reference to his practice in similar cases, he was satisfied
 gnation was not ordered by him, and that the interlocu-
 tly written out by the clerk ; at least, that the only
 was in allowing ten days for consignment in place of

y statement was then submitted on the part of the agents,
 ie letter was unjustifiable and intemperate, and that it
 or erroneous impressions, now removed.

st.—It does not appear to me that the statement now made
 sufficient. The duty of a Clerk of Court, intrusted with
 dgments we pronounce, is in the highest degree delicate and
 peachment of his official integrity, is, therefore, a charge of
 description. That is expressly made in the letter of these
 ey tell him he must exhibit to them, in twenty-four hours, a
 tor ; that is, an interlocutor altered to suit their terms, or
 removed from his office. I never saw a more outrageous
 s. I think it not only made an unfounded charge against the
 io is well entitled to our protection, but was an insult to the
 the process depended, and to the Court itself. I consider
 ology is due to the Court, as well as to the Clerk, and I move
 order these agents to attend personally at the bar, on Thurs-

ges concurred, but leave was given to the agents, in the
 t in a minute of apology. Such a minute was accord-
 nitting that the imputations against the Clerk of Court
 founded ; expressing regret at having, under the heat
 excitement, made such a charge, and apologizing to the
 to the Clerk. On considering this minute, the Court
 th it, and no farther proceedings on the subject were

— — Agents.

No. 344. MRS AGNES KERR, of M'ROBERT, and HUSBAND, Pursuers.—*Kerr—Brodie—R. Robertson.*

July 7, 1836.

Kerr v.

Martin.

ALEXANDER MARTIN, Defender.—*D. F. Hope—M'Neill.*

Decree in Foro—Process.—1. Circumstances in which the Court held an extracted decree by a Lord Ordinary, in a previous process, to have been pronounced in foro, and refused to allow a pursuer to open it up, though it affected his legitimacy, and he alleged, that, through poverty, he had been unable to bring it under review, before it was extracted. 2. Circumstances in which it was held that an interlocutor necessarily implied a finding of the illegitimacy of the pursuer, though it contained no such express finding.

Res Judicata—Process.—Question, whether, when an action relating to a special heritable subject, is decided against a pursuer, on the ground of illegitimacy, and such pursuer brings a new action, relating to other subjects, against the same defender, the pursuer's status of illegitimacy is to be held res judicata in the second action.

Bastard—Legitimation.—Question, whether when a child is born out of wedlock, and its mother does not marry its reputed father, until after she has been married to another man, and left a widow—legitimation per subsequens matrimonium, is barred by the mid-impediment of the intervening marriage.

July 7, 1836.

1ST DIVISION.
J. Cockburn.
B.

IN November, 1820, Alexander Martin, residing in Laigh Craighmore, married Isabella Kerr, aged about 20 years, who was possessed of a house and garden in the burgh of Stranraer, besides one half of a right of lease of certain subjects, the endurance of which was 999 years, and also some moveable property. She died without issue in May, 1821, having previously executed, on 28th February, a general disposition of her whole heritage and moveables in favour of Martin, whom she appointed her sole executor. Martin entered into possession of her heritable and moveable estate. In January, 1822, Mrs Agnes Kerr and M'Robert, and her husband, Thomas M'Robert, residing at Portpatrick, raised an action of declarator against Martin, concluding to have it declared that she had the only title to these subjects, and that Martin had no title. Mrs M'Robert alleged herself to be the daughter and heir of John Kerr, next elder brother of James Kerr, the father of the deceased Isabella Kerr or Martin, and that she was heir-at-law of her cousin-german, the deceased: and before raising her declarator, she obtained a cognition before the Magistrates of Stranraer, finding that she was the heir of the deceased Isabella Kerr or Martin, in the house and garden, in the burgh of Stranraer, and under this cognition she was infeft.

Martin alleged in his defences that Mrs M'Robert was not the heir of her alleged father, but was born of one Mary Bone, who was then unmarried, and who afterwards, in 1781, married one Taylor, who survived till 1793; and that it was only in 1794, after his death, that Mary Bone or

John Kerr, the reputed father of **Mrs M'Robert**. **Mar-** **No. 344.**
 ontended that she was born a bastard, and that there could **July 7, 1836.**
 tion per subsequens matrimonium, on account of the mid- **Kerr v.**
 the intervening marriage between her mother and Taylor; **Martin.**
 therefore represent John Kerr, or be heir of Isabella Kerr
 besides this defence, Martin alleged that John Kerr had
 hat Mrs M'Robert, even if legitimate, did not represent
 farther objected to the cognition and sasine as being ir-
 uined, and on insufficient evidence. He produced in pro-
 t of the deed of general disposition in his favour. Besides
 s, Martin raised a reduction of the cognition and sasine
 bert.

utor of conjunction of the processes was pronounced by
 s Ordinary, and on 27th February, 1824, an interlocutor
 ed in these terms :—

“ Act. Baird—Alt. Cuninghame and Hyndman.
 heard parties' procurators in the conjoined actions of reduc-
 urator, before answer, appoints the pursuer of the reduction
 special condescendence, in terms of the Act of Sederunt,
 circumstances he avers and offers to instruct as to the mar-
 ry Bone with Taylor; and when said condescendence is
 s the same to be seen and answered, also in terms of the
 ant.”

duced an extract and certificate from the records of the
 neykirk, bearing that the banns of marriage had been duly
 etween Mary Bone and Taylor, and that they had been
 5th December, 1781; and that the marriage between Mary
 an Kerr took place in 1794.

ing interlocutor was thereafter pronounced by Lord Eldin,
 s, 1824 :—

“ Act. Baird—Alt. Cuninghame and Hyndman.
 again heard parties' procurators, in respect of the certificate
 ed from the session records of the parish of Stoneykirk,
 age of Mary Bone with John Taylor, finds it unnecessary
 er of the reduction to give in any condescendence as to
 ; sustains the reasons of reduction at his instance, and re-
 is, and declares accordingly; and, in the process of decla-
 ies the defender from the conclusions of the libel, and

entation, or reclaiming petition, was lodged against this

No. 344. judgment, and it was extracted by Martin, who thereafter got himself infest in the subjects in Stranraer:
 July 7, 1836.
 Kerr v.
 Martin.

In 1834, Mrs M'Robert and her husband raised an action of reduction, declarator, and count and reckoning against Martin. In this summons the pursuers narrated the birth of Mrs M'Robert, the intervening marriage of Mary Bone and Taylor, and the subsequent marriage of Mary Bone, when a widow, to John Kerr, in the same terms as appeared from the certificates which had been produced in the former process. The pursuers concluded for reduction, 1st, Of the judgment of Lord Eldin, of reduction and absolvitor; and, 2d, Of an instrument of sasine, or of cognition and sasine, in favour of Martin, in regard to the subjects in Stranraer. They libelled Mrs M'Robert's title as "heiress-apparent of the now deceased Isabella Kerr, spouse of the said Alexander Martin, and as cognosced and served nearest and lawful heir to the said Isabella Kerr, conform to petition to the Magistrates of the burgh of Stranraer, deliverance thereon, and proof of propinquity led before, and minute of cognition and service by the said Magistrates, dated the 7th day of September, 1821, and instrument of cognition and sasine in the pursuer's favour following thereon."

The reasons of reduction were—

1st, That the decree of reduction was disconform to its warrants, particularly as the summons of reduction libelled on the date of the general disposition by Isabella Kerr or Martin, as being 21st February, 1821, whereas there was no such deed, the only disposition being dated 28th February, 1821.

2d, There¹ was no litiscontestation, no defences having been lodged in the reduction, and no act or warrant for proof having been granted or extracted; and the condescendence, ordered by interlocutor of 27th February, 1824, not having even been put in, when the certificates were produced, upon which the judgment of 14th June, 1824, proceeded.

3d, That judgment was erroneous in point of law, inasmuch as a child, though born out of wedlock, if not born in adultery, was legitimated by the subsequent marriage of the parents, whether there was any other intervening marriage or not:² and the certificates, on which the judgment proceeded, had been regularly produced, and were improbativ documents. But even if that decree was irreducible, it could not affect the pursuer's right now to insist, so far as regarded the subjects in the lease, or the moveable property; because it was only the subjects in Stranraer, and the respective rights thereto, which were in issue in the actions of reduction and declarator;³ and,

¹ 4 St. 39, 1; 4 Ersk. 1, 69; Millie, Nov. 27, 1801 (12176), and March 18, 1807 (F.C.); Sassen, Nov. 20, 1829 (ante, VIII. 102).

² 1 Ersk. 6, 52; 1 Bankt. 57, 8; Bell's Princ. § 1627.

³ 4 Ersk. 3, 8; Bell's Princ. § 2947.

pursuer was on the poor's roll, in the former actions, as No. 344.
 and, through poverty, had been unable to bring the judg-
 w.

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Martin.

general disposition of Isabella Kerr or Martin the pur-
 as granted by her when in minority, and also when she
 feudal title to the subjects, and that the disposition was
 to affect her heritage, &c.

rights being reduced, the pursuers concluded for declarator
 1st, To the house and garden in Stranraer; 2d, To the
 the lease; and, 3d, To the moveables. Conclusions of
 amount and reckoning followed.

and preliminary defences, but was ordered to satisfy the
 reversing the effect of the preliminary defences. He then

action that the summons of reduction, by a clerical error,
 of the general disposition of Isabella Kerr or Martin,
 y, 1821, in place of 28th February, 1821, was imma-
 specially as an extract of the deed had been produced in
 any rate it fell under the exception of competent and

as litiscontestation. Issue was first joined in the decla-
 not the practice then to lodge defences in a reduction;
 of the Court proved that parties had been repeatedly
 conjunction of the actions, and it appeared that two
 both occasions, appeared for the pursuer. The judg-
 ore pronounced, in foro contentioso, and was evidently
 the merits; as it necessarily implied the illegitimacy of
 its basis, which finding disposed of the whole merits.

a decree by the Supreme Court, in foro contentioso, it
 not to reduce it, either upon any allegation of being con-
 upon any plea falling under the exception of competent
 But as the summons, in this new action, libelled the
 facts, relative to the marriage of Mary Bone and Taylor,
 the certificates formerly produced, every plea regarding
 in any question with this defender, was necessarily res
 as exposed to the exception of either competent and
 oned and repelled, in the former action: and it was im-
 the present action embraced other property than the for-
 the pursuer's status of illegitimacy being res judicata
 ties in the former action, was also res judicata here, and
 cut off her right of action; and,

was stated against the finality of this decree in foro, in
 ty, which might not equally be stated by any party on
 and it would be highly dangerous to the country if the
 nanced.

. 344.

7, 1836.

v.

in.

Defences were also stated in support of the general disposition of Isabella Kerr or Martin, and of Martin's own cognition and satire.

After closing the record,* the Lord Ordinary "sustained the defences against the conclusions for reduction of the decree pronounced by Lord Eldin on the 14th of June, 1824, and assoilzied therefrom: Found that this decree excludes the pursuer's title to insist in the present action: Therefore, sustained the defences thereto, assoilzied the defender from the whole conclusions of the libel, and decerned, and found the pursuer liable in expenses." †

* NOTE by the Lord Ordinary (Jeffrey) at ordaining Martin to satisfy the production.

"The Lord Ordinary was much inclined to have sustained the preliminary defences, and dismissed the action as unsupported by any truly relevant allegation. He thinks it pretty clear that the pursuer has no title to reduce the disposition in favour of the defender, till she has first set aside the decree of absolvitor and reduction, pronounced by Lord Eldin; for, though she does generally set forth that she is heir-apparent of Isabella Kerr, yet Lord Eldin's decree, proceeding on the ground of her illegitimacy, is, while it stands, exclusive of her right to such a character. That decret again, being a decret in foro of the Supreme Court, cannot be set aside upon allegations of its being contrary to law, and unsupported by evidence, or the pursuer being unable, through poverty, to submit it, in time, to review. But, considering that the pursuer declines to admit that the allegation of the interlocutors being vitiated and erased in substantialibus is made, merely as a part of the style, and that there may be some doubts whether the title as heir-apparent is barred by the decret in question, the Lord Ordinary has thought it safer to let the production be satisfied under a reservation of the preliminary defences."

† "NOTE.—This is an action for reducing the defender's titles, in which the pursuer insists, as 'cognosced and served nearest and lawful heir to the said Isabella Kerr,' and also in the character of 'heiress-apparent' of that person.

"But this cognition was set aside by a decree of the Court of Session of 14th June, 1824. This decree is brought under reduction now, but, the Lord Ordinary thinks, on no sufficient grounds. The 3d reason was abandoned, as a reason of reduction, at the debate. As to the others, the Lord Ordinary is of opinion, 1st, That the objections now taken to the decree, on the ground that, in the action in which it was pronounced, there was an error in setting forth the date of the deed on which that action was instituted, even if competent, was omitted. 2d, That the decree cannot be held to have been in absence, because, though no defences had been lodged in the reduction, where they were not necessary or usual, that process was conjoined with a declarator, raised by the present pursuers, and in this conjoined process, the parties were fully heard. 3d, That though some favour (too much) has occasionally been shown to poverty, no case has been produced in which this feeling has been carried so far as to open up decrees of the Supreme Court pronounced after parties were thus fully heard.

"Now while this decree stands, certainly the pursuer has no title on the cognition.

"Then, as to the apparenacy, the decree destroys it also. The question, truly at issue in that action, was, whether the pursuer was, or was not, the heir of Isabella Kerr. The defender said that she was not, because she was illegitimate; and hence his 2d reason of reduction was in these words:—'2d, The said Agnes Kerr was neither the nearest, nor the lawful heir, of the said Isabella Kerr,' her alleged cousin. Now, the interlocutor of Lord Eldin, besides assoilzieving generally, expressly 'sustains the reasons of reduction.' In the face of this decree, finding that she is no heir whatever of Isabella Kerr, how can she have a title or apparenacy?"

reclaimed, and now made an allegation that the two **No. 344**
of declarator and reduction had never been conjoined, **July 7, 1836**
of Lord Eldin was irregularly pronounced. **Kerr v.**

objected, that they were barred from stating this, as they **Martin.**
in their summons, and on the closed record, that these
conjoined.

llowed a minute and answers on this point, after which
“ Found the pursuers barred from pleading the objection
in their minute, that the original decree proceeded with-
njunction of the processes of reduction and declarator;
finding, appointed the cause to be put to the roll for ad-
claiming¹ note.”

then raised a supplementary action of reduction, declar-
ator, setting forth that, in respect of
interlocutor, it had been rendered necessary. This ac-
the two former processes had never been conjoined, and
the irregularities of procedure which had been specially
minutes and answers. The action was, in other respects,
that which was already in dependence.

ed preliminary defences, contending that it was incom-
siderable colour of a supplementary summons, to add new
action, which should have been previously stated, or which
not with the first summons and record; that it was res-
the pursuers were personally barred from alleging the non-
the former processes; that the procedure before Lord
them from the statement; and that, at all events, it could
on condition of paying all previous expenses.

rdinary made great avizandum with the supplementary
defences, which were advised along with the original

SENT.—The expedient of bringing a supplementary action can-
free the pursuers from the personal objection which we have
at of their proceedings in the original action. They are the
d the personal objection reaches to them in the supplementary
the original one. I think the defences to the supplementary
sustained, and this case disposed of, precisely as if that action
aised. In regard to the original action, it will be observed that
first ordered, in the two previous processes, a condescence of
circumstances averred by Martin “ as to the marriage of Mary
r.” By pronouncing this order, it seems to me to be neces-
at Lord Eldin held the averments respecting that marriage to
ntial in the cause, if duly instructed. And when I see that his

¹ Feb. 6, 1836 (*ante*, p. 444).

No. 344. Lordship, as soon as the certificate of the marriage was produced, pronounced an interlocutor, narrating such production, superseding the order for the condempnence, and pronouncing decree of reduction, I cannot doubt that his Lordship held every thing to depend upon the facts of the marriage, so established. This seems as clear as if a proof of the marriage, hinc inde, had been allowed and led, and that had been followed by decree of reduction in respect of such proof. But if so, it appears to me that this decree of Lord Eldin, of necessity, amounts to a finding of the pursuer, Mrs M'Robert's illegitimacy; it cannot be intelligibly read, unless upon that footing. And as it was a decree in foro, thus affixing the status of illegitimacy to that pursuer, and as I do not see any sufficient ground for touching that decree, I think the pursuer must now be dealt with as illegitimate, which is fatal to her present action. There is a difference between the effect of an action which merely embraces certain special subjects, and one which involves the status of a party. In the former action the decree cannot go beyond the subjects which it embraces: but in the latter, the status which is affixed to a party must follow and adhere to that party, at least in all other actions between the same pursuer and defender, provided that the question of status has been once decided in a competent action.

LORD GILLIES.—This is, in some respects, a rather remarkable case. The defender, Martin, holds a general disposition of all the heritage and moveables of his late wife, Isabella Kerr, and the pursuers, if allowed to get into the merits of the case, offer to instruct that this disposition was granted by a minor who had made up no titles: and so far as appears on the record, there is a strong probability that the allegations as to the minority are true. But whatever I might think of the invalidity of such a disposition, as to the heritage, the prejudicial question is whether the pursuers are debarred from bringing the question, for decision on the merits, before the Court. In so far as the extracted decree by Lord Eldin debars them, I do not think that they can evade the effect of it, or that they have stated enough to entitle them to open up that decree in foro. But, after allowing full effect to it, it cannot be broader than the action in which it was pronounced. That action embraced only the right to the subjects in the burgh of Stranraer, it did not touch the pursuer's right to the subjects under the lease, which are in issue in the present process. It is true that it would appear, as the Lord President has stated, that the decree of Lord Eldin went on the footing that the pursuer, Mrs M'Robert, was illegitimate. And if a decree in foro had been pronounced, in an appropriate action such as a declarator of legitimacy, fixing the status of bastardy on the pursuer, I should conceive that a status, so fixed, would have followed her in every action she might raise against the same party, and that she could not be allowed to try it over again in other actions. But it was in a very different species of action that the question of illegitimacy appears to have been raised and decided. It was an action as to a right to a house and garden in Stranraer; and, incidentally, the important question of status was involved in the extrication of this action relative to the right to a heritable subject. Now although the illegitimacy was held to be ascertained, as in that action, and to the effect of disposing of all the claims there made, I certainly am not prepared to hold that the status of bastardy was indelibly fixed on the pursuer, so as to destroy her right of action in reference to all other subjects. It might be that she afterwards found out a separate estate of great value, to which, if legitimate, she would be entitled: and, on her raising action to

it, I do not think, even supposing the new action happened also to be against the same defender as the former, that he could plead illegitimacy as *res judicata* relative to the subjects claimed under the new action. At the same time, I do not wish to be considered as delivering a matured opinion that the question of illegitimacy is an open question between these parties in the present action. I should wish to have that matter more carefully examined and decided before being finally disposed of. But, at present, I am not at all prepared to go the length of holding that the status of illegitimacy is fixed in this case because it was incidentally involved and decided in the previous one, relative to part only of the subjects claimed by the pursuer in this action. So far as the former decree went, that is, so far as it found she had no right to the land and garden in the burgh of Stranraer, it is *res judicata*, but I am not at all prepared to allow it to go farther.

MACKENZIE.—I do not think that the decree of Lord Eldin can be opened. There never may be the *ex facie* appearance of invalidity of the general disposition in favour of Isabella Kerr to the defender Martin, so far at least as it affects heritable subjects. I am unwilling to offer any opinion respecting its validity at present; and the question to be determined is, how far does the decree of Lord Eldin, when it is given to it, produce the effect of barring the present action? I have no doubt whether that decree can be held to have made the pursuer, Mrs Martin, illegitimate, a *res judicata* in this action. In the first place, the decree of Lord Eldin does not contain an express finding of illegitimacy. Although, in reference to the state of the action, we may be able reasonably to infer that the ground on which his Lordship pronounced decree of reduction was that he held the pursuer's illegitimacy to be established, yet, as his Lordship's decree does not contain any finding whatever, which is declaratory of her illegitimacy, I doubt whether such status can be held to be *res judicata*. In the second place, I entertain a view similar to that expressed by Lord Gillies, that, although a judgment was pronounced in the present action, relative to a special heritable subject, a judgment was pronounced in the same parties, incidentally involving a finding that the pursuer was illegitimate, that does not necessarily make the status of such pursuer *res judicata* in a subsequent action relative to other subjects, though it is an action between the same parties. I should certainly not be inclined to go so far as that without much more consideration than I have yet been able to give to the subject. Indeed it occurs to me that where both these grounds of doubt concur in holding that there is *res judicata* on the question of status, it would be very far indeed, and would be very hazardous, to lay down at once that the status was *res judicata* in this action.

PRESIDENT.—In reference to one of the observations of Lord Mackenzie I wish to add, that, I should not have held there was *res judicata* as to status had I not considered that there was stated, in the decree of Lord Eldin, enough to demonstrate that his Lordship gave decree of reduction, and he held Mrs M'Robert to be illegitimate, and on no other ground. If the locutor had not itself set forth special reasons or grounds, it would have been a different case. But where a summons of reduction sets forth various grounds and the decree of reduction specifies some of these in the decree, I think it must be held to be *res judicata* between the parties, otherwise it would be necessary to hold that every one of the reasons stated on the record was examined and decided on. For it is impossible to examine the Judge who pro-

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July 7, 1883

Kerr v.

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344. pronounced the interlocutor, in order thereby to discover which of the several grounds of reduction he had sustained and decided on.

7, 1836. *Dean of Faculty for Defender.*—If the Court hold, that, so far as concerns the property in the burgh of Stranraer, the illegitimacy of the pursuer, Mr M'Robert, is *res judicata*, perhaps the best course would be to give judgment to that effect, and remit to the Lord Ordinary to proceed *quoad ultra*.

THE COURT approved of this suggestion and pronounced the following interlocutor:—"Sustain the defences in the supplementary action; dismiss that action, and decern; and, in the original action, refuse the date of this reclaiming note, and adhere to the interlocutor reclaimed against, in so far as relates to the burgage subjects which were in question before Lord Eldin, and find that the interlocutor of Lord Eldin excludes the pursuer's title to insist in the present action, so far as relates to the said subjects; *quoad ultra*, remit to the Lord Ordinary to hear parties as to the effect of the said decree in all other respects, reserving all questions of expenses, both in the original and in the supplementary action."

J. ANDERSON, S.S.C.—J. M'CRACKEN, S.S.C.—Agents.

345. MRS MARIA LACY or HARVEY, and Husband, Petitioners.—*A. Dunlop.*
MRS CATHERINE LACY, and OTHERS, Respondents.—*T. Mackenzie.*

Trust—Judicial Factor.—1. Judicial factor appointed to execute a trust, the trustee having declined to accept. 2. Court refused, in determining the application for a factor, to decide on any claims upon the trust-fund.

7, 1836. By mutual deed of settlement, in accordance with a contract of marriage, the late Captain Lacy and his wife, the respondent Mrs Lacy, conveyed all their property to trustees to hold the same in trust for the life and use and benefit of the survivor of the spouses, and for their children, nine in number, in fee, the trustees being directed, after the death of either of the spouses, to pay to the survivor, "or to permit or legally authorize such survivor to uplift and receive the rents, interest, and annual profits of the foresaid residue and effects, during his or her life (the trustees not being themselves to act during the lifetime of such survivor, unless particularly required,)" and after the death of the survivor to divide it among the children who should be alive when the youngest attained twenty-one.

The trustees, amongst with Mrs Lacy, were appointed tutors and curators to the children. Captain Lacy died in 1829. The property of the spouses consisted of two houses belonging to Mrs Lacy, a house and an heritable bond for £3000 belonging to Captain Lacy, together with some moveable funds, making in all about £4800. The trustees were not at this time called upon to accept by Mrs Lacy, who intromitted with the moveable funds, and discharged the debts of her husband. She drew

and interest of the other property, and supported the family; No. 345. g become involved in debt, she, in order to discharge it, sold s standing in her own name, and also obtained £200 of the heri- July 7, 1836. Harvey v. d from the creditor. She thereafter incurred a further debt of Lacy.

d the trustees being applied to, agreed to act, provided this debt cleared off. For this purpose, titles were made up to the heri- l, in name of the eldest son, who was now of age; and he hav- ed a discharge, payment of the balance of £2800 due there- made to Mr Harvey, writer in Campbeltown, who held a man-

Mrs Lacy and her son to uplift the money, apply £400 in of the debt above-mentioned, and invest the remainder in name stees. The debt was accordingly paid; but the trustees not t accepted, the balance was lodged by Harvey in a bank in his , "for the family of Captain Lacy." In the meantime, how-

Lacy had incurred additional debt to the extent of £300, and es having again refused to accept till this was cleared off, Har- ced that sum out of the money deposited; but a still further eing thereafter demanded for new embarrassments, the trustees used to act. Mrs Lacy and her son thereupon raised an action arvey for payment of the deposited money, but he having mar- f the daughters, insisted on a right of retention, and also pre- etition in name of his wife and himself, praying the Court, in the non-acceptance of the trustees, "to nominate and appoint n to be judicial factor upon the trust-estate of the said deceased Thomas Lacy, with the usual powers, and especially with power ssession of, ingather, and properly invest the whole remainder estate, and to execute and carry into effect the provisions and of the above-mentioned trust-deed of settlement thereanent."¹

answers were returned in name of Mrs Lacy and her other chil- essing their willingness that the residue of the deposited money securely invested, after discharging a further debt of £300, y her, as she alleged, in maintaining and fitting out her chil- she contended that that was a proper charge on the capital, be- r impensum by a tutor for the pupils.

Court refused to enter into any question of this kind, and ointed a factor as prayed for.

J. and W. FERRIER, W.S.—SCIPIO MACTAGGART, W.S.—Agents.

ler, Feb. 27, 1824 (ante, II. 745); Moir, July 6, 1826 (IV. 801); Sheriff, 9 (VII. 314); Robertson, Feb. 7, 1833 (XI. 365); Ireland, May 18, 1833

No. 346.

A B, Pursuer.

— FRASER, Defender.—*Robertson.*

July 8, 1836.

1st Division.

A B v. Fraser.

Scottish Union
Insurance Co.

v. Calderwood.

Poor's Roll.—In consequence of a tender of £20, of damages, besides expenses, to a pursuer on the poor's roll, his counsel reported that there was no longer a *probabilis causa litigandi*, and, on the motion of the defender, he was ordered to be removed from the poor's roll.

— Agents.

No. 347.

SCOTTISH UNION INSURANCE COMPANY, Pursuers.—*Monteith.*
MRS DURHAM CALDERWOOD and HUSBAND, Defenders.—*Speirs.*

Process—Reclaiming Note.—Where decree by default has been pronounced against a defender who has failed to lodge defences in due time, it is competent for him to present a reclaiming note, accompanied with the defences, at any time before extract, though beyond twenty-one days from the date of the decree reclaimed against.

July 8, 1836.

1st Division.

Ld. Cockburn.
D.

IN a reduction at the instance of the Scottish Union Insurance Company against William C. C. Graham of Gartmore, and the other heirs of entail of Gartmore, including Mrs Durham Calderwood, the Lord Ordinary, on 7th June, "in respect the defences, ordered by the foregoing interlocutor, have not been lodged, sustained the reasons of reduction, reduced, decerned," &c.

On 7th July, Mrs Durham Calderwood and husband presented a reclaiming note, to be reponed on payment of such expenses as might be found due; the note was accompanied with the defences.

The pursuers objected to the competency of the note, that more than twenty-one days had elapsed since the interlocutor reclaimed against.

The defenders answered, that, as it was a decree by default which was reclaimed against, the note was competent at any time, before extract.

LORD MACKENZIE.—This is not a point about which any difficulty should be raised. The clause regulating it is the 45th section of Act of Sederunt, 11th July, 1828, which provides that "if defences, &c., have not been lodged as required, the Lord Ordinary shall pronounce decree, &c.; against which decree the defender shall only be reponed by presenting a reclaiming note to the Inner House before extract," &c. It is clear that the note is competent before extract and there has been no extract here.

er Judges concurred, and

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THE COURT remitted to repone on the usual terms.

July 8, 1836.
M'Ghie v.
Wotherspoon.

J. & R. ELLIS, W.S.—J. KNOX, S.S.C.—KEE and DICKSON, W.S.—Agents.

Fullerton v.
Jaffray.

MRS MARGARET M'GHIE, Petitioner.—*Sandford.*

WOTHERSPOON (Common Agent in Ranking of Cliftonhill), Respondent.—*D. F. Hope—Russell.* No. 348.

—*Ranking and Sale.*—A special case, in which a petition and July 8, 1836.
of an unfounded nature, presented against the common agent
ranking and sale of Cliftonhill, by a party who had never been 1ST DIVISION.
that process, was refused by the Court, with expenses. D.

C. C. STEWART, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

FULLERTON (Judicial Factor on Dumbarton Glass Work Com- No. 349.
pany), Pursuer.—*D. F. Hope—Christison.*

JOHN DIXON and OTHERS (Dixon's Trustees), Defenders.—
Rutherford—H. J. Robertson.

AND

FULLERTON (Judicial Factor, &c.), Pursuer.—*D. F. Hope*
—*Christison.*

ALD GRAHAME and MANDATARY, Defenders.—*Rutherford—*
H. J. Robertson.

AND

JOHN DIXON and OTHERS (Dixon's Trustees), Nominal Raisers.
—*Rutherford—H. J. Robertson.*

DIXON or JAFFRAY and OTHERS, Claimants.—*D. F. Hope—*
Forsyth.

—*Partnership.*—In an action of accounting, brought by a judicial factor
of a company, against the trustees of the last surviving partner, for their
as,—interim-decree pronounced against the trustees, to pay to the judi-
£5298, 17s. 7d., being the balance of company funds which they admitted
ceived, without applying, to company purposes; but this, on condition
tees, and the company debtors who had made payments to them, should
dited for the amount, and secured against second payment.

of the case reported ante, March 5, 1833.¹ After the death July 8, 1836.
Jacob Dixon, senior, who was then sole surviving partner of 1ST DIVISION.
Ld. Corehouse.
D.

...by the judicial factor, using the same person
fiary interest under the trust-settlement of James
These actions were conjoined, and, a record being
Ordinary pronounced an interim decree in these to
pursuer, the judicial factor, entitled to payment of
17s. 7d. sterling, being the balance of the funds of the
Work Company, admitted by the defenders, Anthony
to have been intromitted with by them, and not appli
poses; but always on the condition, that the pursuer
to be allowed to the said defenders, and to the debt
by the receivers, who have been judicially appoin
Ireland, for the sums paid to the pursuer, so that the
be liable to account, or the debtors of the company t
to the said receivers, and decerns; and allows this d
be extracted, ad interim."

Anthony Dixon and Others reclaimed; when an
the judicial factor, to find caution for the amount
decree, that it should be forthcoming, if credit was r
of the condition contained in the interlocutor.

THE COURT, thereon, unanimously affirmed
with that addition; and reserving expenses.

BENNY and WEBSTER, W.S.—D. FISHER, S.S.C.—T. GRAHAM

ANDREW WILSON, Pursuer.—*Keay—Marshall.*
 vs WEBSTER, Defender.—*D. F. Hope—H. J. Robertson.*

No. 350.

July 8, 1836.

Wilson v.
Webster.

m—Accretion—Warrandice—Heritable Right.—In 1781 a creditor led an action of a heritable subject against a debtor who had no right or title to it. Fourteen years afterwards a right, as heir-apparent, opened to the debtor, and he made up an erroneous feudal title to it; in the following year declaratory of the legal was obtained by the creditor; and two years afterwards sold part of the subjects falling under the adjudication; Held, in a sub-rogation of a right founded on this sale, that, as the pursuer founded on a title which was nugatory, the defender must be assolized.

James Webster, writer in Cupar, purchased a heritable sub-
 stituting of a maltstead and kiln, &c. in Leven, Fife, from Andrew
 senior. He entered into possession, and continued in possession
 July 8, 1836.
 1st Division.
 Lord Cockburn.
 R.

In 1831, Andrew Wilson, junior, as eldest son of Andrew Wilson, senior, raised a reduction of the conveyance to Webster, alleging that his father had merely a right of liferent, and that he, either alone or along with his only sister, was fiar. He founded his title on a sale of the subject, which had been executed by his grandfather, and on an adjudication of the subjects against one Thomas Goodsir, which was followed by decree of declarator of expiry of the year 1796. It appeared, however, that, at the date of the adjudication, Thomas Goodsir had no right or title to the subjects; James Good-son, the elder brother of Thomas, was then living, and was infeft in the subjects as heir to his father, James Goodsir, senior. James Wilson, senior, did not die till 1793, and was survived by a son, who died in 1795. It was then only that a right of apparen- cy came into the person of Thomas Goodsir, who, afterwards in the same year, erroneously founded a feudal title as heir of his father, in place of his brother the elder brother, who was then living, and was infeft in the subjects as heir to his father, James Goodsir, senior. James Wilson, senior, did not die till 1793, and was survived by a son, who died in 1795. It was then only that a right of apparen- cy came into the person of Thomas Goodsir, who, afterwards in the same year, erroneously founded a feudal title as heir of his father, in place of his brother the elder brother, who was then living, and was infeft in the subjects as heir to his father, James Goodsir, senior. James Wilson, senior, did not die till 1793, and was survived by a son, who died in 1795. It was then only that a right of apparen- cy came into the person of Thomas Goodsir, who, afterwards in the same year, erroneously founded a feudal title as heir of his father, in place of his brother the elder brother, who was then living, and was infeft in the subjects as heir to his father, James Goodsir, senior.

The case came before the Inner-House, under a reclaiming note, and on the interlocutory judgment of the Lord Ordinary, when cases

No. 350. were ordered, on considering which their Lordships unanimously assented to the defender with expenses.

July 8, 1836.
Kirkland.

Thomson v.
Magistrates of
Wick.

LORD MACKENZIE.—An adjudging creditor takes out of his debtor whatever he can find in him, and he puts what he chooses into his decree. But that will not give a title to the debtor if he has none otherwise; and if he has none, the decree will not transfer a title to the creditor.

The other Judges concurred.

J. LITTLE, S.S.C.—G. HEGGIE, W.S.—Agents.

No. 351.

JAMES KIRKLAND, Petitioner.—*Ellis*.

July 8, 1836.

1st Division.
B.

Bankruptcy—Process.—Petition by bankrupt and trustee, with concurrence of all the creditors, to recall the sequestration (which had been granted about five months previously); to ordain all proceedings thereon to cease; and to ordain the trustee to reconvey the sequestrated estate so far as not realized, to the bankrupt—

Granted, after intimation, and there being no opposition.

CATHCART and DOUGLAS, W.S.—Agents.

No. 352.

ROBERT THOMSON and OTHERS, Complainers.—*McNeill—Nelson.*
MAGISTRATES OF WICK and OTHERS, Respondents.—*Rutherford—Peterson.*

Burgh—Process.—Petition and complaint to have an election of three councillors in a royal burgh set aside on the ground of the town-clerk having improperly transferred to the municipal register the names of certain voters, their supporters, who were alleged not to be qualified in respect of premises situated within the royal burgh—refused as incompetent.

July 8, 1836.

2d Division.
R.

THE royal burgh of Wick is entitled, along with certain other burghs, to return a member to parliament. Its mode of municipal election is in terms of the 11th section of the statute 3d and 4th William IV. c. 76, by a public meeting of the electors declaring their votes by signed list. The council consists of twelve persons, four of whom go out of office annually, a similar number being elected in their room. The last election took place in November, 1835, when four councillors were elected.

With the view of setting aside the election of three of those persons, Robert Thomson, and two other parties who stood next in the number of votes, presented a petition and complaint, founding on the acts 16 Geo.

§ 24; 14 Geo. III. c. 81, § 1; and 3 and 4 William IV. c. No. 352. July 8, 1836. Thomson v. Magistrates of Wick.
 , 5, 8, 11, 15, 16 and 36; and setting forth, inter alia, that clerk had irregularly and improperly transferred to the municipality of the burgh of Wick the names of certain persons qualified for the election of members of parliament, but whose premises situated within the royalty of the burgh, as required by the Act of 3 and 4 Will. IV. c. 76; that, at the election of councillors in 1835, these persons wrongfully tendered, and were wrongfully induced to give their votes in support of three of the successful parties, and were therefore unduly elected, and that the legal and true majority was in favour of the complainers; which facts they offered to prove by evidence, and prayed the Court to grant warrant for serving the writ of mandamus upon all concerned, and to find that the voters in question were not entitled to have voted, that the election of the three councillors was null and void, and that the complainers were duly elected, and to direct the magistrates and council to induct them accordingly; and in the event of an equality of votes, to ordain a new election to be held, in terms of the statute; and also to prohibit and discharge the persons elected as above from acting as such, and to find that their votes were null.

The magistrates and town-council, and the electors whose votes were in question, lodged answers, in which, denying generally the fact of the irregularity in right of which the votes were given not being within the burgh of Wick, they maintained that the petition and complaint was incompetent, inasmuch as the Burgh Reform Act was framed upon, and referred to, the Parliamentary Reform Act, by which a certain mode of review in such cases as the present was appointed, and the jurisdiction of the ordinary courts was excluded.¹

It was stated at the bar that an ordinary action had been raised at the instance of the complainers to reduce the election in question.

The COURT, reserving their opinion as to the reduction, held that the present proceeding was incompetent, and not contemplated by the statutes referred to, and accordingly “refused the petition and complaint as incompetent, with expenses.”

HOBNE and ROSE, W.S.—W. SUTHERLAND, W.S.—Agents.

Will. IV. c. 76, §§ 1, 4, 5, 6, 8 and 36; 2 and 3 Will. IV. c. 65, §§ 15, 16, 47.

No. 354. **WILLIAM SWANSON (Biggar's Trustee), Petitioner**
Monteith.

ROBERT WIGHT, Respondent.—*A. M.*

Bankrupt—Sequestration—Trustee.—Where an ex-trustee is admitted that he had a large balance of trust funds in his hands, and that he was to make a deduction of such further payments as he can instruct"—or balance, and interim extract allowed, unless consignation at certain short space.

July 2, 1836. In a petition and complaint by William Swanson, trustee on the sequestrated estate of Walter Biggar, against Robert Wight, trustee on that estate, Wight was ordained to lodge the precise sum, if any, which he admits he has in his control, as trustee on Walter Biggar's sequestrated estate, and to lodge a minute admitting intromissions to the amount and stating deductions to the amount of £2307, 8s. that the balance of £2049, 9s. 6½d. "remained in his hands, and that he was to make a deduction of such further payments as he can instruct."

The Lord Ordinary reported the minute to the Court, and allowed the consignation of the admitted sum, and allowed interim extract at Lammas next, unless consignation was previously

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—J. ADAM

JOHN WILKIE and CURATOR, Pursuers.—*G. G. Bell.*

No. 355

JAMES JACKSON, Defender.—*D. F. Hope—Jardine.*

July 9, 1836

Wilkie v.

Jackson.

Si Sine Liberis—Succession—Heritable or Moveable.—A father, in his settlement, disposed of his whole heritable and moveable estate, which was considerable, to his eldest son, and the heirs of his body; whom failing, to his second, third, and fourth sons, *seriatim*, and the heirs of their bodies respectively; whom failing, to his nearest heirs and assignees whomsoever: he had two daughters, and he disposed of the succession of his eldest son with payment of £200 to each of the sons, “their heirs and assignees,” and of £100 to each of his daughters; and his second and third sons were each burdened, if they succeeded, with an additional sum, payable to the younger son or sons, “their heirs or assignees,” and an equal sum, payable to each of the daughters; the fourth son, if succeeding, was to have a sum payable to each of the daughters, “their heirs or assignees:” These provisions were declared real burdens upon the lands, and appointed to be recorded in the infestments; the deed declared the provisions to younger children in preference of all legitim, &c.; the eldest daughter predeceased her father, leaving issue; those of the sons who *seriatim* succeeded, did not make up titles under the settlement:—Held that the *conditio si sine liberis* applied, and that the provisions of the eldest daughter did not lapse by her predecease.

JACKSON of Bardykes, at the date of his settlement in 1785, had July 9, 1836
 of four sons and two daughters. By his settlement, on the nar- 1st Division:
 “certain onerous causes and considerations,” he disposed of his Ld. Corehouse
 which were considerable, to himself in life, and to John Jackson, D.
 his eldest son, and the heirs of his body; whom failing, to William,
 his second son, and the heirs of his body; whom failing, to his third and
 fourth sons, and the heirs of their bodies respectively, in like manner;
 and, failing, to his, the granter’s own heirs and assignees whomsoever.
 The deed contained a provision “declaring always that upon my eldest
 son, or the heirs lawfully to be procreate of his body, their attaining pos-
 session of the lands, &c. above disposed, they shall be bound and obliged
 to make payment to each of the foresaid William, James, and Andrew
 my sons, their heirs or assignees, the sum of £200 sterling
 and to each of Margaret Jackson and Janet Jackson, my two
 daughters, the sum of £100 money foresaid; and that at and upon the
 day of Whitsunday or Martinmas next, and immediately following
 thereafter, whenever the same shall happen: As also providing and
 that upon my second son, or the heirs lawfully procreated of
 him, their attaining possession of the foresaid lands, teinds, and
 the decease of the said John Jackson, my eldest son, and heirs

At the date, 11th February, 1836. The cause was not then finally decided, but expected to be so decided during the session; on which account the court delayed of that part of the cause which did form the subject of a judgment of the Court. But it is now given, as it is uncertain when the cause may be decided.

No. 355.
 July 9, 1836.
 Wilkie v.
 Jackson.

lawfully procreated of his body, they shall be bound and obliged, upon the first term of Whitsunday or Martinmas after their attaining possession as said is, to make payment to each of the said James and Andrew Jackson, my third and fourth sons, their heirs or assignees, the sum of 1200 merks Scots; and to each of the saids Margaret and Janet Jackson, my two daughters, the sum of 600 merks money foresaid," &c.

By a similar provision, the third son succeeding was to pay £100 to "the fourth son, his heirs or assignees," and "to each of Margaret and Janet Jackson, my two daughters, the sum of £50;" and the fourth son succeeding was to "make payment to each of Margaret and Janet Jackson, my daughters, their heirs or assignees, of the sum of £100:" "and which provisions above written, in favours of my younger sons and daughters, and theirs above named, in the several events above expressed, are hereby declared to be real burdens affecting the foresaid lands, tenements, and others." There was a declaration also that these provisions should be engrossed in the infeftments to follow under the settlement. The deed of settlement also contained a general conveyance of his whole moveable estate, "under the conditions, provisions, &c. above and underwritten" to his eldest son, and the heirs of his body, "whom failing, the other substitutes above written, and theirs above named, in the order above set down." There then followed a provision, subjecting the son succeeding in the granter's debts, and then a declaration "that the provisions above written, conceived in favour of my sons and daughters foresaid, are granted by me, and to be accepted by them, in full satisfaction and payment to them respectively, of all that they or any of them, their heirs and successors, can ask, claim, or crave of me, my heirs, executors, and successors, as bairns-part of gear, portion-natural, or any other way whatever, as children of my family; reserving always to me, not only my liferent of the sums of money, goods, gear, and others above assigned, during all the days of my lifetime, but also full power and liberty to alter," &c.

John Jackson died in 1801. He was predeceased by his eldest daughter Margaret, who had married John Wilkie, portioner of Uddingstone, by whom she had two sons, John and James. Her son John died without issue, but James left a son, John Wilkie, a minor, to whom Donald Cuthbertson, accountant in Glasgow, was appointed curator.

John, the eldest son of John Jackson of Bardykes, only survived till 1803. He possessed the lands, but made up no titles to them, and died without leaving heirs of his body. His next brother William succeeded to the lands, and made up a title to them, but not under the settlement of 1785. He held the lands until 1823 when he died, without heirs of his body. His next brother James had predeceased him, leaving a family. William Jackson executed a settlement in favour of his nephew James, the eldest son of his brother James; and his nephew expedite a precept of

stat, as heir to his uncle, and entered on the possession of the No. 351

2, John Wilkie and his curator, libelling that he represented his ^{July 9, 189} John Wilkie, and was thereby in right of the provisions conceived ^{Wilkie v. Jackson.} settlement 1785 in favour of Margaret Jackson or Wilkie, the daughter of John Jackson of Bardykes; which provisions were a real burden on the lands, and thereby possessed a heritable right. The plaintiff raised an action against James Jackson, now of Bardykes, as being his father, James Jackson, and his two uncles, William and John Jackson, in their obligations, and as being liable to pay those provisions in favour of the said Margaret Jackson or Wilkie, which were by the settlement 1785, in the event of these parties respectively dying, to be paid to the lands. In making up a record, it was not stated how long James Jackson, the testator, had lived after the death of his daughter Margaret Jackson or Wilkie; but apparently she had lived and died in 1891.

In other defences, the defender pleaded, that, as Margaret Jackson had predeceased her father, the provision in her favour, which was in the nature of a legacy, lapsed, and nothing ever became due under the settlement, to her representatives. This was apparent, not only from the provisions being specific sums bequeathed to her in a settlement which was revocable and ambulatory until after her death; but also, because, although she lived long enough to leave two sons, her father, John Jackson, did not think fit to make any provision for her. It must be held to have done this ex proposito, especially as the sums of money destined to his younger sons, were always made payable to them, "their heirs or assignees;" while the sums made payable to the daughters had no such addition, with the exception of the last sum, which was to become payable only if the fourth son succeeded. Apparently, as that was a more distant contingency, that single sum was declared payable to each of the daughters, "their heirs or assignees." But there was no question, under this action, as to this last sum, because the fourth son had never succeeded. And as the deed was prepared by a professional man, and in a technical manner, the distinction between the terms of the provisions to the sons and to the daughters, afforded the clearest evidence of intention to pay the sums in question upon the heirs or assignees of a predeceased daughter.

The defenders, who stated that the settlement of 1785 had, for a long time, been lost or mislaid, so as to be unknown to them, pleaded, that it was, as to the interpretation of a family settlement, by a father disposing of his whole estate, heritable and moveable, in favour of his children, *per viam*, under burden of certain provisions to his daughters, to be declared to be in lieu of legitim or all other claim. In such cases, it would require something not short of an explicit declaration,

presumed to have intended. And, separately, as these declared real burdens, and were intended by the testator, whoever took them up, they were not of the nature of a legacy, but formed a heritable provision, naturally descending to the heirs, even though a destination to heirs was not expressed.

The Lord Ordinary found, "in respect of the implication in favour of the children, that the provisions to Margaret Jackson did not exclude the children of the deceased." His Lordship, on separate grounds, was of opinion that the provisions were not exhausted by the children of the deceased.

The pursuers reclaimed against the interlocutor, so far as it related to the children of the deceased. The defender presented a counter-reclaiming note against the interlocutor, which is above quoted.

LORD BALGRAY.—When I see the declaration in this settlement, that the children of the deceased were to be in lieu of their legitime, and that the children of the family, I have no difficulty in holding that the provision in favour of the children is let in, to qualify such a provision.

It was understood that the *Dean of Faculty*, for the defence of the settlement, was to be up any contest as to that part of the interlocutor which related to the children of the deceased, and that the *conditio sine liberis* applied.

The subsequent discussion was chiefly, if not solely, on the ground of the children of the deceased. But it was understood that the children of the deceased were to be in lieu of their legitime.

THE COURT were unanimous in pronouncing their decision in favour of the pursuers, and the Lord Ordinary adhered to the interlocutor of the Lord Ordinary.

PACK DALMAHOY (Lamb's Curator), Petitioner.—*D. F. Hope.* No. 356

Bonis—Lunatic.—Circumstances in which the Court authorized a curator July 9, 1834
except of a composition of less than 10s. per pound, and to grant a dis- Dalmahoy.
three parties, alleged to be debtors to the lunatic, and one of whom
y was so for the whole debt—in respect that such a measure was the
icial which could be adopted for the lunatic's estate, and the next of kin
itic concurred in the application.

0, one Reid was appointed curator bonis to John Lamb, a July 9, 1836
nd Thomas Hume, senior, farmer, near Dunbar, became his 1st Division
In 1833, Reid's appointment was recalled, and Peter Hume S.
ed curator bonis, to whom Thomas Hume, junior, became.

These parties were sons of Thomas Hume, senior. In 1835,
ion by Peter Hume, and the next of kin of John Lamb, Peter
ppointment was recalled, and Patrick Dalmahoy, W.S., was
in his stead. Dalmahoy found that Reid was owing a con-
balance to the lunatic's estate, and that Peter Hume had never
to account. Upon judicial examination of their accounts, it
that the balance against Reid was £413, 19s. 6d., and that
me owed a balance, on his intromissions, of £8, 7s. The
reporting on these accounts, called the attention of the Lord
to the question whether Peter Hume had not rendered himself
liable for the whole balance due by Reid, in consequence of
ting to call him duly to account. Whilst a discussion regard-

Hume's liability was pending, Dalmahoy gave a charge of
Reid without recovering any funds, as his circumstances were

An offer was then made on the part of Thomas Hume, senior,
itioner, and Peter Hume and his cautioner, Thomas Hume,
pay a sum of £200 for a complete discharge to them of the
y Reid. Dalmahoy made enquiry into the circumstances of
and satisfied himself, that, even in the event of obtaining de-
whole debts against Peter Hume and his cautioner, and using
ligence against all the parties, he would not recover so large
he lunatic's estate as £200. The next of kin of the lunatic,
y's suggestion, made personal enquiries respecting the cir-
of these parties, who were their neighbours in the country,
l the same opinion, that, to accept the composition of £200,
st beneficial measure which could be adopted for the lunatic's
ey signed a minute to that effect, and Dalmahoy presented a
iting the circumstances, and prayed the Court “to authorize
er the petitioner, as curator foresaid, to receive the said sum
ith the legal interest thereof since the 19th day of May last,
ayment thereof to discharge the said Thomas Hume, senior,

356. Peter Halliburton Hume, and Thomas Hume, junior, of the foresaid debt due by the said Thomas Reid and his cautioner to the said John Lamb's estate, provided always that the said payment be made on or before the 1st day of November next."

THE COURT ordered intimation, and afterwards granted the prayer of the petition, which was not opposed.

P. DALMAHOY, W.S.—Agent.

357. JOHN MORISON, W.S., Pursuer.—*More.*
JAMES HAMILTON and JAMES M'INNES, Defenders.—*D. F. Hope—Tait.*

Adjudication.—Intimation appointed of a first adjudication proceeding on a bill *ex facie* prescribed, where the debtor had, prior to the date of the bill, made a trust-conveyance of his whole heritable property for behoof of creditors.

- 9, 1836. IN August, 1821, the late John Buchan, W.S., accepted a bill for £125, drawn upon him by the defender, Hamilton, who indorsed it to one Anderson, by whom it was indorsed to another party, and by him protested, in December, for non-payment. It was thereafter paid by the pursuer Morison, for the honour of Anderson, the drawer and acceptor, and Anderson being at the same time retained as jointly and severally liable in repayment.

Some years previous to the date of the bill, Hamilton had made a conveyance of his whole heritable property in trust for behoof of his creditors, to the defender, M'Innes, who was thereon infeft.

In 1834, Morison raised an action of adjudication against Hamilton of the lands included in the trust-conveyance, proceeding on the bill, but making no reference to its being prescribed, and not averring that any interruption to prescription had taken place by diligence or otherwise.

Defences were given in by Hamilton and also by the trustee, M'Innes, who sisted himself for the interest of the creditors, in which it was pleaded, that the bill libelled on being, *ex facie* of the summons, prescribed, was incapable of founding any diligence or action, and that the action was besides incompetent, Hamilton's heritable estate having been vested in the person of the trustee for behoof of the creditors, at a period anterior to the date of the bill, and not liable to be affected by the present proceeding; and, at all events, nothing could be affected but Hamilton's reversionary interest, which qualification, however, the conclusions of the summons did not contemplate.

The Lord Ordinary "having heard parties, in respect it is stated that *this is the first process of adjudication brought against the defender (Ha-*

objects libelled, appointed intimation thereof to be made," No. 357.

is reclaimed, praying the Court to recal this interlocutor, action, but

July 9, 1836.
Milligan v.
M'Lachlan's
Trustees.

THEIR LORDSHIPS adhered, with expenses.

.S.—JAMES HAMILTON, W.S.—GORDON and MACKAY, W.S.—Agents.

JURY SITTINGS.

MILLIGAN and SPOUSE, Pursuers.—*M'Neill—A. M'Neill.* No. 358.
M'LACHLAN'S TRUSTEES, Defenders.—*D. F. Hope—Maitland.*

Tales.—A cause having been set down for trial by a special number of special jurors not appearing on the day appointed, on jurors, however, in attendance, Question, whether a tales in section of the 55 Geo. III. c. 42 was competent?

section of the 55 Geo. III. c. 42, it is enacted, " That, July 13, 1836, y shall not appear before the said Jury Court, or else- 2^D DIVISION
challenge by either of the parties, and the jury is like to re- Lord Justice-
or default of jurors, it shall be lawful for the said Court, Clerk.
itioner before whom any issue is to be tried, to direct the R.
officer or officers who summoned the said jury, upon re-
either party, to add to the list of the said jury the name
other person or persons of the county, city, town, or
e issue is to be tried, who shall be inserted in some other
s, and who shall then be attending the court where such
d, to serve upon such jury, and not any others, if so many
other list be present in Court, or can there be found, and
e parties, pursuer and defender, may have his challenge
jurors so named and added to the former original list, in
he or they had been originally included in the said list of
rial of such issue, and that the said Court or Commissioner
r such issue, shall and may proceed to the trial there-

No. 358. of, with those persons whose names were originally inserted in the said list of jurors, together with the person or persons whose names have been so added to the original list of jurors as aforesaid, in the same manner as the said court or commissioner might and ought to have done, if all the said jurors whose names were inserted in the said original list, had appeared to try such issue."

July 13, 1836.
Walker v.
Ritchie.

The case of *Milligan v. M'Lachlan's trustees* was set down to be tried on the 12th of this month by a special jury, which had been applied for by the defenders. A sufficient number of special jurors not appearing on the morning of the 12th, it was put off till the 13th (this day), when there was likewise a deficiency of special jurors. The common jurors summoned for the July sittings were in attendance.

In these circumstances, a question arose, whether the trial ought to be proceeded with. The pursuer maintained the affirmative, and that the deficiency of jurors should be made up from the common jury list, in terms of the 28th section of the act above cited, which, following immediately after the provisions as to special juries, must have been intended to apply to such juries in particular, or, at all events, applied generally both to common and special juries.

The defenders, on the other hand, contended that there was no way of making up the deficiency, and that the section in question was not applicable to the present case, which appeared from its expressly alluding to the *challenge* of jurors, for which there was no provision in reference to special juries.

THE LORD JUSTICE-CLERK expressed doubts, and ordered that the trial should in the mean time be delayed.

CHARLES FISHER, S.S.C.—JOHN CULLEN, W.S.—Agents.

No. 359.

THOMAS WALKER, Pursuer.—*Rutherford—Patton.*
JAMES RITCHIE, Defender.—*D. F. Hope—J. Anderson.*

Proof—Jury Trial.—1. A witness for the pursuer having, on cross-examination, deponed that he had not said to a certain person that he would swear for either party for a twenty pound note,—This person not allowed to be called by the defender to disprove the witness's statement.

July 13, 1836.

2. Under an issue, whether the defender assaulted and wrongfully struck the pursuer, to his loss, injury, and damage,—evidence admitted that the pursuer was of a violent and quarrelsome disposition, there being a statement to that effect on the record.

1st DIVISION.
Lord Justice-
Clark.
R.

AN action of damages for assault, concluding for a sum of £500, was raised by *Thomas Walker* against *James Ritchie*, before the sheriff of

and subsequently advocated by Walker to the Court of No. 350.
 6 Geo. IV. c. 120, § 40. An issue was sent to trial, ^{July 14, 1834}
 near the Whins Toll House, on the road from Alloa ^{Inch v. Thomson.}
 on or about the 24th day of June, 1834, the defender
 wrongfully struck or cut and wounded the pursuer with a
 injury, and damage of the pursuer?
 at £500."

the pursuer, on cross-examination, deponed, that he
 one Jean Henderson that he would swear for either
 ty pound note. The *Dean of Faculty* having, in the
 idence for the defender, proposed to call Jean Hender-
 his witness's statement, an objection was taken thereto
 the Court.

Faculty, for the defender, proposed to adduce witnesses
 pursuer was of a violent and quarrelsome disposition,
 he record a statement to that effect.
 nitted the evidence.

after being enclosed, returned a verdict of "Not Pro-
 ich was marked as a verdict for the defender.

and HILL, W.S.—MACKINTOSH and GEMMELL—Agents.

HN INCH, Pursuer.—*Robertson—W. Bell.*

No. 360.

THOMSON and OTHERS, Defenders.—*Neaves.*

rigous Apprehension.—1. Evidence which held to prove that a party
 ded. 2. A pursuer having been apprehended, and detained in
 ar diligence, circumstances in which the Jury found one shilling

Thomson, held a bill for £40, 4s. 4d., accepted by the ^{July 14, 1836}
 flesher in Canonmills, on which, in the year 1832, he

The letters of horning contained warrant to charge ^{2^D DIVISION.}
 t of this principal sum, under deduction of £12 paid to ^{Lord Justice-}
 charge left by the messenger bore to be for payment of ^{Clerk.}
 nder the above deduction. The execution of charge ^{R.}
 been given for the sum as in the letters of horning. On
 s of caption were taken out, and put into the messenger's

ng a bill of suspension of the charge, on the ground of
 above-mentioned, which was refused,¹ Inch raised action

¹ Nov. 27, 1832 (ante, XI. 93).

tained, to the loss, injury, and damage of the pursuer?

" Damages laid at £500."

There was no direct evidence of apprehension, but the caption had been, on 13th October, put into the messenger, Thomson instructing him to obtain the from Inch in partial payments; that Brown went into one o'clock of that day, and was thereafter seen walking shop door, followed by Inch at a little distance; and together to the messenger's office or house, where Inch hour and a half, apparently under no restraint. While the messenger's clerk to request a friend to assist him did so to the extent of £8, Inch himself paying £2 of the diligence was raised. This person, as well as a ne in Canonmills, had the impression that he was in custody, quitted the messenger's house, and took no notice of the charge which had been left with him, till 27th October the suspension above-mentioned. In February, 1833, the having been passed from, and a new charge given, the of the debt was paid, and the expenses of the diligence all which proceeding, the present action was brought.

The defenders led no evidence, but contended that the having been apprehended was imperfect; that if he was just debt, and as he had allowed the matter to lie by the ber, without letting the defenders know of the mistake was not entitled to damages; more especially as such

we have first to consider whether the pursuer was apprehended
 due of this irregular warrant, and secondly, if he was so appre-
 was to his loss, injury, and damage? On going over the
 think there was that sort of communication between the pur-
 nger which rendered him under the custody of the messenger,
 say whether there is a reasonable doubt of his having been
 of the diligence. But if there was an apprehension, I am
 the most delicate apprehension that possibly could be. As
 looking to the whole case, how the creditor conducted him-
 messenger proceeded, it would be difficult to say that these
 ated by an intention to injure; and in regard to the loss and
 in the Lord Chief Commissioner's observations in the case of
 been referred to. The party, the messenger, and the cau-
 ally responsible, if you should find damages; and you may
 you think proper.

No. 360.

July 14, 1836.

Anderson v.
Broom.Moncreiffe's
Tutors v.
Henderson.

JURY found for the pursuer, one shilling damages.

JOSEPH HILL, Solicitor—JAMES BENNETT, W.S.—Agents.

ANDERSON, Pursuer.—*Rutherford—Whigham.*
 M BROOM, Defender.—*D. F. Hope—Maitland.*

No. 361.

action for assault, damages being laid at £500.

July 14, 1836.

Verdict for the pursuer,—damages £10.

2D DIVISION.
Lord Justice-
Clerk.

R.

WHIGHAM, W.S.—THOMAS RANKINE, S.S.C.—Agents.

MONCREIFFE'S TUTORS, Pursuers.—*Keay—Speirs.* No. 362.
 HENDERSON, Defender.—*M'Neill—Marshall.*

question whether a public road for horses and foot passen-
 illage of Abernethy to Auchtermuchty lay through cer-
 pursuer's or of the defender's.

2D DIVISION.
Lord Justice-
Clerk.

R.

Verdict for the pursuers.

G. MACKAY, W.S.—THOMSON and ELDER, W.S.—Agents.

July 16 and 18,
1836.

2d Division.
Lord Justice-
Clerk.

R.

THIS was an action at the instance of an heir-at-law of deeds on the ground of incapacity and circumvention. The deeds were in the form of a disposition and settlement, the object of agreement between the deceased and the defender, that a sum of money was to be paid to the latter on account of services rendered to the deceased. The defence was a general denial of reduction.

The cause was tried on the following issues, repeated :—

“ 1. Whether the disposition and deed of settlement process, sought to be reduced, bearing date the 2d October 1835, was not the deed of the late Peter Dewar, residing in Haddo.

“ 2. Whether, on or prior to the said 2d day of October 1835, said Peter Dewar was a person of a weak and facile mind, imposed on; and whether the defender, taking advantage of said weakness and facility, did, by fraud or circumvention, wrongfully procure the said deed, to the lesion of the said Peter Dewar.

LORD JUSTICE-CLERK, in charging the Jury, observed—The facts of the case sets of issues, having reference to the three deeds. In regard to the burden of proof lies on the pursuer to make out that the deed of the granter, which resolves into a question whether he was of sound mind and capacity as to enable him to execute a valid deed. The capacity which the law requires in the case of a mere testamentary disposition is what is required for a contract or a deed of a very complicated nature, with regard to the second of the deeds in question (that in the 1835).

What is a valid ground in law for reducing it, and this applies to the No. 363.
of issues. You cannot mix the whole together, but will have to make
finds on the one ground or the other. If you are satisfied that the July 19, 1836
is reduced from age or infirmity to such a state of imbecility as to be Shirreff v.
in making a deed, you will have to find a verdict for the pursuer on the Brodie.
5th issues; and if you think he had sufficient intelligence to dispose
of property, but yet was facile and weak, and this facility and weakness was
availed of by the defender, then it is equally in your power to find for
him on the other issues. The two sets of issues are not to be mixed up
except in so far that if the evidence as to the first should not be suffi-
cient to warrant your finding a verdict on it, that evidence will be a most im-
portant element in your consideration of the second.

JURY found for the pursuer on the 2d issue, and the corresponding
verdicts as to the other deeds.

BY MACANDREW, S.S.C.—GRAHAM and ANDERSON, W.S.—Agents.

IN SHIRREFF, Pursuer.—*Robertson—Ivory—Moncreiff.* No. 364.
BRODIE and OTHERS (James Shirreff's Trustees), Defenders.—
Keay—Walker—Rutherford.

Proof—In a reduction of a trust-settlement, on the ground of fraud, fa-
lacy, &c.—Verdict for the defenders.

Of reduction of the trust-disposition and settlement of the late July 19, 1836
James Shirreff of Bastleridge, merchant in Leith, on the grounds, inter 1ST DIVISION.
alleged fraud, and lesion; of the want of a sound and disposing Ld. President
mind on the part of the deceased, &c.

Following issues went to trial:—

1. Is it admitted that the pursuer is heir of conquest to the late
James Shirreff of Bastleridge, merchant in Leith:
2. Whether the deed, bearing date 8th March, 1834, sought to be
reduced, which No. 11 of process is an extract, is not the deed of the
James Shirreff?

3. Whether, on the said day, and prior thereto, the said James Shirreff
was of a weak and facile mind, and easily imposed on, and
4. Whether the defenders, taking advantage of the said facility and weak-
ness, by fraud or circumvention, wrongfully procure or obtain the
reduction of the lesion of the said James Shirreff?"

There was silence on both sides, which did not raise any point of general

circumstances, *Rutherford*, for Comrie and Graham, gave up No. 365.
nd

July 20, 1836.

Dempster v.

Corrie.

JURY found for the suspender and pursuer, Alexander Mac-
yre.

ROBERTSON and SPENCE, W.S.—D. GRAY, S.S.C.—Agents.

E DEMPSTER and ANDREW AITKEN, Pursuers.—*Robertson*. No. 366.
CORRIE (Manager of British Linen Company), and OTHERS,
Defenders.—*R. Bell—Cowan*.

—*Process—Forgery*.—1. Where a letter is to be objected to, by a de-
admissible in evidence, the pursuer is not permitted to read it to the
ing his case; but he may state the substance of it, as part of the case
undertakes to prove. 2. Circumstances in which it was held to be
the signature of one of the witnesses at an execution of search was a

DEMPSTER of Skibo, and Andrew Aitken, being creditors of July 20, 1836.
en, formerly tacksman of Pulrossie, Sutherlandshire, had an
competition with the British Linen Company, and other cre-
David Aitken, to reduce an execution of search which had
ed to be made against him, under letters of caption at the in-
he bank. The execution of search bore date the 13th June,
Donald Munro, messenger, residing at Tain, who returned it,
ead.

1st DIVISION.
Ld. President.

r and Aitken raised a reduction of the execution, calling the
he other creditors, as defenders, and alleging, 1st, That the
oth the subscribing witnesses were forged; and, 2d, That no
made, as set forth in the execution.

legations were denied by the defenders, and the following
to trial:—

hether the names of Donald Munro and John Munro, or either
bscribed as witnesses to the execution of search, dated 13th
, sought to be reduced, are not, or either of them is not the
i of Donald Munro, residing at Skibo, and John Munro, re-
ain?

hether what is set forth in the said execution is false, in so far
search was made by Donald Munro, messenger-at-arms, then
Tain, on the said day?"

uers, in opening their case, were about to read the contents
when the defenders objected that the letter itself would be
issible in evidence, when tendered, and therefore could not

the two witnesses, set forth in the execution, were such and whose testimony threw considerable doubt on the fact that there was any person, at the date of the execution, in that designation of Donald Munro, residing in Skibo, could have been applied.*

The defender led no evidence, and the jury found for the pursuers.

A. STORIE, W.S.—HUNTER, CAMPBELL, and Co., W.S.—

No. 367. MRS SCRIMZEOUR OF FURMAN, and HUSBAND, and the
Pursuers.—*D. F. Hope—A. M'Neill*
REV. JOHN KER and OTHERS (Scrimzeour's Trustee
Robertson—Neaves.

Process—Jury Trial.—Verdict finding that a certain deed of the deed of the party ex facie executing it; and also that it was a fraud and circumvention, to the lesion of that party.

July 21, 1836. REDUCTION of a settlement executed in 1798 by
Scrimzeour, senior, of Thornhall, in favour of his second son,
George Scrimzeour, junior, surgeon. The pursuer, James
Furman, of South Carolina, United States of America, representative of the oldest son, who had gone abroad earlier than the others.
The action was directed against the trustees of the settlement.

whether, at and prior to the said 24th day of September, the No. 367.
 Scrimzeour, senior, of Thornhall, was a person of a weak July 26 & 27,
 mind, and easily imposed on? And whether the late George 1836.
 surgeon in Polmont, taking advantage of his said facility and Hercules In-
 id, by fraud or circumvention, wrongfully procure or obtain surance Co. v.
 ed, to the lesion of the said George Scrimzeour, senior, of Hunter.
 "

JURY found for the pursuers on both issues.

STOSH and GEMMELL, S.S C.—HOPKIRK and IMLACH, W.S.—Agents.

INSURANCE COMPANY and ROBERT SALMOND, Pursuers.— No. 368.

D. F. Hope—Robertson—Neaves.

JOHN HUNTER, Defender.—*M'Neill—Anderson.*

Proof—Jury Trial.—1. A letter alleged to be confidential having, in making up the record, been recovered from one of the parties, by a e instance of the other party, and no motion having been made for from process—Objection to its production at the trial repelled. 2. allowed to be called by the defender to disprove what one of the esses had stated on cross-examination. 3. Evidence having been rties as to the character and proceedings of a certain person, on the being a party in the cause, and no notice having been given in the e defender that he was to be adduced as a witness—Held that the notwithstanding, entitled to call him. 4. Where the machinery in i insured for a certain sum, and subsequently destroyed by fire, it lue of the property so destroyed, and not the particular amount of the cy which the party insured is entitled to recover. 5. The intrinsic worth of such machinery is the only rule for estimating its value.

the case mentioned ante, p. 147, which see.
 ing issues were sent to trial:—

July 26 & 27,
 1836.

2D DIVISION.
 Ld. Moncreiff.
 R.

; admitted that certain machinery, the property of the inter, was insured by the pursuers, against damage by period from 8th October, 1831, to Martinmas, 1832, and machinery was, on the 22d of October, 1831, destroyed by

also admitted, that the said parties submitted to the ami- of Claud Girdwood, engineer, and Hector Grant, mer- gow, the claims arising for the damage done by the said b, on the 3d and 4th days of April, 1832, the said ar- ounced the decree, of which No. 4 of Process is an

a diligence granted in the course of making up the

McNeill, for the Defender, objected to its production made up by Hunter with reference to this cause communicated to his agent during the progress thereof that the objection was timeously made, now that it tempted to be used.

The *Dean of Faculty, for the Pursuers*, answered, that this account in terms of a specification of writing which a diligence had been granted; that the defender submitted it to have been properly produced, and, at that time too late to object, no motion having been made for the diligence was reported.

LORD MONCREIFF.—I am bound to hold that this document covered under the diligence granted by the Court, not put in process, nor moved to be withdrawn; but the question now be used in evidence. Neither the party nor the agent that it was confidential; although made up during the process it is a document under the hand of the party, originally process, and I see no good reason for excluding it.

The account was accordingly put in.

The defender having proposed to call a witness to one of the pursuers' witnesses had stated on cross-examination the Faculty objected that this was incompetent, and withdrew the point.

LORD MONCREIFF.—Whatever my own opinion may

person, after his other witnesses had been examined, though no No. 1
e of such intention had been given in his opening speech.

he *Dean of Faculty* objected that this was incompetent, as during the July 26,
e trial the case had been conducted on the footing of Montgomery 1836.
; a party—statements made by him had been allowed to be proved, Hercules
evidence led of his character and of his having been a particeps in insurance
er's proceedings, while the defender did not open on the intention Hunter.
ducing him as a witness.

ED MONCREIFF.—This is properly an objection to the evidence which has
already adduced, not to the admissibility of the witness, and I can see no
d for rejecting him.

Neill, for the Defender.—If the Court think this evidence would not
been admitted, had it been stated that Montgomery was to be called,
I shall not call him.

ED MONCREIFF.—I am of opinion that the evidence in question as to
gomery would not have been admitted, had it been understood that he was
a witness in the cause.

Montgomery was accordingly not called.

appeared from the evidence adduced, that in February 1881, the
der Hunter purchased the machinery in Wyndford spinning-mill
price of £110, and subsequently laid out a considerable sum in
ing it—that in April he insured this property with the office of the
ers for £600, and in October following raised the insurance to
0, 16s—that immediately prior to the last insurance he entered into
action with his foreman Montgomery, by certain missives which
red to be simulate, whereby Montgomery was to purchase the
inery at a price of £1450, 16s., payable in small instalments—that
ntrinsic or marketable value of the machinery was not nearly equal
s sum, but it was stated as the opinion of some of the witnesses for
efender, that, although the separate articles might not be equal in
to new machinery, yet, if put into good working order, its value,
taken together, might be equal to that of new machinery, and be
about as much as the sum for which it was insured—that Hunter's
n in regard to fire insurance was, that where certain machinery was
ed for a particular sum, and then destroyed by fire, the insurers
bound either to supply new machinery or pay the whole sum
ed.

ED MONCREIFF, in charging the Jury, observed,—This is a peculiar and
It case originating in a contract of insurance. This contract is in its
an equitable contract, by which, in consideration of payment of a premium,
ne party binds himself to indemnify the other for whatever loss he can in-

No. 368.

July 26 & 27,
1836.Hercules In
Insurance Co. v.
Hunter.

struct to have arisen through fire or other risk insured against. But it is a contract of indemnity only, and not of the nature of a wager. If a party insure to the extent of £10,000, and cannot instruct that his loss amounts to more than £500, this last sum is all that he can recover. As it is a contract of indemnity, so it is a contract of the strictest equity, and whether it have arisen out of a sea, or fire, or life insurance, the most rigid good faith must be observed. Thus every concealment, or whatever is inconsistent with the good faith of the contract, vitiates the insurance. This strikes so deep into the contract, that if there have been a misrepresentation or deviation from any of its conditions, the insurance falls, however fairly the event causing the loss may have happened according to the terms of the contract otherwise. Then it is a contract of vast importance to the public, and undoubtedly it is important that when a loss does take place, where there is no fraud and no deviation, the party sustaining the loss shall not be exposed to difficulties in recovering, but shall be dealt with fairly and discreetly; but, on the other hand, when a case occurs in which there are facts indicating unfair dealing, it is of great consequence that the party shall not benefit by his fraud, and the insurers shall be protected against it. This is always taken strictly; and it is necessary that it should be so, because otherwise the good faith of the contract would be destroyed. If individuals could conspire to make insurances on property, intending from the first to destroy the property by fire, the contract could not exist in this country without involving utter ruin to the parties insurers.

In the present case you have before you two special issues, upon a narrative of certain admissions. (His Lordship read the issues.) The second issue goes back to the root of the insurance, and asks you whether it was effected with the intention of destroying the machinery by fire? There is no general issue as to the right of the party insured to receive from the office the sum in the policy. The Dean of Faculty says, this is involved in the issues before you; but, as the case stands, this could not have been before you. Had Hunter brought an action against the office for the sum in the policy, the issues would have been different, and he would have stood *pursuer*, bound to prove his loss. But the reason of the difference here is, that Hunter's claim against the office has been the subject of a submission and decret-arbitral, whereby it was found that the machinery in question had not been over valued, and that he had right to the whole sum in the policy. This having been so found, it was impossible for the Insurance Office to get at a proof of the facts which they say came to their knowledge, after the decret-arbitral was pronounced, except by reducing the decret. Accordingly, this reduction has been brought, and upon two grounds, first, That since the submission was entered into, the pursuers have discovered that the insurance was fraudulently made, with the view of having the property destroyed by fire, and obtaining an exorbitant sum from the office; and, secondly, That the property was in fact wilfully destroyed by the defender. This is the mode in which these issues have come before you, and you will have to answer affirmatively or negatively on them, without reference to the effect such finding may have on the defender's right to recover under this insurance. But, though the issues are special, neither the one nor the other is to be decided on a partial consideration of any one part of the evidence, but on the whole facts carefully combined together. I need hardly remind you that it is the duty of the pursuer to prove the affirmative of the issues; but this, above all cases, is

be equally well proved by circumstantial as by direct evidence. No. 3
 Consider the whole facts of the case, and by combining them, to sa-
 tisfy whether it is proved or not that the property in question has been July 26,
 1836.

by accidental but by intentional fire, or that the insurance was Hercules
 intended so to destroy it. The question, whether there was a fraudulent Insurance &
 Hunter.
 fact, is, by express terms of the second issue, a part of the case; and
 fact is competent to be proved. The arbiters have found that the
 valued correctly; and their decret is matter of evidence; but that
 itself under reduction, the proof cannot be considered as thereby
 the Court having found that the present investigation is competent,
 require, first, whether upon all the evidence before you there was
 tion; and, secondly, whether it was made with the intention of
 the machinery by fire. If the facts are such as to show that the
 l, or that the insurance was made with the intention of destroying
 this evidence will draw back on the question of over-valuation; for
 nces coming before the jury operate reciprocally on each other; and
 bining the whole that the jury arrive at their verdict. You
 n the whole facts, always remembering that, unless you are satisfied
 he fire was wilful, or that the insurance was made with intent to
 roperty by fire, they can be of no effect to warrant a verdict for the
 ere is a strong presumption for the defender; the case as against
 is severe, and the pursuers' case must be proved so as to leave in
 no reasonable doubt as to the affirmative of the issue. But this

To the presumption in favour of the defender, you may have to
 deration of the facility with which a cotton mill may be set on fire,
 oken to by several witnesses.

o the palpable facts as at first presented, there is no reason to be
 ed that suspicions arose in the minds of the Insurance Company.
 calling for investigation.

ship then digested and commented on the evidence).

o the theory of the defender, that, admitting the machinery in ques-
 een old, and purchased at a comparatively small cost, yet by repair-
 ng it in working order, he renders it of greater proportional value
 unt of the original cost and the repairs, so that at the time of the
 sic value would be fully as great as the sum for which the property
 his Lordship observed, after reading the evidence in support of this
 s evidence, in regard to the value of the property, is a combination
 dence of *opinion*, and requires to be weighed. It depends much on
 lopted on this subject, of which I entertain great doubt: But it
 uch ideas had been entertained by persons of great respectability.
 ived exactly, it proves that there has been no over-valuation in
 But if I were trying this case in a common question of insurance,
 he loss, after the fire had taken place, I should have great diffi-
 g that it was a right mode of estimating the value of the machinery.
 y, that in making an insurance, old machinery may be held to be of
 ue as new. But new machinery has in itself an intrinsic value in
 which old machinery has not. This theory of the defender proceeds
 that you may value property in one way for insurance and differently

. 368. for other purposes, than which no more dangerous principle can be bruited in this country; and I must say that, so far as it may be matter of law, it appears to me to be entirely groundless. It would tend to the destruction of a most important branch of mercantile dealing. If we look to insurances on furniture in houses, the insurer takes the value as the party gives it; but that party can only recover according to the actual value proved of the particular furniture destroyed. The rule is, that you can get nothing but indemnification for the thing lost, and that you can get nothing more than the value of the thing lost. There is, however, another view in which the evidence I am referring to may be of great importance. If it appears that this notion, however erroneous, had become pretty general, and had been adopted by the defender, the question comes to be, What shall be the effect of this on the particular case before you? You will easily see how it bears on the point of the wilful fire-raising, or the *intent to burn*; and how far it goes you have to judge. He may have over-valued upon an erroneous principle; but the proof of such an error prevailing may materially take from the effect of such a fact in proving either of the particular issues.

The second issue requires to be considered separately, for two reasons; first, though there was an intention to burn, the mill may have been burned by accident, before the purpose was carried into effect, and it is possible you may be satisfied that there was a fraudulent over-valuation, with the intention of burning the machinery, and yet that it was not actually so intentionally destroyed; and, secondly, the evidence may be insufficient, or doubtful, in regard to the fact of the fire being wilful, or, though you should be satisfied that it was not accidental, you may not be convinced that it took place with Hunter's or Montgomery's privacy; and yet it may remain for your consideration whether there may not be abundance of evidence to prove, that the insurance was made on a fraudulent over-valuation of the property, with the intention of destroying it by fire.

The Jury found for the defender, on the first issue, and as to the second issue, "that the insurance was effected by the defender upon a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire."

G. and W. NAPIER, W.S.—JAMES WRIGHT, W.S.—Agents.

APPENDIX.

ACT OF SEDERUNT

of the Fees of the Sheriff and Stewart-Clerks of Scotland.

Edinburgh, 7th July, 1836.

Council and Session, having taken into consideration the Act of Geo. IV. ch. 23, together with the Report of the Commissioners said Act, and also the Act of Sederunt 27th January, 1830, and Committee of Judges relative to the Fees of Sheriff and Stewart-considering that it is now proper for the Court, under the authority of Parliament, to make a Regulation of the Fees of the said Clerks and Stewarts, Do therefore hereby enact and declare, that from and after three calendar months after the first day of the next Session of Parliament, in all time coming, until altered by lawful authority, the Sheriff and Stewarts of Scotland shall be entitled to receive fees according to the Table annexed, as applicable to the counties and stewartries therein mentioned; which regulation of Fees shall be binding on all parties considering, as it is hereby further enacted and declared, that notwithstanding the said Act of Parliament, and as a temporary exemption therefrom, the persons holding for life the offices of Sheriff-Clerks of the counties of Aberdeen, Edinburgh, Perth, Forfar, and Lanark, having been the holders of these offices at the date of the said Act of Parliament, shall nevertheless refuse to accept of the same in lieu of the fees and emoluments payable by the said Act, they were entitled) be entitled, during their continuance and while they hold the said offices, to receive Fees according to the Table annexed to the Act of Sederunt 27th January, 1830, which Table is hereby referred to that effect; and this regulation shall be binding on all parties

And do hereby appoint this Act, together with the said Tables of Fees, to be inserted in the Sederunt Book, and printed and published in the usual manner.

C. HOPE, *I.P.D.*

No. I.

TABLE OF FEES IN CIVIL BUSINESS, FOR THE SHERIFF-CLERKS OF THE COUNTIES OF ABERDEEN AND RENFREW.

	In cases of L.12 and under.			Above L.12.		
	L.0	1	1	L.0	1	9
Libel, summons, or claim to found an action, When more defenders than one are sued for a separate debt or prestation, the above fees to be paid on one of the debts or prestations highest in amount, and a third of the above fees to be paid for each of the other debts or prestations, according to the amount of the claim against each defender, or set of defenders.						
Certifying copy of libel, in terms of Act of Sederunt for Sheriff Courts, ch. 18. § 4,	0	0	4½	0	0	4½
Summary petition or complaint (except petition of sequestration), and deliverance thereon,	0	1	5	0	2	1½
Defence, answer, or first paper for each defender, or set of defenders, or compeerer, or set of compeerers in any action,	0	0	8½	0	1	5
Each paper or pleading, for either party, subsequent to the first step, including objections and answers in a proof when stated in separate papers,	0	0	4½	0	0	8½
Appeal to the sheriff-depute,	0	0	4½	0	0	8½
Receiving and marking each set of productions, except the productions lodged with the first paper for each party, for which no charge is to be made,	0	0	4½	0	0	4½
Extracting each decret in absence, in the abridged form,	0	1	5	0	2	1½
When a decret is extracted against more defenders than one, sued for a separate debt or prestation, the above fee of extract to be paid on one of the debts or prestations highest in amount, and a third of the above fee for extract to be paid on each of the others, according to the amount of the claim against such defender, or set of defenders.						
Extracting each decree in foro in the abridged form,	0	2	9½	0	3	6
If the decree, whether in absence or in foro, shall exceed one sheet, for writing each succeeding sheet,	0	0	8½	0	0	8½
Recording abridged decreets—per sheet,	0	0	8½	0	0	8½

	In cases of L.12 and under.			Above L.12,		
t insisting,	L.0	0	8½	L.0	1	1
ns—first sheet,	0	0	8½	0	1	1
each,	0	0	8½	0	0	8½
ken on the interlocutor allowing it, g an act and commission, there will party leading proof,	0	0	8½	0	1	1
pt for citing parties incidentally, ers,	0	0	8½	0	1	1
declaration,	0	0	8½	0	1	1
t thereof, after the first, when the as writing clerk,	0	0	8½	0	0	8½
or his depute, when acting as com- ing a proof, deposition of party or be allowed the following fees:—						
eding L.8, each hour,	0	1	9			
t exceeding L.25, each hour,	0	2	9½			
hour,	0	3	6			
fee for writing, at the rate of 6d. per						
tenant's effects, or of joint tenants in -viz.						
ration, and service,	0	1	9	0	2	1½
ry, when taken by the clerk, if the ed be L.12, or under,—						
s,	0	3	6			
above L.12, and does not exceed						
s,				0	5	3
above L.25, and does not exceed						
s,				0	7	0
above L.50,—						
s,				0	8	9
tory and schedule, per sheet of each, ove cases,				0	0	8½
witnesses are necessarily employed hours in taking the inventory, or hat purpose, he will be allowed, in above fees, for every hour after the						
es,	0	1	1	0	1	1
charges, for the hours after the first						

In cases of L.12
and under.

Above

two, the clerk not to have in one day, for himself and witnesses, more than 7s.

Warrant of sale,

L.0 0 8½ L.0

Extract thereof, per sheet, when required,

0 0 8½ 0

Intimating sale to Tax Office,

0 0 8½ 0

The clerk, when he executes any warrant to roup, and collects the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows:—

When the amount of the roup-roll is L.8 or under, he will be allowed 6s. 6d.

When the amount of the roup-roll is above L.8, and does not exceed L.100, he will be allowed at the rate of 4 per cent.

When the amount of the roup-roll exceeds L.100, but does not exceed L.1000, he will be allowed 4 per cent for the first L.100, and for every additional L.100 or part of L.100, 2½ per cent. And when the amount exceeds L.1000, he will be allowed the above rates for the first L.1000, and 1½ per cent for each additional L.100, and part of L.100.

The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, drawing advertisements and articles of roup, but the clerk will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c. He will also, when the proceeds are above L.20, be allowed 6s. 6d. for an assistant clerk.

If roup be stopped, after time of sale is fixed,

0 1 9 0

Receiving the report of sale, and note of the sum arising from it, and marking the same,

0 0 8½ 0

Allowing inspection of the same,

0 0 8½ 0

In sales under other warrants of the sheriff, including poindings, the same fees to be paid as in sales under sequestrations.

At intimating caption to compel return of a process, including dues of caption, if issued,

0 0 8½ 0

Enrolling a cause, to be paid by the party requiring enrolment,

0 0 4½ 0

When any cause at avizandum is enrolled by order of the Sheriff, the above fee to be paid by the parties equally.

At borrowing a process or part of a process, the clerk

	In cases of L. 12 and under.			Above L. 12.		
be bound to compare the process, both ed and returned, and to mark the	L.0	0	4½	L.0	0	4½
licial inspections or visitations, when e Sheriff or either of the parties, seal- ories, or executing any other order or Sheriff, not otherwise provided for in						
mployed,	0	2	9½	0	3	6
,	0	1	9	0	2	9½
ary outlays.						
ts of expenses, when remit made to						
n absence,	0	0	8½	0	0	8½
cases, when the amount of the account is under L.5,	0	2	5½	0	2	5½
and under L.10,	0	3	6	0	3	6
and under L.20,	0	4	11	0	4	11
and under L.40,	0	7	0	0	7	0
and under L.60,	0	8	5	0	8	5
and under L.80,	0	10	6	0	10	6
and upwards,	0	14	9	0	14	9
.	0	0	8½	0	0	8½
ants of arrestment, when contained in	0	0	4½	0	0	4½
sed in the summons,	0	1	1	0	1	5
estment in either case,	0	1	1	0	1	5
tion and relative certificate,	0	3	6	0	5	3
is of curatory, or for giving up inven-	0	1	9	0	1	9
receiving, and entering the nomination	0	3	6	0	3	6
igning tutorial or curatorial inventories, each duplicate,	0	0	4½	0	0	4½
uratory, or upon production of inven-	0	3	6	0	3	6
r sheet,	0	1	9	0	1	9
—per sheet,	0	1	9	0	1	9
bill of advocation, and marking the g trouble of transmitting the process y,	0	3	6			
tracted processes, in consequence of a the Court of Session, or the Sheriff, decree or sentence of the Sheriff to the	0	1	1	0	1	9

Court of Justiciary or Circuit Court, or answers thereto,	L.0. 11. 6. 1
Searching for a process in which no procedure has taken place for a year, if search does not exceed five years, and no extract ordered,	0. 0. 8 1/2
Each additional year, after the first five, in which the search is made,	0. 0. 4 1/2
For each consignment of money in the clerk's hands, if under L.10,	0. 1. 0
And an additional fee, for the amount above L.10, at the rate of 7s. on each L.100 consigned.	
On the lodging of a bank receipt, when money ordered to be consigned is lodged in a bank, instead of being consigned,	0 1 9
The fees in these three last articles not to be chargeable on proceeds of rouns or sales conducted by the clerks.	
Each warrant to uplift consigned money,	0 1. 0
Full extract, or second extract, or authenticated copy of a process, or part of a process, or other procedure or paper, when required by a party, and furnished by the clerk,—per sheet,	0 0 8 1/2

Note.—In all cases where the conclusions are *ad factum prout* entirely pecuniary, the highest class to be the rate of charge. papers in summonses of removal or ejection, to be charged the rent of the subject from which the defender is summoned or to be ejected.

Recording hornings, inhibitions, interdictions, lawburrows, with their executions, discharges, and other writings recorded in the registers of hornings and inhibitions,—per sheet,	1
First, or subsequent extracts thereof, when required,—per sheet,	
Recording bonds, tacks, dispositions, and other writings, in the register of deeds, and probative writs,—per sheet,	
First extracts of such deeds or writings, when required,—per sheet,	
Subsequent extracts,—per sheet,	
Recording protests on bills, including extract,	
Subsequent extracts,	
Recording accounts, states, and the like,—per sheet of figures,	
Extract thereof,—per sheet,	
Inspection of records of entailed vouchers,	

ings, or inhibitions, including minute-			
a year,	L.0	0	4½
.	0	5	3
, for the first year, or part of the year			
.	0	0	8½
.	0	0	4½
ed,	0	1	9
a party or his agent makes the search,			
responding minute-book,	0	1	9
skrupt Act, when the sheriff-clerk acts			
a, each diet,	0	5	3
therein,—per sheet,	0	0	8½

SERVICES.

General Service.

d, and intimation to agent,	0	2	5½
,—framing and recording the minutes,			
.	0	4	11
.	0	14	0
.	0	3	6

Service or Service as Heir of Provision.

d, and intimation to agent,	0	2	5½
,—framing the minutes, and recording,			
.	0	4	3
.	0	1	5
et,	0	10	6
ther sheet,	0	7	0
sheet,	0	1	5
ervice, when required,—each sheet,	0	1	5

Infestments.

on Chancery precepts,—first sheet,—			
.	0	10	6
.	0	7	0
et,	0	2	1½
.	0	1	5
r parchment.			
r taking infestment thereon, when the			
ot exceed L.100 per annum,	0	14	9
200,	1	9	6

L.200, and not exceeding L.500,
 L.500, and not exceeding L.1000,
 And for every additional L.1000,
 But not to exceed in all,
 And if the distance exceed three miles, each additional mile, until
 it exceeds 10 miles,
 But, under this charge, not to receive more per day than
 Besides travelling charges.
 Extracts of minutes of procedure of freeholder meetings, when
 required,—per sheet,
 Each person taking the oaths to Government, when the oaths are
 not administered at a county meeting,
 Certificate thereof, when required,
 Qualifying a peer to vote at an election,
 Extract of the fiars, each year,
 Receiving each precept from the Court of Session, making up list
 of jury, and instructing officer to summon, and making return,
 Receiving countermand of trial, and instructing officer,
 Writing and booking each necessary letter,
 Each duplicate and copy,

Fees for Public Business, payable in Exchequer.

For the principal precept of intimation of election of a Member of
 Parliament, besides expense of printing,
 Writings relative to elections of Members of Parliament (exclusive
 of the precept)—to summoning the Commissioners of Supply for
 laying on the land tax, and to other public business, payable in
 Exchequer, each sheet,
 When consisting of more than one sheet, each additional sheet,
 Superintending the execution of Chancery precepts, and returning
 the execution, for each precept,
 Superintending the publication of royal proclamations or writs,
 each,
 Warrant to summon jury and witnesses for striking the fiars, and
 making list, and instructing officer to summon them,
 Attendance at striking the fiars, and writing the evidence and pro-
 cedure, and recording the verdict,
 To the sheriff-clerk, for instructing the persons employed in taking
 up the lists of jurors, receiving the returns, and engrossing the
 lists in the jury books, for each hundred names, exclusive of
 printing,
 To the district clerk, or other person having local knowledge, for
 attending and assisting the Sheriff at revising lists, at the rate of
 21s. per day, including travelling charges and postages.

N.B.—The sheet of writings to be computed at 300 words, when

but if the writing does not contain 300 words, to be charged as one sheet if, after finding the sheet or sheets which any such writing shall comprehend at the rate aforesaid, any number of words less than 300 words in, such fewer words shall be charged as a sheet. Although the fees for writs, inghornings, inhibitions, deeds, and other writings in the registers of writs and inhibitions, and of deeds and probative writs, are to be paid for at the rate of one sheet for every sheet, yet it is understood that the clerks are to frame the writs, so as to contain, in each sheet, the number of words prescribed by the Act of the Lord Clerk Register.

The fees in the above table to be paid, though the duty be performed by the clerk depute, or by an assistant clerk, and to be exclusive of postage and outlays.

C. HOPE, *I.P.D.*

No. II.

TABLE OF FEES IN CIVIL BUSINESS, FOR THE SHERIFF-CLERKS OF THE COUNTIES OF AYR AND DUMFRIES.

	In cases of L.12 and under.			Above L.12.		
Summons, or claim to found an action, . . .	L.0	1	2½	L.0	2	0
Where more defenders than one are sued for a separate prestation, the above fees to be paid on one debt or prestations highest in amount, and a part of the above fees to be paid for each of the debts or prestations, according to the amount claimed against each defender, or set of defen-						
Copy of libel, in terms of Act of Sederunt of Sheriff Courts, ch. 18. § 4, . . .	0	0	5	0	0	5
Petition or complaint (except petition of sequestration), and deliverance thereon, . . .	0	1	7	0	2	7
Answer, or first paper for each defender, or defenders, or compeerer, or set of compeerers in action, . . .	0	0	9½	0	1	7
Reply or pleading, for either party, subsequent to the first step, including objections and answers in a pleading then stated in separate papers, . . .	0	0	5	0	0	9½

	In cases of L.12 and under.			Above L.12		
	L.0	0	5	L.0	0	9½
Appeal to the sheriff-depute,						
Receiving and marking each set of productions, except the productions lodged with the first paper for each party, for which no charge is to be made,	0	0	5	0	0	5
Extracting each decret in absence, in the abridged form,	0	1	7	0	2	7
When a decret is extracted against more defenders than one, sued for a separate debt or prestation, the above fee of extract to be paid on one of the debts or prestations highest in amount, and a third of the above fee for extract to be paid on each of the others, according to the amount of the claim against such defender, or set of defenders.						
Extracting each decree in foro in the abridged form,	0	3	2	0	4	0
If the decree, whether in absence or in foro, shall ex- ceed one sheet, for writing each succeeding sheet,	0	0	9½	0	0	9½
Recording abridged decreets,—per sheet,	0	0	9½	0	0	9½
Protestations for not insisting,	0	0	9½	0	1	2½
Extract thereof,	0	0	9½	0	1	2½
Acts and commissions,—first sheet,	0	0	9½	0	1	2½
Subsequent sheets, each,	0	0	9½	0	0	9½
If the proof be taken on the interlocutor allowing it, without extracting an act and commission, there will be paid by each party leading proof,	0	0	9½	0	1	2½
Diligence or precept for citing parties incidentally, witnesses, or havers,	0	0	9½	0	1	2½
Second diligence,	0	0	9½	0	1	2½
Each deposition or declaration,	0	0	9½	0	1	2½
Writing each sheet thereof, after the first, when the sheriff-clerk acts as writing clerk,	0	0	9½	0	0	9½
The sheriff-clerk or his depute, when acting as commis- sioner in taking a proof, deposition of party or de- claration, will be allowed the following fees :—viz.						
In causes not exceeding L.8, each hour,	0	2	0			
Above L.8, and not exceeding L.25, each hour,	0	3	2			
Above L.25, each hour,	0	4	0			
As also his clerk's fee for writing, at the rate of 6d. per sheet.						
Sequestration of a tenant's effects, or of joint tenants in one possession,—viz.						
Warrant of sequestration, and service,	0	2	0	0	2	7
Taking the inventory, when taken by the clerk, if the rent to be secured be L.12, or under,—						
Clerk and witnesses,	0	4	0			
When the rent is above L.12, and does not exceed L.25,—						

	In cases of L.12 and under.	Above L.12.		
witnesses,		L.0	6	0
rent is above L.25, and does not exceed				
witnesses,		0	8	0
rent is above L.50,—				
witnesses,		0	10	0
at inventory and schedule, per sheet of each,				
of the above cases,		0	0	9½
rk and witnesses are necessarily employed				
an two hours in taking the inventory, or tra-				
for that purpose, he will be allowed, in addi-				
the above fees, for every hour after the first				
witnesses,	0	1	2½	0 1 2½
these charges, for the hours after the first				
clerk not to have in one day, for himself and				
s, more than 8s.				
f sale,	0	0	9½	0 1 7
reof, per sheet, when required,	0	0	9½	0 1 7
sale to Tax Office,	0	0	9½	0 0 9½
when he executes any warrant to roup, and				
the proceeds, will be held liable for the				
of the roup-roll, and will be allowed for his				
and risk, including auctioneer's fees, as				
—				
amount of the roup roll is L.8 or under, he				
allowed 6s. .				
amount of the roup roll is above L.8, and				
exceed L.100, he will be allowed at the				
per cent.				
amount of the roup roll exceeds L.100, but				
exceed L.1000, he will be allowed 4 per				
the first L.100, and for every additional				
part of L.100, 2½ per cent. And when				
nt exceeds L.1000, he will be allowed the				
tes for the first L.1000, and 1½ per cent for				
itional L.100 and part of L.100.				
poundage to cover all charges for trouble				
n to the sale, and for collecting the pro-				
awing advertisements and articles of roup ;				
clerk will be allowed all his necessary dis-				
its or expenses, such as advertising, paying				
ivelling charges, &c. He will also, when				
eds are above L.20, be allowed 6s. for an				
clerk.				
stopped, after the time of sale is fixed,	0	2	0	0 2 0

	In cases of L.12 and under.			Above
Receiving the report of sale, and note of the sum arising from it, and marking the same, . . .	L.0	0	9½	L.0
Allowing inspection of the same, . . .	0	0	9½	0
In sales under other warrants of the Sheriff, including poindings, the same fees to be paid as in sales under sequestrations.				
At intimating caption to compel return of a process, including dues of caption, if issued, . . .	0	0	9½	0
Enrolling a cause, to be paid by the party requiring enrolment, . . .	0	0	5	0
When any cause at avizandum is enrolled by order of the Sheriff, the above fee to be paid by the parties equally.				
At borrowing a process or part of a process, the clerk being for this fee bound to compare the process, both when borrowed and returned, and to mark the return, . . .	0	0	5	0
Attending at judicial inspections or visitations, when required by the Sheriff or either of the parties, sealing up repositories, or executing any other order or warrant of the Sheriff, not otherwise provided for in this Table :—				
First hour employed, . . .	0	3	2	0
Every other, . . .	0	2	0	0
Besides necessary outlays.				
Auditing accounts of expenses, when remit made to the clerk :—				
In decrees in absence, . . .	0	0	9½	0
In litigated cases, when the amount of the account rendered is under L.5, . . .				
When L.5, and under L.10, . . .	0	2	9½	0
When L.10 and under L.20, . . .	0	4	0	0
When L.20, and under L.40, . . .	0	5	7	0
When L.40, and under L.60, . . .	0	8	0	0
When L.60, and under L.80, . . .	0	10	0	0
When L.80, and upwards, . . .	0	12	0	0
Caveat, . . .	0	16	9½	0
Precepts or warrants of arrestment, when contained in the summons, . . .				
When not contained in the summons, . . .	0	0	5	0
At loosing an arrestment in either case, . . .	0	1	2½	0
Each bond of caution and relative certificate, . . .	0	4	0	0
Edict or summons of curatory, or for giving up inventories, . . .	0	2	0	0
Calling in Court, receiving, and entering the nomination of curators, . . .	0	4	0	0

	In cases of L.12 and under.			Above L.12.		
igning tutorial or curatorial inven- t of each duplicate,	L.0	0	5	L.0	0	5
story, or upon production of inven-						
.	0	4	0	0	4	0
heet,	0	2	0	0	2	0
er sheet,	0	2	0	0	2	0
ll of advocacy, and marking the rouble of transmitting the process				0	4	0
ted processes, in consequence of a Court of Session, or the sheriff, ecree or sentence of the Sheriff to iciary or Circuit Court, or answers	0	1	2½	0	2	0
ess in which no procedure has taken if search does not exceed five years, dered,	0	1	7	0	2	0
r, after the first five, in which the	0	0	9½	0	1	7
on of money in the clerk's hands,	0	0	5	0	0	5
ee, for the amount above L.10, at each L.100 consigned. bank receipt, when money ordered lodged in a bank, instead of being	0	2	0	0	2	0
hree last articles not to be charge- of rouns or sales conducted by the						
ift consigned money,	0	2	0	0	2	0
nd extract, or authenticated copy rt of a process, or other procedure quired by a party, and furnished by heet,	0	0	9½	0	1	2½

as where the conclusions are ad factum præstandum, or not
niary, the highest class to be the rate of charge. But fees on
nmonses of removal or ejection, to be charged according to
ie subject from which the defender is summoned to remove, or

, inhibitions, interdictions, lawburrows, with

their executions, discharges, and other writings recorded in the registers of hornings and inhibitions,—per sheet, . . .	L.0	1	4
First or subsequent extracts thereof, when required,—per sheet, . . .	0	1	2½
Recording bonds, tacks, dispositions, and other writings in the register of deeds, and probative writs—per sheet, . . .	0	1	2½
First extracts of such deeds or writings, when required,—per sheet, . . .	0	0	9½
Subsequent extracts,—per sheet,	0	1	2½
Recording protests on bills, including extract,	0	2	0
Subsequent extracts,	0	1	2½
Recording accounts, states, and the like,—per sheet of figures, . . .	0	1	7
Extract thereof,—per sheet,	0	1	2½
Inspection of records of entailed vouchers,	0	0	5
Searching the record of hornings, or inhibitions, including minute-book, each year, or part of a year,	0	0	5
In all not exceeding,	0	6	0
Searching for deeds recorded, for the first year, or part of the year specified,	0	0	9½
Every additional year,	0	0	5
Certificate of search, if required,	0	2	0
Inspection of records, when a party or his agent makes the search, —each record-book and corresponding minute-book, . . .	0	2	0
Examinations under the bankrupt act, when the sheriff-clerk acts as clerk to the examination, each diet,	0	6	0
Writing declarations or oaths therein,—per sheet,	0	0	9½

SERVICES.

General Service.

Procuring the brieve executed, and intimation to agent, . . .	0	2	9½
Attending in court at service, framing and recording the minutes, and instrument money,	0	5	7
Fees of the service,	0	16	0
Engrossing the retour,	0	4	0

Special Service or Service as Heir of Provision.

Procuring the brieve executed, and intimation to agent, . . .	0	2	9½
Attending in Court at service,—framing the minutes, and recording, —first sheet,	0	4	9½
Each other,	0	1	7
Framing the retour,—first sheet,	0	12	0
Each other sheet,	0	8	0
Engrossing the retour,—each sheet,	0	1	7
Extracts from the record of service, when required,—each sheet, . . .	0	1	7

Infestments.

f sasine on Chancery precepts,—first sheet,			
t,	L.0	12	0
t, 250 words per sheet,	0	8	0
-first sheet, 250 words per sheet,	0	2	7
t, 250 words per sheet,	0	1	7
ellum or parchment.			
ceive for taking infestment thereon, when the			
does not exceed L.100 per annum,	0	16	9½
ling L.200,	1	13	7
ing L.500,	2	10	5
ing L.1000,	3	7	0
ial L.1000,	0	16	9½
d in all,	8	8	0
exceed three miles, each additional mile, un-			
niles,	0	4	0
charge, not to receive more per day than	1	13	7
ng charges.			
procedure of freeholder meetings, when re-			
.	0	2	0
oaths to government, when the oaths are not			
unty meeting,	0	1	7
en required,	0	2	7
ote at an election,	1	13	7
h year,	0	1	2½
t from the Court of Session, making up list			
ing officer to summon, and making return,	0	4	0
d of trial, and instructing officer,	0	4	0
ach necessary letter,	0	2	0
py,	0	0	9½

for Public Business payable in Exchequer.

pt of intimation of election of a Member of			
expense of printing,	0	10	6
ections of Members of Parliament (exclusive			
ummoning the commissioners of supply for			
ax, and to other public business payable in			
reet	0	1	0
re than one sheet, each additional sheet,	0	1	6
ecution of Chancery precepts, and returning			
each precept,	0	0	6
blication of royal proclamations or writs,—			
.	0	5	0

Warrant to summon jury and witnesses for striking the fiars, and making list, and instructing officer to summon them,	L.0 10
Attendance at striking the fiars and writing the evidence and procedure, and recording the verdict,	1 11
To the sheriff-clerk, for instructing the persons employed in taking up the lists of jurors, receiving the returns, and engrossing the lists in the jury books, for each hundred names, exclusive of printing,	0 2
To the district clerk, or other person having local knowledge, for attending and assisting the Sheriff at revising lists, at the rate of 21s. per day, including travelling charges and postages.	

NB.—The sheet of writings to be computed at 300 words, when not otherwise specified; but if the writing does not contain 300 words, to be charged as a sheet; and if, after finding the sheet or sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than 300 words shall remain, such fewer words shall be charged as a sheet. Although the fees for recording hornings, inhibitions, deeds, and other writings in the registers of hornings and inhibitions, and of deeds and probative writs, are to be paid for at certain rates for every sheet, yet it is understood that the clerks are to frame those registers so as to contain, in each sheet, the number of words prescribed by the regulations of the Lord Clerk Register.

Note. The fees in the above Table to be paid, though the duty be performed by the clerk depute, or by an assistant clerk, and to be exclusive of post and outlays.

C. HOPE, *JP.*

No. III.

TABLE OF FEES IN CIVIL BUSINESS, FOR THE SHERIFF-CLERK OF THE COUNTIES OF EDINBURGH AND PERTH.

	In cases of L. 12 and under.	Above L. 12
Libel, summons, or claim to found an action,	L.0 0 9	L.0 1
When more defenders than one are sued for a separate debt or prestation, the above fees to be paid on one of the debts or prestations highest in amount, and a third of the above fees to be paid for each of the other debts or prestations, according to the amount of the claim against each defender or set of defenders.		
Certifying copy of libel, in terms of Act of Sederunt for Sheriff Courts, ch. 18, § 4,	0 0 3	0 0

	In cases of L.12 and under.			Above L.12.		
complaint (except petition of se-						
verance thereon,	L.0	1	0	L.0	1	6
st paper for each defender or						
ompearer, or set of compearers						
.	0	0	6	0	1	0
. for either party, subsequent to						
ing objections and answers in a						
separate papers,	0	0	3	0	0	6
spute,	0	0	3	0	0	6
each set of productions, except						
ed with the first paper for each						
barge is to be made,	0	0	3	0	0	3
t in absence, in the abridged						
.	0	1	0	0	1	6
racted against more defenders						
separate debt or prestation, the						
o be paid on one of the debts						
in amount, and a third of the						
o be paid on each of the others,						
ant of the claim against such						
fenders.						
in foro in the abridged form,	0	2	0	0	2	6
n absence or in foro, shall ex-						
riting each succeeding sheet,	0	0	6	0	0	6
reets,—per sheet,	0	0	6	0	0	6
isting,	0	0	6	0	0	9
.	0	0	6	0	0	9
—first sheet,	0	0	6	0	0	9
,	0	0	6	0	0	6
n the interlocutor allowing it,						
act and commission, there will						
leading proof,	0	0	6	0	0	9
or citing parties incidentally,						
.	0	0	6	0	0	9
.	0	0	6	0	0	9
aration,	0	0	6	0	0	9
reof, after the first, when the						
riting clerk,	0	0	6	0	0	6
depute, when acting as com-						
proof, deposition of party or						
lowed the following fees, viz.						
L.8, each hour,	0	1	3			
eeding L.25, each hour,	0	2	0			
.	0	2	6			
or writing, at the rate of 4d per						

	In cases of L. 12 and under.			Above L.	
Sequestration of a tenant's effects, or of joint tenants in one possession, viz.					
Warrant of sequestration and service,	L.0	1	3	L.0	1
Taking the inventory, when taken by the clerk, if the rent to be secured be L.12, or under,—					
Clerk and witnesses,	0	2	6		
When the rent is above L.12, and does not exceed L.25—					
Clerk and witnesses,				0	3
When the rent is above L.25, and does not exceed L.50,—					
Clerk and witnesses,				0	5
When the rent is above L.50,—					
Clerk and witnesses,				0	6
Writing out inventory and schedule, per sheet of each, in any of the above cases,					
				0	6
If the clerk and witnesses are necessarily employed more than two hours in taking the inventory, or travelling for that purpose, he will be allowed, in addition to the above fees, for every hour after the first two,—					
Clerk and witnesses,	0	0	9	0	6
But under these charges, for the hours after the first two, the clerk not to have in one day for himself and witnesses, more than 5s.					
Warrant of sale,	0	0	6	0	1
Extract thereof, per sheet, when required,	0	0	6	0	1
Intimating sale to tax office,	0	0	6	0	0
The clerk, when he executes any warrant to roup, and collects the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows:—					
When the amount of the roup-roll is L.8 or under, he will be allowed 3s. 9d.					
When the amount of the roup-roll is above L.8, and does not exceed L.100, he will be allowed at the rate of 2½ per cent.					
When the amount of the roup-roll exceeds L.100, but does not exceed L.1000, he will be allowed 2½ per cent for the first L.100, and for every additional L.100 or part of L.100, 1½ per cent. And when the amount exceeds L.1000, he will be allowed the above rates for the first L.1000, and 1 per cent for each additional L.100, and part of L.100.					
The above poundage to cover all charges for trouble in					

	In cases of L. 12 and under.			Above L. 12.		
a, and for collecting the proceeds, ments and articles of roup, but the red all his necessary disbursements as advertising, paying crier, travel- He will also, when the proceeds e allowed 3s. 9d. for an assistant						
after time of sale is fixed. .	L.0	1	3	L.0	1	3
of sale, and note of the sum arising ng the same,	0	0	6	0	1	0
of the same,	0	0	6	0	0	6
warrants of the Sheriff, including e fees to be paid as in sales under						
a to compel return of a process in- ption, if issued,	0	0	6	0	0	6
o be paid by the party requiring	0	0	3	0	0	3
vizandum is enrolled by order of ove fee to be paid by the parties						
ess or part of a process the clerk ound to compare the process, both d returned, and to mark the return, l inspections or visitations, when eriff or either of the parties, seal- , or executing any other order or eriff, not otherwise provided for in	0	0	3	0	0	3
oyed,	0	2	0	0	2	6
.	0	1	3	0	2	0
outlays. expenses, when remit made to the						
sence,	0	0	6	0	0	6
s, when the amount of the account nder L.5,	0	1	9	0	1	9
under L.10,	0	2	6	0	2	6
l under L.20,	0	3	6	0	3	6
l under L.40,	0	5	0	0	5	0
l under L.60,	0	6	0	0	6	0
l under L.80,	0	7	6	0	7	6
l upwards,	0	10	6	0	10	6
.	0	0	6	0	0	6
of arrestment, when contained in	0	0	3	0	0	3

	In cases of L.12 and under.			Above L.12.			
When not contained in the summons,	L.0	0	9	L.0	1	0	
At loosing an arrestment in either case,	0	0	9	0	1	0	
Each bond of caution and relative certificate,	0	2	6	0	3	9	
Edict or summons of curatory, or for giving up inven- tories,	0	1	3	0	1	3	
Calling in Court, receiving, and entering the nomination of curators,	0	2	6	0	2	6	
Docqueting and signing tutorial or curatorial invento- ries,—per sheet of each duplicate,	0	0	3	0	0	3	
Extract acts of curatory, or upon production of inven- tories,—							
First sheet,	0	2	6	0	2	6	
Every other sheet,	0	1	3	0	1	3	
Second extracts,—per sheet,	0	1	3	0	1	3	
Production of a bill of advocation, and marking the same, including trouble of transmitting the process when necessary,					0	2	6
Transmitting extracted processes, in consequence of a warrant from the Court of Session, or the Sheriff,	0	0	9	0	1	3	
Appeal against a decree or sentence of the Sheriff to the Court of Justiciary or Circuit Court, or answers thereto,	0	1	0	0	1	3	
Searching for a process in which no procedure has taken place for a year, if search does not exceed five years, and no extract ordered,	0	0	6	0	1	0	
Each additional year, after the first five, in which the search is made,	0	0	3	0	0	3	
For each consignment of money in the clerk's hands, if under L.10,	0	1	3	0	1	3	
And an additional fee, for the amount above L.10, at the rate of 5s. on each L.100 consigned.							
On the lodging of a bank receipt, when money ordered to be consigned is lodged in a bank, instead of being consigned,	0	1	3	0	1	3	
The fees in these three last articles not to be chargeable on proceeds of rouns or sales conducted by the clerks.							
Each warrant to uplift consigned money,	0	1	3	0	1	3	
Full extract, or second extract, or authenticated copy of a process, or part of a process, or other procedure or paper, when required by a party, and furnished by the clerk,—per sheet,	0	0	6	0	0	9	

Note.—In all cases where the conclusions are ad factum præstandum, or not entirely pecuniary, the highest class to be the rate of charge. But fees on papers in summonses of removal or ejection, to be charged according to

subject from which the defender is summoned to remove, or

inhibitions, interdictions, lawburrows, with charges, and other writings recorded in the and inhibitions,—per sheet, . . .	L.0	0	10
tracts thereof, when required,—per sheet,	0	0	9
, dispositions and other writings, in the re- robative writs,—per sheet, . . .	0	0	9
leeds or writings, when required,—per sheet,	0	0	6
per sheet,	0	0	9
bills, including extract,	0	1	3
.	0	0	9
ates, and the like,—per sheet of figures,	0	1	0
heet,	0	0	9
f entailed vouchers,	0	0	3
hornings or inhibitions, including minute- part of a year,	0	0	3
.	0	3	9
orded, for the first year or part of the year	0	0	6
.	0	0	3
required,	0	1	3
when a party or his agent makes the search, and corresponding minute-book, . . .	0	1	3
e bankrupt act, when the sheriff-clerk acts as tion, each diet,	0	3	9
oaths therein,—per sheet,	0	0	6

SERVICES.

General Service.

recuted, and intimation to agent . . .	0	1	9
service,—framing and recording the minutes y,	0	3	6
.	0	10	0
.	0	2	6

Service, or Service as Heir of Provision.

recuted, and intimation to agent, . . .	0	1	9
service, framing the minutes, and recording,	0	3	0

Each other,	L. 0 1 0
Framing the retour,—first sheet,	0 7 6
Each other sheet,	0 5 0
Engrossing the retour,—each sheet,	0 1 0
Extracts from the record of service, when required,—each sheet,	0 1 0

Infidments.

Drawing instrument of assize on Chancery precepts,—first sheet, 250 words per sheet,	0 7 6
Each subsequent sheet,	0 5 0
Extending the same,—first sheet,	0 1 6
Each subsequent sheet,	0 1 0
Besides the stamped vellum or parchment.	
And that the clerk receive for taking infidment thereon, when the rent of the property does not exceed L.100 per annum,	9 10 6
L.100, and not exceeding L.200,	1 1 0
L.200, and not exceeding L.500,	1 11 6
L.500, and not exceeding L.1000,	2 2 0
And for every additional L.1000,	0 10 6
But not to exceed in all,	5 3 0
And if the distance exceed three miles, each additional mile, until it exceeds 10 miles,	0 2 6
But under this charge, not to receive more per day than	1 1 0
Besides travelling charges.	
Extracts of minutes of procedure of freeholder meetings, when required,—per sheet,	0 1 3
Each person taking the oaths to government, when the oaths are not administered at a county meeting,	0 1 0
Certificate thereof, when required,	0 1 6
Qualifying a peer to vote at an election,	1 1 0
Extract of the fiars, each year,	0 0 0
Receiving each precept from the Court of Session, making up list of jury, and instructing officer to summon, and making return,	0 2 6
Receiving countermand of trial, and instructing officer,	0 2 6
Writing and booking each necessary letter,	0 1 3
Each duplicate and copy,	0 0 6

Fees for Public Business, payable in Exchequer.

For the principal precept of intimation of election of a Member of Parliament, besides expenses of printing,	0 10 6
Writings relative to elections of Members of Parliament (exclusive of the precept)—to summoning the commissioners of supply for laying on the land tax, and to other public business, payable in Exchequer, each sheet,	0 1 0

consisting of more than one sheet, each additional sheet,	L.0	1	6
attending the execution of Chancery precepts, and returning execution, for each precept,	0	0	6
attending the publication of royal proclamations or writs,—	0	5	0
it to summon jury and witnesses for striking the fiars, and ing list, and instructing officer to summon them	0	10	6
ance at striking the fiars and writing the evidence and pro- re, and recording the verdict,	1	11	6
sheriff-clerk, for instructing the persons employed in taking ie lists of jurors, receiving the returns, and engrossing the in the jury-books, for each hundred names, exclusive of ing,	0	5	0
district clerk, or other person having local knowledge, for ding and assisting the Sberiff at revising lists, at the rate of per day, including travelling charges and postages.			

—The sheet of writings to be computed at 300 words, when not otherwise
d ; but if the writing does not contain 300 words, to be charged as one
and if, after finding the sheet or sheets which any such writing shall com-
alculated at the rate aforesaid, any number of words less than 300 words
main, such fewer words shall be charged as a sheet. Although the fees
rding hornings, inhibitions, deeds, and other writings in the registers of
s and inhibitions, and of deeds and probative writs, are to be paid for at
rates for every sheet, yet it is understood that the clerks are to frame those
so as to contain, in each sheet, the number of words prescribed by the re-
s of the Lord Clerk Register.

—The fees in the above Table to be paid, though the duty be performed
by the clerk-depute, or by an assistant clerk, and to be exclusive of post-
ages and outlays.

C. HOPE, *I.P.D.*

No. IV.

BLE OF FEES IN CIVIL BUSINESS, FOR THE SHERIFF-
CLERK OF THE COUNTY OF FORFAR.

	In cases of L. 12 and under.	Above L. 12.
ummons, or claim to found an action,	L.0 0 11	L.0 1 6
more defenders than one are sued for a separate or prestation, the above fees to be paid on one		

	In case of L. 12 and under.			Above L. 12.		
of the debts or prestations highest in amount, and a third of the above fees to be paid for each of the other debts or prestations, according to the amount of the claim against each defender, or set of defenders.						
Certifying copy of libel, in terms of Act of Sederunt for Sheriff Courts, ch. 18, § 4,	L.O	0	3½	L.O	0	3½
Summary petition or complaint (except petition of sequestration), and deliverance thereon,	0	1	2½	0	1	9½
Defence, answer, or first paper for each defender, or set of defenders, or comparer, or set of comparers in any action,	0	0	7	0	1	2½
Each paper or pleading, for either party, subsequent to the first step, including objections and answers in a proof when stated in separate papers,	0	0	3½	0	0	7
Appeal to the sheriff-depute,	0	0	3½	0	0	7
Receiving and marking each set of productions, except the productions lodged with the first paper for each party, for which no charge is to be made,	0	0	3½	0	0	3½
Extracting each decret in absence, in the abridged form,	■	1	2½	0	1	9½
When a decret is extracted against more defenders than one, sued for a separate debt or prestation, the above fee of extract to be paid on one of the debts or prestations highest in amount, and a third of the above fee for extract to be paid on each of the others, according to the amount of the claim against such defender, or set of defenders.						
Extracting each decree in foro in the abridged form,	0	2	5	0	3	0
If the decree, whether in absence or in foro, shall exceed one sheet, for writing each succeeding sheet,	0	0	7	0	0	7
Recording abridged decreets,—per sheet,	0	0	7	0	0	7
Protestations for not insisting,	0	0	7	0	0	11
Extract thereof,	0	0	7	0	0	11
Acts and commissions,—first sheet,	0	0	7	0	0	11
Subsequent sheets, each,	0	0	7	0	0	7
If the proof be taken on the interlocutor allowing it, without extracting an act and commission, there will be paid by each party leading proof,	0	0	7	0	0	11
Diligence or precept for citing parties incidentally, witnesses, or havers,	0	0	7	■	0	11
Second diligence,	0	■	■	0	0	11
Each disposition or declaration,	0	0	7	0	0	11
Writing each sheet thereof, after the first, when the sheriff-clerk acts as writing-clerk,	0	0	7	0	0	7
The sheriff-clerk, or his depute, when acting as com-						

ACT OF SEDERUNT.

1167 .

	In cases of L.12 and under.	Above L.12.
making a proof, deposition of party or will be allowed the following fees, viz.		
Exceeding L.8, each hour,	L.0 1 6	
Not exceeding L.25, each hour,	0 2 5	
Each hour,	0 3 0	
Clerk's fee for writing, at the rate of 4d.		
For a tenant's effects, or of joint tenants possession, viz.		
Appraisal, and service,	0 1 6	L.0 1 9½
Inventory, when taken by the clerk, if the value is cured be L.12, or under,—		
Fees,	0 3 0	
If value is above L.12, and does not exceed		
Fees,		0 4 6
If value is above L.25, and does not exceed		
Fees,		0 6 0
If value is above L.50,—		
Fees,		0 7 6
Inventory and schedule, per sheet of each, in above cases,		0 0 7
When witnesses are necessarily employed more than two hours in taking the inventory, or for that purpose, he will be allowed, in ad- dition to the above fees, for every hour after the		
Fees,	0 1 6	0 0 11
For the charges, for the hours after the first day, not to have in one day, for himself and fees, more than 6s.		
Fees,	0 0 7	0 1 2½
For, per sheet, when required,	0 0 7	0 1 2½
For to tax office,	0 0 7	0 0 7
When he executes any warrant to rouse, and proceeds, will be held liable for the value of the rouse-roll, and will be allowed for his risk, including auctioneer's fees, as fol-		
When the amount of the rouse-roll is L.8 or under, he will be allowed 4s. 6d.		
When the amount of the rouse-roll is above L.8, and does not exceed L.100, he will be allowed at the rate of 10 per cent.		
When the amount of the rouse-roll exceeds L.100, but		

	In cases of L. 12 and under.			Above L. 12.		
does not exceed L.1000, he will be allowed 3 per cent for the first L.100, and for every additional L.100 or part of L.100, 1½ per cent. And when the amount exceeds L.1000, he will be allowed the above rates for the first L.1000, and 1 per cent for each additional L.100, and part of L.100.						
The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, drawing advertisements and articles of roup, but the clerk will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c. He will also, when the proceeds are above L.20, be allowed 4s. 6d. for an assistant clerk.						
If roup be stopped, after time of sale is fixed, .	0	1	6	0	1	6
Receiving the report of sale, and note of the sum arising from it, and marking the same, .	0	0	7	0	1	2½
Allowing inspection of the same,	0	0	7	0	0	7
In sales under other warrants of the Sheriff, including poindings, the same fees to be paid as in sales under sequestrations.						
At intimating caption to compel return of a process, including dues of caption, if issued,	0	0	7	0	0	7
Enrolling a cause, to be paid by the party requiring enrolment,	0	0	3½	0	0	3½
When any cause at avizandum is enrolled by order of the Sheriff, the above fee to be paid by the parties equally.						
At borrowing a process or part of a process, the clerk being for this fee bound to compare the process both when borrowed and returned, and to mark the return,	0	0	3½	0	0	3½
Attending at judicial inspections or visitations, when required by the Sheriff or either of the parties, sealing up repositories, or executing any other order or warrant of the Sheriff, not otherwise provided for in this Table :—						
First hour employed,	0	2	5	0	3	0
Every other,	0	1	6	0	2	5
Besides necessary outlays.						
Auditing accounts of expenses, when remit made to the clerk :—						
In decrees in absence,	0	0	7	0	0	7
In litigated cases, when the amount of the account rendered is under L.5,	0	2	1	0	2	1
When L.5, and under L.10,	0	3	0	0	3	0

	In cases of L.12 and under.			Above L.12.		
	L.0	4	2½	L.0	4	2½
nd under L.20, . . .						
nd under L.40, . . .	0	6	0	0	6	0
nd under L.60, . . .	0	7	2½	0	7	2½
nd under L.80, . . .	0	9	0	0	9	0
nd upwards, . . .	0	12	7	0	12	7
.	0	0	7	0	0	7
s of arrestment, when contained in						
.	0	0	3½	0	0	3½
. in the summons, . . .	0	0	11	0	1	2½
ment in either case, . . .	0	0	11	0	1	2½
n and relative certificate, . . .	0	3	0	0	4	6
f curatory, or for giving up inven-						
.	0	1	6	0	1	6
ceiving and entering the nomina-						
.	0	3	0	0	3	0
ing tutorial or curatorial invento-						
each duplicate,	0	0	3½	0	0	3½
ory, or upon production of inven-						
.	0	3	0	0	3	0
et,	0	1	6	0	1	6
—per sheet,	0	1	6	0	1	6
. of advocacy, and marking the						
ouble of transmitting the process .						
.				0	3	0
ed processes, in consequence of a						
Court of Session, or the Sberiff,	0	0	11	0	1	6
ree or sentence of the Sheriff to						
ciary or Circuit Court, or answers						
.	0	1	2½	0	1	6
cess in which no procedure has						
year, if search does not exceed						
extract ordered,	0	0	7	0	1	2½
after the first five, in which the						
.	0	0	3½	0	0	3½
of money in the clerk's hands,						
.	0	1	6	0	1	6
, for the amount above L.10, at						
ach L.100 consigned.						
ank receipt, when money ordered						
odged in a bank, instead of being						
.	0	1	6	0	1	6
he last articles not to be charge-						
roups or sales conducted by the						

	In cases of L.12 and under.	Above
Each warrant to uplift consigned money,	L.0 1 6	L.0
Full extract, or second extract, or authenticated copy of a process, or part of a process, or other procedure or paper, when required by a party, and furnished by the clerk,—per sheet,	0 0 7	0

Note.—In all cases where the conclusions are *ad factum præstandum* entirely pecuniary, the highest class to be the rate of charge. But papers in summonses of removal or ejection, to be charged *acc* the rent of the subject from which the defender is summoned to or to be ejected.

Recording hornings, inhibitions, interdictions, lawburrows, with their executions, discharges, and other writings recorded in the registers of hornings and inhibitions,—per sheet,	L.0
First, or subsequent extracts thereof, when required,—per sheet,	0
Recording bonds, tacks, dispositions, and other writings, in the re- gister of deeds, and probative writs,—per sheet,	0
First extracts of such deeds or writings, when required,—per sheet,	0
Subsequent extracts,—per sheet,	0
Recording protests on bills, including extract,	0
Subsequent extracts,	0
Recording accounts, states, and the like,—per sheet of figures,	0
Extract thereof,—per sheet,	0
Inspection of records of entailed vouchers,	0
Searching the record of hornings, or inhibitions, including minute- book, each year, or part of a year,	0
In all not exceeding	0
Searching for deeds recorded, for the first year, or part of the year specified,	0
Every additional year,	0
Certificate of search, if required,	0
Inspection of records, when a party or his agent makes the search, —each record-book and corresponding minute-book,	0
Examinations under the Bankrupt Act, when the sheriff-clerk acts as clerk to the examination, each diet,	0
Writing declarations or oaths thereon,—per sheet,	0

SERVICES.

General Service.

Procuring the brieve executed, and intimation to agent,	0
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service,—framing and recording the minutes,			
by,	L.0	4	2½
.	0	12	0
.	0	3	0

Service or Service as Heir of Provision.

executed, and intimation to agent, .	0	2	1
service—framing the minutes, and recording,			
.	0	3	7
.	0	1	2½
first sheet,	0	9	0
Each other sheet,	0	6	0
—each sheet,	0	1	2½
rd of service, when required,—each sheet,	0	1	2½

Infestments.

of sasine on Chancery precepts—first sheet			
st),	0	9	0
,	0	6	0
first sheet,	0	1	9½
,	0	1	2½
ellum or parchment.			
give for taking infestment thereon, when the			
does not exceed L.100 per annum. .	0	12	7
ing L.200,	1	5	2½
ing L.500,	1	17	2½
ing L.1000,	2	10	5
al L.1000	0	12	7
l in all	6	6	0
exceed three miles, each additional mile, until			
es.	0	3	0
his charge, not to receive more per day than	1	5	2
elling charges.			
procedure of freeholder meetings, when re-			
.	0	1	6
e oaths to Government, when the oaths are			
a county meeting,	0	1	2½
en required,	0	1	9½
ote at an election,	1	5	2½
ch year,	0	0	11
t from the Court of Session, making up list of			
officer to summon, and making return,	0	3	0
l of trial, and instructing officer, .	0	3	0

Writing and booking each necessary letter,	L.0 1 6
Each duplicate and copy,	0 0 7

Fees for Public Business, payable in Exchequer.

For the principal precept of intimation of election of a Member of Parliament, besides expenses of printing,	0 10 6
Writings relative to elections of Members of Parliament (exclusive of the precept),—to summoning the commissioners of supply for laying on the land tax, and to other public business, payable in Exchequer, each sheet,	0 1 0
When consisting of more than one sheet, each additional sheet,	0 1 6
Superintending the execution of Chancery precepts, and returning the execution, for each precept,	0 0 6
Superintending the publication of royal proclamations or writs,—each	0 5 0
Warrant to summon jury and witnesses for striking the fiars, and making list, and instructing officer to summon them,	0 10 6
Attendance at striking the fiars and writing the evidence and procedure, and recording the verdict,	1 11 6
To the sheriff-clerk, for instructing the persons employed in taking up the lists of jurors, receiving the returns, and engrossing the lists in the jury-books, for each hundred names, exclusive of printing,	0 5 0
To the district clerk, or other person having local knowledge, for attending and assisting the Sheriff at revising lists, at the rate of 2ls. per day, including travelling charges and postages.	

N.B.—The sheet of writings to be computed at 300 words, when not otherwise specified; but if the writing does not contain 300 words, to be charged as one sheet; and if, after finding the sheet or sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than 300 words shall remain, such fewer words shall be charged as a sheet. Although the fees for recording hornings, inhibitions, deeds, and other writings in the registers of hornings and inhibitions, and of deeds and probative writs, are to be paid at certain rates for every sheet; yet it is understood that the clerks are to frame those records, so as to contain, in each sheet, the number of words prescribed by the regulations of the Lord Clerk Register.

Note.—The fees in the above Table to be paid, though the duty be performed by the clerk-depute, or by an assistant clerk, and to be exclusive of postages and outlays.

C. HOPE, *IP.A.*

No. V.

**FEES IN CIVIL BUSINESS, FOR THE SHERIFF-
CLERK OF THE COUNTY OF LANARK.**

	In cases of L.12 and under.			Above L.12.		
for claim to found an action,	L.0	0	6½	L.0	0	10½
When more than one are sued for a separate debt or prestation, the above fees to be paid on one of the prestations highest in amount, and a third of the above fees to be paid for each of the other prestations, according to the amount claimed against each defender, or set of defendants.						
For libel, in terms of Act of Sederunt 1697, ch. 18, § 4.	0	0	2½	0	0	2½
For a petition or complaint (except petition of seal deliverance thereon,	0	0	8½	0	1	0½
For a first paper for each defender, or for a first compeerer, or set of compeerers	0	0	4½	0	0	8½
For a paper, including, for either party, subsequent to the first, including objections and answers in a paper, and ed in separate papers,	0	0	2½	0	0	4½
For a paper by the sheriff-depute,	0	0	2½	0	0	4½
For a paper making each set of productions, except the first, lodged with the first paper for each party, at no charge is to be made,	0	0	2½	0	0	2½
For a paper decreet in absence, in the abridged form,	0	0	8½	0	1	0½
For a paper extracted against more defenders than one, for a separate debt or prestation, the above fees to be paid on one of the debts or prestations highest in amount, and a third of the above fees to be paid on each of the others, according to the amount of the claim against such of the defendants.						
For a decree in foro in the abridged form,	0	1	5	0	1	9
For a paper, whether in absence or in foro, shall extract for writing each succeeding sheet,	0	0	4½	0	0	4½
For a paper of decreets,—per sheet,	0	0	4½	0	0	4½
For a paper not insisting,	0	0	4½	0	0	6½
For a paper	0	0	4½	0	0	6½

	In cases of L. 12 and under.	Above L. 12
Acts and commission,—first sheet,	L. 0 0 4½	L. 0 0 4
Subsequent sheets, each	0 0 4½	0 0 4
If the proof be taken on the interlocutor allowing it, without extracting an act and commission, there will be paid by each party leading proof	0 0 4½	0 0 4
Diligence or precept for citing parties incidentally, wit- nesses, or havers,	0 0 4½	0 0 4
Second diligence,	0 0 4½	0 0 4
Each deposition or declaration,	0 0 4½	0 0 4
Writing each sheet thereof, after the first, when the sheriff-clerk acts as writing clerk,	0 0 4½	0 0 4
The sheriff-clerk, or his depute, when acting as com- missioner in taking a proof, deposition of party, or declaration, will be allowed the following fees, viz.		
In causes not exceeding L. 8, each hour	0 0 10½	
Above L. 8, and not exceeding L. 25, each hour	0 1 5	
Above L. 25, each hour	0 1 9	
As also his clerk's fee for writing, at the rate of 4d per sheet.		
Sequestration of a tenant's effects, or of joint tenants in one possession, viz.		
Warrant of sequestration, and service,	0 1 10½	0 1 10
Taking the inventory, when taken by the clerk, if the rent to be secured be L. 12, or under,—		
Clerk and witnesses,	0 1 9	
When the rent is above L. 12, and does not exceed L. 25,—		
Clerk and witnesses,		0 1 9
When the rent is above L. 25, and does not exceed L. 50,—		
Clerk and witnesses,		0 1 9
When the rent is above L. 50,—		
Clerk and witnesses,		0 1 9
Writing out inventory and schedule, per sheet of each, in any of the above cases,		0 0 4
If the clerk and witnesses are necessarily employed more than two hours in taking the inventory, or tra- velling for that purpose, he will be allowed, in addi- tion to the above fees, for every hour after the first two,—		
Clerk and witnesses,	0 0 6½	0 0 6
But under these charges, for the hours after the first two, the clerk not to have in one day, for himself and witnesses, more than 3s. 6d.		
Warrant of sale,	0 0 4½	0 0 4
Extract thereof, per sheet, when required,	0 0 4½	0 0 4

ACT OF SEDERUNT.

1175

	In cases of L. 12 and under.			Above L. 12.		
tax-office,	L.0	0	4½	L.0	0	4½
he executes any warrant to roup, and proceeds, will be held liable for the roup-roll, and will be allowed for his k, including auctioneer's fees, as fol-						
it of the roup-roll is L.8 or under, he 1 2s. 7½d.						
it of the roup-roll is above L.8, and ed L.100, he will be allowed at the ent.						
it of the roup-roll exceeds L.100, but d L.1000, he will be allowed 2 per first L.100, and for every additional of L.100, 1½ per cent. And when ceeds L.1000, he will be allowed the or the first L.1000, and 1 per cent for l L.100, and part of L.100.						
lage to cover all charges for trouble in sale, and for collecting the proceeds, tisements and articles of roup, but the allowed all his necessary disburse- nces, such as advertising, paying crier, rges, &c. He will also, when the above L.20, be allowed 2s. 7½d. for an i.						
ed, after time of sale is fixed,	0	0	10½	0	0	10½
report of sale, and note of the sum t, and marking the same,	0	0	4½	0	0	8½
tion of the same,	0	0	4½	0	0	4½
ther warrants of the Sheriff, including same fees to be paid as in sales under L.						
caption to compel return of a process, s of caption, if issued,	0	0	4½	0	0	4½
se, to be paid by the party requiring	0	0	2½	0	0	2½
e at avizandum is enrolled by order of he above fee to be paid by the parties						
process or part of a process, the clerk fee bound to compare the process, both red and returned, and to mark the re-	0	0	2½	0	0	3½
judicial inspections or visitations, when the Sheriff or either of the parties, scal-						

	In cases of L.12 and under.			Above L.12.		
ing up repositories, or executing any other order or warrant of the Sheriff, not otherwise provided for in this Table :—						
First hour employed,	L.0	1	5	L.0	1	5
Every other,	0	0	10½	0	0	10½
Besides necessary outlays.						
Auditing accounts of expenses, when remit made to the clerk :—						
In decrees in absence,	0	0	4½	0	0	4½
In litigated cases, when the amount of the account rendered is under L.5,	0	1	2½	0	1	2½
When L.5, and under L.10,	0	1	9	0	1	9
When L.10, and under L.20,	0	2	5½	0	2	5½
When L.20, and under L.40,	0	3	6	0	3	6
When L.40, and under L.60,	0	4	2½	0	4	2½
When L.60, and under L.80,	0	5	3	0	5	3
When L.80, and upwards,	0	7	4½	0	7	4½
Caveat,	0	0	4½	0	0	4½
Precepts or warrants of arrestment, when contained in the summons,	0	0	2½	0	0	2½
When not contained in the summons,	0	0	6½	0	0	8½
At loosing an arrestment in either case,	0	0	6½	0	0	8½
Each bond of caution and relative certificate,	0	1	9	0	2	7½
Edict or summons of curatory, or for giving up in- ventories,	0	0	10½	0	0	10½
Calling in Court, receiving, and entering the nomi- nation of curators,	0	1	9	0	1	9
Doqueting and signing tutorial or curatorial invento- ries,—per sheet of each duplicate,	0	0	2½	0	0	2½
Extract acts of curatory, or upon production of in- ventories,—						
First sheet,	0	1	9	0	1	9
Every other sheet,	0	0	10½	0	0	10½
Second extracts,—per sheet,	0	0	10½	0	0	10½
Production of a bill of advocation, and marking the same, including trouble of transmitting the process when necessary,						0 1 9
Transmitting extracted processes, in consequence of a warrant from the Court of Session, or the Sheriff,	0	0	6½	0	0	10½
Appeal against a decree or sentence of the Sheriff to the Court of Justiciary or Circuit Court, or answers thereto,	0	0	8½	0	0	10½
Searching for a process in which no procedure has taken place for a year, if search does not exceed five years, and no extract ordered,	0	0	4½	0	0	4½

	In cases of L.12 and under.			Above L.12.		
after the first five, in which the	L.0	0	2½	L.0	0	2½
on of money in the clerk's						
0,	0	0	10½	0	0	10½
ie, for the amount above L.10,						
d. on each L.100 consigned.						
bank receipt, when money order-						
l is lodged in a bank, instead of						
.	0	0	10½	0	0	10½
se three last articles not to be						
proceeds of rouns or sales con-						
clerks.						
it consigned money,	0	0	10½	0	0	10½
nd extract, or authenticated copy						
t of a process, or other procedure						
quired by a party, and furnished						
sheet,	0	0	4½	0	0	6½

uses where the conclusions are ad factum præstandum, or acuniary, the highest class to be the rate of charge. But fees summonses of removal or ejection, to be charged according the subject from which the defender is summoned to remove, ed.

inhibitions, interdictions, lawbur-			
executions, discharges, and other			
in the registers of hornings and			
beet,	L.0	0	7
extracts thereof, when required,—per sheet,	0	0	6½
ks, dispositions, and other writings, in the re-			
d probative writs,—per sheet,	0	0	6½
deeds or writings, when required,—per sheet,	0	0	4½
—per sheet,	0	0	6½
n bills, including extract,	0	0	10½
.	0	0	6½
states, and the like,—per sheet of figures,	0	0	8½
r sheet,	0	0	6½
s of entailed vouchers,	0	0	2½
d of hornings, or inhibitions, including minute-			
r part of a year,	0	0	2½
ding	0	2	7½
recorded, for the first year, or part of the year			
.	0	0	4½
r,	0	0	2½

Certificate of search, if required,	L.0	0	10½
Inspection of records, when a party or his agent makes the search, —each record-book and corresponding minute-book,	0	0	10½
Examinations under the bankrupt act, when the sheriff-clerk acts as clerk to the examination, each diet,	0	2	7½
Writing declarations or oaths therein,—per sheet,	0	0	4½

SERVICES.

General Service.

Procuring the brieve executed, and intimation to agent,	L.0	1	2½
Attending in Court at service,—framing and recording the minutes, and instrument money,	0	2	5½
Fees of the service,	0	7	0
Engrossing the retour,	0	1	9

Special Service or Service as Heir of Provision.

Procuring the brieve executed, and intimation to agent,	L.0	1	2½
Attending in Court at service—framing the minutes, and recording,— First sheet,	0	2	1½
Each other,	0	0	8½
Framing the retour,— First sheet,	0	5	3
Each other sheet,	0	3	6
Engrossing the retour,—each sheet,	0	0	8½
Extracts from the record of service, when required,—each sheet,	0	0	8½

Infestments.

Drawing instrument of sasine on Chancery precepts,— First sheet, 250 words per sheet,	L.0	5	3
Each subsequent sheet,	0	3	6
Extending the same,— First sheet,	0	1	0½
Each subsequent sheet,	0	0	8½
Besides the stamped vellum or parchment.			

And that the clerk receive for taking infestment thereon, when the rent of the property does not exceed L.100 per annum,	0	7	4½
L.100, and not exceeding L.200,	0	14	9
L.200, and not exceeding L.500,	1	2	1½
L.500, and not exceeding L.1000,	1	9	6

sal L.1000,	L.0 7 4½
d in all,	3 18 6
nce exceed three miles, each additional mile,	
s ten miles,	0 1 9
this charge, not to receive more per day than	0 14 9
telling charges.	

f procedure of freeholder meetings, when re-	
.	0 0 10½
se oaths to Government, when the oaths are	
a county meeting,	0 0 8½
en required,	0 1 0½
ote at an election,	0 14 9
ach year,	0 0 6½
ot from the Court of Session, making up list	
cting officer to summon, and making return,	0 1 9
id of trial, and instructing officer, .	0 1 9
each necessary letter,	0 0 10½
opy,	0 0 4½

for Public Business, payable in Exchequer.

cept of intimation of election of a Member	
des expense of printing,	L.0 10 6
lections of Members of Parliament (exclusive	
summoning the Commissioners of Supply for	
tax, and to other public business, payable in	
heet,	0 1 0
more than one sheet, each additional sheet,	0 1 6
recution of Chancery precepts, and returning	
ach precept,	0 0 6
ublication of Royal proclamations or writs,—	
.	0 5 0
jury and witnesses for striking the fiars, and	
structing officer to summon them, .	0 10 6
ing the fiars and writing the evidence and pro-	
ng the verdict,	1 11 6
or instructing the persons employed in taking	
ors, receiving the returns, and engrossing the	
ooks, for each hundred names, exclusive of	
.	0 5 0
or other person having local knowledge, for	
ing the Sheriff at revising lists, at the rate of	
ling travelling charges and postages.	

f writings to be computed at 300 words, when not other-
the writing does not contain 300 words, to be charged as

one sheet ; and if, after finding the sheet or sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than 800 words shall remain, such fewer words shall be charged as a sheet. Although the fees for recording hornings, inhibitions, deeds, and other writings in the registers of hornings and inhibitions, and of deeds and probative writs, are to be paid for at certain rates for every sheet, yet it is understood that the clerks are to frame those records, so as to contain, in each sheet, the number of words prescribed by the regulations of the Lord Clerk Register.

Note.—The fees in the above Table to be paid, though the duty be performed by the clerk depute, or by an assistant clerk, and to be exclusive of postage and outlays.

C. HOPE, L.P.D.

No. VI.

TABLE OF FEES IN CIVIL BUSINESS, FOR THE SHERIFF AND STEWART CLERKS OF THE FOLLOWING COUNTIES AND STEWARTRIES, VIZ.

ARGYLL,
BANFF,
BERWICK,
BUTE,
CAITHNESS,
CLACKMANNAN,
CROMARTY,
DUMBARTON,
ELGIN,

FIFE,
HADDINGTON,
INVERNESS,
KINCARDINE,
KINROSS,
KIRKCUDBRIGHT,
LINLITHGOW,
NAIRN,
ORKNEY,

PEEBLES,
ROSS,
ROXBURGH,
SELKIRK,
SHETLAND,
STIRLING,
SUTHERLAND,
AND
WIGTON.

In cases of L.12 and under. Above L.12.

Libel, summons, or claim to found an action,	L.0	1	6	L.0	2	6
--	-----	---	---	-----	---	---

When more defenders than one are sued for a separate debt or prestation, the above fees to be paid on one of the debts or prestations highest in amount, and a third of the above fees to be paid for each of the other debts or prestations, according to the amount of the claim against each defender, or set of defenders.

	In cases of L.12 and under.			Above L.12.		
libel, in terms of Act of Sederunt ch. 18, § 4,	L.0	0	6	L.0	0	6
or complaint (except petition of se- l deliverance thereon,	0	2	0	0	3	0
or first paper for each defender, or or compeerer, or set of compeerers,	0	1	0	0	2	0
ding, for either party, subsequent to cluding objections and answers in a ed in separate papers,	0	0	6	0	1	0
riff-Depute,	0	0	6	0	1	0
king each set of productions, except lodged with the first paper for each no charge is to be made,	0	0	6	0	0	6
lecreet in absence, in the abridged	0	2	0	0	3	0
is extracted against more defenders or a separate debt or prestation, the tract to be paid on one of the debts ighest in amount, and a third of the tract to be paid on each of the others, e amount of the claim against such of defenders.						
ecree in foro in the abridged form, ether in absence or in foro, shall ex- for writing each succeeding sheet, d decreets,—per sheet,	0	4	0	0	5	0
ot insisting,	0	1	0	0	1	0
.	0	1	0	0	1	0
.	0	1	0	0	1	6
sions,—first sheet,	0	1	0	0	1	6
, each,	0	1	0	0	1	0
ken on the interlocutor allowing it, ing an act and commission, there will a party leading proof,	0	1	0	0	1	6
cept for citing parties incidentally, vers,	0	1	0	0	1	6
.	0	1	0	0	1	6
or declaration,	0	1	0	0	1	6
et thereof, after the first, when the s as writing clerk,	0	1	0	0	1	0
or his depute, when acting as Com- king a proof, deposition of party, or l be allowed the following fees, viz. eeding L.8, each hour,	0	2	6			
not exceeding L.25, each hour,	0	4	0			

	In cases of L. 12 and under.	Above L. 12.
Above L.25, each hour,	L.0 5 0	
As also his clerk's fee for writing, at the rate of 8d. per sheet.		
Sequestration of a tenant's effects, or of joint tenants in one possession, viz.		
Warrant of sequestration, and service,	0 2 6	L.0 3 0
Taking the inventory, when taken by the clerk, if the rent to be secured be L.12, or under,—		
Clerk and witnesses,	0 5 0	
When the rent is above L.12, and does not exceed L.25,—		
Clerk and witnesses,		0 7 6
When the rent is above L.25, and does not exceed L.50,—		
Clerk and witnesses,		0 10 0
When the rent is above L.50,—		
Clerk and witnesses,		0 12 6
Writing out inventory and schedule, per sheet of each, in any of the above cases,		0 1 0
If the clerk and witnesses are necessarily employed more than two hours in taking the inventory, or tra- velling for that purpose, he will be allowed, in addi- tion to the above fees, for every hour after the first two,—		
Clerk and witnesses,	0 1 6	0 1 6
But under these charges, for the hours after the first two, the clerk not to have in one day, for himself and witnesses, more than 10s.		
Warrant of sale,	0 1 0	0 2 0
Extract thereof, per sheet, when required,	0 1 0	0 2 0
Intimating sale to tax-office,	0 1 0	0 1 0
The clerk, when he executes any warrant to roup, and collects the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as fol- lows :—		
When the amount of the roup-roll is L.8 or under, he will be allowed 7s. 6d.		
When the amount of the roup-roll is above L.8, and does not exceed L.100, he will be allowed at the rate of five per cent.		
When the amount of the roup-roll exceeds L.100, but does not exceed L.1000, he will be allowed five per cent for the first L.100, and for every additional L.100, or part of L.100, three per cent. And when the amount exceeds L.1000, he will be allowed the		

In cases of L.12 and under. Above L.12.

he first L.1000, and two per cent for L.100, and part of L.100.

ge to cover all charges for trouble in ale, and for collecting the proceeds, sements and articles of roup, but the owed all his necessary disbursements h as advertising, paying crier, travel- . He will also, when the proceeds be allowed 7s. 6d. for an assistant

l, after time of sale is fixed, . . .	L.0	2	6	L.0	2	6
ort of sale, and note of the sum						
nd marking the same, . . .	0	1	0	0	2	0
e of the same, . . .	0	1	0	0	1	0

x warrants of the Sheriff, including ame fees to be paid as in sales un- ns.

ion to compel return of a process,						
if caption, if issued, . . .	0	1	0	0	1	0
, to be paid by the party requiring						
.	0	0	6	0	0	6

s avizandum is enrolled by order of above fee to be paid by the parties

ccess, or part of a process, the clerk						
ee bound to compare the process,						
owed and returned, and to mark the						
.	0	0	6	0	0	6

lcial inspections or visitations, when e Sheriff or either of the parties, stories, or executing any other order to Sheriff, not otherwise provided for

mployed,	0	4	0	0	5	0
.	0	2	6	0	4	0

necessary outlays.

s of expenses, when remit made to

i absence,	0	1	0	0	1	0
mes, when the amount of the account						
s under L.5,	0	3	6	0	3	6
nd under L.10,	0	5	0	0	5	0
, and under L.20,	0	7	0	0	7	0
, and under L.40,	0	10	0	0	10	0
, and under L.60,	0	12	0	0	12	0
, and under L.80,	0	15	0	0	15	0

	In cases of L.12 and under.			Above L.12.		
	L.1	1	0	L.1	1	0
When L.80 and upwards,						
Caveat,	0	1	0	0	1	0
Precepts or warrants of arrestment, when contained in the summons,	0	0	6	0	0	6
When not contained in the summons,	0	1	6	0	2	0
At loosing an arrestment in either case,	0	1	6	0	2	0
Each bond of caution and relative certificate,	0	5	0	0	7	6
Edict or summons of curatory, or for giving up inven- tories,	0	2	6	0	2	6
Calling in Court, receiving, and entering the nomination of curators,	0	5	0	0	5	0
Doqueting and signing tutorial or curatorial invento- ries,—per sheet of each duplicate,	0	0	6	0	0	6
Extract acts of curatory, or upon production of inven- tories,—						
First sheet,	0	5	0	0	5	0
Every other sheet,	0	2	6	0	2	6
Second extracts,—per sheet,	0	2	6	0	2	6
Production of a bill of advocacy, and marking the same, including trouble of transmitting the process when necessary,				0	5	0
Transmitting extracted processes, in consequence of a warrant from the Court of Session, or the Sheriff,	0	1	6	0	2	6
Appeal against a decree or sentence of the Sheriff to the Court of Justiciary or Circuit Court, or answers thereto,	0	2	0	0	2	6
Searching for a process in which no procedure has ta- ken place for a year, if search does not exceed five years, and no extract ordered,	0	1	0	0	2	0
Each additional year, after the first five, in which the search is made,	0	0	6	0	0	6
For each consignment of money in the clerk's hands, if under L.10,	0	2	6	0	2	6
And an additional fee, for the amount above L.10, at the rate of 10s. on each L.100 consigned.						
On the lodging of a bank receipt, when money ordered to be consigned is lodged in a bank, instead of being consigned,	0	2	6	0	2	6
The fees in these three last articles not to be chargeable on proceeds of rouns or sales con- ducted by the clerks.						
Each warrant to uplift consigned money,	0	2	6	0	2	6
Full extract, or second extract, or authenticated copy of a process, or part of a process, or other procedure or paper, when required by a party, and furnished by the clerk,—per sheet,	0	1	0	0	1	6

where the conclusions are ad factum præstandum, or
uniary, the highest class to be the rate of charge. But fees
monmonses of removal or ejection, to be charged according to
subject from which the defender is summoned to remove, or

inhibitions, interdictions, lawbur-			
recutions, discharges, and other			
in the registers of hornings and			
set,	L.0	1	8
tracts thereof, when required,—per sheet,	0	1	6
ks, dispositions, and other writings in the re-			
probative writs,—per sheet,	0	1	6
deeds or writings, when required,—per sheet,	0	1	0
—per sheet,	0	1	6
bills, including extract,	0	2	6
.	0	1	6
tates, and the like,—per sheet of figures,	0	2	0
sheet,	0	1	6
of entailed vouchers,	0	0	6
of hornings, or inhibitions, including minute-			
part of a year,	0	0	6
ing	0	7	6
recorded, for the first year, or part of the year			
.	0	1	0
.	0	0	6
f required,	0	2	6
when a party or his agent makes the search,			
and corresponding minute-book,	0	2	6
he Bankrupt Act, when the sheriff-clerk acts			
ination, each diet,	0	7	6
or oaths therein,—per sheet,	0	1	0

SERVICES.

General Service.

executed, and intimation to agent,	L.0	3	6
service,—framing and recording the minutes,			
ey,	0	7	0
.	1	0	0
,	0	5	0
3 F			

Special Service, or Service as Heir of Provision.

Procuring the brieve executed, and intimation to agent, .	L.0	3	6
Attending in Court at service—framing the minutes, and recording,—			
First sheet,	0	6	0
Each other,	0	2	0
Framing the retour,—			
First sheet,	0	15	0
Each other sheet,	0	10	0
Engrossing the retour,—each sheet,	0	2	0
Extracts from the record of service, when required,—each sheet,	0	2	0

Infestments.

Drawing instrument of sasine on Chancery precepts,—			
First sheet, 250 words per sheet,	L.0	15	0
Each subsequent sheet,	0	10	0
Extending the same,—			
First sheet, 250 words per sheet,	0	3	0
Each subsequent sheet,	0	2	0
Besides the stamped vellum or parchment.			
And that the clerk receive for taking infestment thereon, when the rent of the property does not exceed L.100 per annum, .	1	1	0
L.100, and not exceeding L.200,	2	2	0
L.200, and not exceeding L.500,	3	3	0
L.500, and not exceeding L.1000,	4	4	0
And for every additional L.1000,	1	1	0
But not to exceed in all,	10	10	0
And if the distance exceed three miles, each additional mile, until it exceeds ten miles,	0	5	0
But, under this charge, not to receive more per day than	2	2	0
Besides travelling charges.			
Extracts of minutes of procedure of freeholder meetings, when required,—per sheet,	0	2	6
Each person taking the oaths to Government, when the oaths are not administered at a county meeting,	0	2	0
Certificate thereof, when required,	0	3	0
Qualifying a peer to vote at an election,	2	2	0
Extract of the fiars, each year,	0	1	6
Receiving each precept from the Court of Session, making up list of jury, and instructing officer to summon, and making return, .	0	5	0
Receiving countermand of trial, and instructing officer, .	0	5	0

each necessary letter,	0	2	6
copy,	0	1	0

for Public Business, payable in Exchequer.

cept of intimation of election of a Member of s expense of printing,	0	10	6
elections of Members of Parliament (exclusive to summoning the Commissioners of Supply and-tax, and to other public business, payable sheet,	0	1	0
more than one sheet,—each additional sheet,	0	1	6
recution of Chancery precepts, and returning each precept,	0	0	6
ublication of Royal proclamations or writs,—	0	5	0
Jury and witnesses for striking the fiars, and structing officer to summon them,	0	10	6
ing the fiars and writing the evidence and pro- rding the verdict,	1	11	6
for instructing the persons employed in taking ra, receiving the returns, and engrossing the ooks, for each hundred names, exclusive of	0	5	0
or other person having local knowledge, for ting the Sheriff at revising lists, at the rate of ding travelling charges and postages.			

f writings to be computed at 300 words, when not other-
the writing does not contain 300 words, to be charged as
er finding the sheet or sheets which any such writing shall
at the rate aforesaid, any number of words less than 300
ich fewer words shall be charged as a sheet. Although the
rnings, inhibitions, deeds, and other writings in the registers
itions, and of deeds and probative writs, are to be paid for at
sheet, yet it is understood that the clerks are to frame those
ain, in each sheet, the number of words prescribed by the
d Clerk Register.

the above table to be paid, though the duty be performed by
te, or by an assistant clerk, and to be exclusive of postages

C. HOPE, *I.P.D.*

Ac
1

2

S
Ac
Ac
Ac
2

INDEX OF MATTERS

IN

VOLUME XIV.

se of accounting, in which the Lord Ordinary approved of an account, and repelled the defender's objections thereto, in respect either expressly repelled by, or fell within the principle of a prelocutor, to which the Court had adhered. To this judgment the Lord Ordinary adhered, and awarded additional expenses. *Home, or Paul*, May 18, 1836, p. 780.

James v. Bank, in which the Lord Ordinary held that a cash-credit with a bank, and took receipts from the bank for the amount paid in by him, but gave back these receipts at the annual settlement of the bank's accounts, which took place on an examination of vouchers and of the cash-book, after which a balance was struck and signed by the bank and the cash-credit was carried to a new account: This annual settlement was continued for seven successive years, when the party paid up the whole balance due, and retired his cash-credit bond: Party held entitled, in defence of a subsequent action by the bank, to object to go into a question of account in respect of an error calculi, which, the bank alleged, appeared in the books prior to all these settlements, and consisting of an entry to his credit, without any such sum having ever been paid by him. *May 18, 1836*, p. 780.

James v. Trustees, in which the Lord Ordinary, on the petition of a judicial factor on the estates of a deceased partner, against the trustees of the last surviving partner, for their intromission with the company funds, pronounced a decree against the trustees, to pay to the judicial factor the sum of £298, 17s. 7d., being the balance of company funds which they admittedly had received, without applying to company purposes; but this on condition that the trustees, and the company debtors who had made payments should be duly credited for the amount, and secured against second payment.

Fullerton, July 8, 1836, p. 1115.

1, 4, 5, 6.—*Interest—Minor—Cautioneer*, 2.—*Partnership*, 1.

See *Adjudication*, 1.

E. See *Bankruptcy*, 4.—*Property*, 4.

DE.

James v. Bank, in which the Lord Ordinary held that a cash-credit with a bank, and took receipts from the bank for the amount paid in by him, but gave back these receipts at the annual settlement of the bank's accounts, which took place on an examination of vouchers and of the cash-book, after which a balance was struck and signed by the bank and the cash-credit was carried to a new account: This annual settlement was continued for seven successive years, when the party paid up the whole balance due, and retired his cash-credit bond: Party held entitled, in defence of a subsequent action by the bank, to object to go into a question of account in respect of an error calculi, which, the bank alleged, appeared in the books prior to all these settlements, and consisting of an entry to his credit, without any such sum having ever been paid by him. *May 18, 1836*, p. 780.

ACT OF GRACE (Continued).

tition for an award of aliment as against the original incarcerator, but refused to execute a second disposition omnium bonorum in his favour : aliment having been in consequence refused, he presented a bill of suspension and liberation—The Court refused letters of liberation, but on the understanding that the trustee under the new deed was to be a third party. *Johnstone*, Jan. 29, 1836, p. 380.

See *Prisoner*, 3.

ACT OF SEDERUNT, 7th July, 1836, regulating the fees of the sheriff and steward-clerks of Scotland. See *Appendix*.

ADJUDICATION.

1. In 1781, a creditor led a adjudication of a heritable subject against a debtor who had no right or title to it whatever ; fourteen years afterwards a right as heir apparent opened to the debtor, who thereon made up an erroneous feudal title to it : in the following year, declarator of expiry of the legal was obtained by the creditor ; and two years afterwards the debtor sold part of the subjects falling under the adjudication : Held, in a subsequent reduction of a right founded on this sale, that, as the pursuer founded on the adjudication, which was nugatory, the defender must be assoilzied. *Wilson*, July 8, 1836, p. 1117.
2. Intimation appointed of a first adjudication proceeding on a bill ex facie, prescribed, where the debtor had, prior to the date of the bill, made a trust-conveyance of his whole heritable property for behoof of creditors. *Morison*, July 9, 1836, p. 1126.

See *Entail*, 8.

ADMINISTRATION OF JUSTICE.

1. A party, pending an action at his instance, having printed in the form of a pamphlet a memorial and queries previously submitted by him to counsel, and calculated to produce an impression prejudicial to his opponents, and several copies having got into circulation, though not by his direction or authority, found liable in the expenses of a petition and complaint to have the circulation interdicted and the copies delivered up. *Smith*, Dec, 16, 1835, p. 172.
2. The agents of one of the parties in a process, wrote a letter to the Assistant clerk of the process, accusing him of having twice altered and distorted the interlocutors of the Lord Ordinary, especially the last, which had been just pronounced, and calling on him to exhibit a corrected interlocutor within twenty-four hours, under a threat of removal from office, and complaint to the Court ; this being brought under the notice of the Lord Ordinary, and by him reported to the Court, the agents were directed to lodge a minute of retraction of the charge against the Clerk, and of apology to the Court and to the Clerk. *Spalding*, July 7, 1836, p. 1102.

ADMIRALTY.

1. An action for repairs and furnishings to a ship held to be a maritime cause, and dismissed, as not having been brought into Court in the manner required by the 1st William IV., c. 69, § 40. *Gavin*, Dec 19, 1835, p. 187.
2. A process was in dependence before the High Court of Admiralty, when that Court was abolished by 1 Will. IV. c. 69 ; the Judge-Admiral had pronounced several interlocutors which were final in that Court ; the cause was transferred directly into the Court of Session, by a joint note of the parties, in terms of the statute ;—Held, that the interlocutors of the Judge-Admiral had no privilege of finality in this Court, but were liable to be impugned as erroneous. Observed, that the above transference of the cause was substantially a joint advocacy by both parties, and let in the power of review of this Court, of all the procedure in the Admiralty Court, as a necessary preliminary to following out the process to a conclusion in this Court. *Macarthur*, May 24, 1836, p. 820.

See *Arrestment*, 2.—*Process—Ship*.

See *Divorce*.

See *Agent and Client*, 8.

See *Process*, VI.

CLIENT.

agent conducted lawsuits which were current for a series of years, at intervals, on his client for payments to account, and it appeared that these drafts generally exceeded the amount past due, yet such bills were resorted to for the accommodation of the client—held, client should be debited with the cost of the stamps and discounts on . . . *M'Ra*, Dec. 3, 1835, p. 100.

cases in which, held, that no claim lay for commission on a course of actions between parties standing in the relation of agent and client. . . . *Stees*, Feb. 5, 1836, p. 432.

employer refused payment of a business account on a groundless charge of professional misconduct, the Court gave decree against him with costs. . . . *Macqueen*, Mar. 2, 1836, p. 599.

agent was employed to invest a sum of £2000 on heritable security; he put it over a distillery, belonging to another client of his, on which there were prior burdens amounting to £18,500: he was in the knowledge of the property and refrained from communicating it to the lender: the subjects afterwards sold for very much in value, and proved insufficient for the prior burdens—the agent was liable for the £2000, though he alleged that, from improvements of the property he had good reason to hold it was worth more than £18,000 more than the prior burdens at the date of the loan; and that postponed heritable security was drawn and completed with technical accuracy.

circumstances which held to prove that a law agent acted as such borrower and lender. . . . *Haldane*, Mar. 3, 1836, p. 610.

held a decree in absence against a country agent, for a business account which had been incurred to a deceased writer to the signet: the count was £38 to a solicitor before the Supreme Courts, for the special purpose of settling this debt; after a considerable lapse of time, during which no payment was effected, the solicitor raised an action against the country agent for payment of a large balance alleged to be due on their private business, and he refused to apply the £38 in any other way than in ex-*pro tanto*, of this alleged balance:—Held, that a summary petition for payment was competent against the solicitor, and that he was liable in satisfaction of the £38, and should be subjected in the expenses of the petition; but that, in the circumstances, though he had misapprehended his duty, the Court were not warranted in pronouncing any harsher against him. . . . *Scott*, March 10, 1836, p. 682.

an agent was employed by a manufacturing firm to prepare petitions for relief in accordance with the Statute of 1799, against two apprentices, for having neglected their work and other misconduct; the agent accordingly presented the petitions, and founded on the 4 Geo. IV., c. 34, but on the third section instead of the first, which related to apprentices in default of those complained of; the apprentices were convicted and imprisoned, but subsequently liberated by the Court of Justiciary, in respect of which the agent was liable in damages and expenses:—Held that, as the terms of the act were complied with under the statute, and although neither the opposite agents in the petition, nor the sheriff substitute of the county sitting as a justice of the peace, considered the petitions to have been erroneously libelled. . . . *Frame*, 1836, p. 914.

a farmer accepted a bill, at four months, in favour of his law agent, who was to "account of an account of business rendered:" he failed to settle his account, and in 1834, the agent obtained a decree in ab-

AGENT AND CLIENT (Continued).

sence, for the contents of the bill, on which decree he incarcerated the farmer:—Held that the diligence ought not to be suspended, although the accounts had never been taxed. Neilson, June 16, 1836, p. 974.

- 8.—(1.) An action was raised in the Court of Session, in name of Cowan and five others, but without the authority of Cowan: after a record was closed, Cowan lodged a disclaimer, and the other pursuers made no farther appearance: the defenders obtained from the Lord Ordinary a judgment of absolvitor with expenses against all the pursuers, and Cowan reclaimed: the defenders then raised an action against the law-agents of the pursuers, to free and relieve them of all the consequences of the action in which they had unauthorizedly used Cowan's name: the actions were conjoined, and the Court altered the interlocutor of the Lord Ordinary, in so far as it subjected Cowan; and, quoad ultra, subjected the law agents in liability,—

(1.) For the expenses incurred by the defenders in the action in Cowan's name;

(2.) Their expenses as pursuers in the action of relief; and,

(3.) The expenses incurred by Cowan in lodging his disclaimer and subsequently; reserving to the agents their claim of relief against their actual employers, who had assured them that Cowan had concurred in the action.

(2.) Circumstances in which law-agents were personally subjected to defenders for the expenses of a process in which they unauthorizedly used the name of one out of six pursuers, though the agents had acted with perfect professional bona fides.

(3.) Question how far the presumption of mandate, which is implied in the appearance of an advocate in a party's name, will bind such party if he has granted no authority to appear. Cowan, March 4, 1836, p. 634.

- 9.—(1.) Correspondence relating to the subject-matter of an existing suit between one of the parties and two persons who acted for him in the matter in question, but were not professional agents, held not to be protected against a diligence for the production of such correspondence, although admitted to have been of a confidential character.

(2.) Question, whether communications made to an intermediate person by a party, to be conveyed to a professional agent, are protected? Stuart, May 26, 1836, p. 837.

See *Title to Pursue*, 3.—*Process*, IX. 2.—X. 16.—*Inhibition*, 3.—*Prescription*—*Triennial*—*Prisoner*, 3.—*Trust*, 5.

AGENT AND PRINCIPAL.

1. Circumstances in a sale of goods by a dealer in Scotland to a dealer abroad, conducted chiefly through the medium of a mutual friend, who was not a regular agent for the buyer, but to whose credit the seller mainly looked, and with whom the party abroad had settled for the value of the goods, which held not to warrant the dealer in this country in coming upon the dealer abroad for payment of the price, on the bankruptcy of the agent. Stevenson, Feb. 25, 1836, p. 562.
2. Special circumstances in which, where part of the stock of a man who became bankrupt had been consigned by him in security of advances, and with powers of sale; and the consignee had been obliged to sell for his own relief; and the purchaser alleged the goods, on examination, to be unmarketable; the consignee, in accounting for the proceeds to the bankrupt's creditors, was allowed to take credit for the expense of a submission into which he had entered with the purchaser, for deciding whether the goods were marketable; and also for a sum of damages which had been awarded, as a deduction from the price, in respect that the goods were held by the referees not to be marketable. Douglas, May 27, 1836, p. 843.
3. A commissioner cannot appoint a mandatary for a principal out of the country. Dempster, Feb. 18, 1836, p. 521.

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v

is *Arrestment*, 3.—*Cessio*, 3, 6, 8.—*Curator Bonis*, 4.—*Pri-Title to Pursue*, 3.—*Process*, X. 25.

NS. See *Entail*.

OF LIBEL. See *Process*, I. 2. (2.)

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suspension of imposition of annuity tax by stentmasters competent. Circumstances in which Court refused to pass a bill of suspension of payment. *Flethers of Edinburgh*, Dec. 15, 1835, p. 157.

stances in which the Court refused to grant authority to bring an injury judgment under review of the House of Lords by appeal. *Fraser*, 1836, p. 582.

May 21, 1836, p. 315.

, X. 3.—*Expenses*, 14.

See *Agent and Client*, 6.

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stances in which the Court held, that an award, by a judicial referee, liable to reduction, and that an allegation of its being ultra vires, not exhausting the subject of the submission, and of its being pro- without duly hearing parties, was unfounded. *George*, Feb 4, 1836,

issues having been prepared for trial, and subsequently referred to , with full power to determine the matters therein contained, “ in the inner, and as fully and freely ” as could have been done by a judge and held, that although the arbiter, in his findings, should have given a instruction to the issues, this would only amount to an error in judgment was no ground for suspending a charge on the decree as being ul-

Anderson, Feb. 6, 1836, p. 447.

as to the effect of an obligation in a minute of lease, by which either is empowered to apply to the Judge Ordinary to name an arbiter, in : of the other party failing to name an arbiter, notwithstanding a requisition to do so. *Carruthers*, Feb. 11, 1836, p. 464.

he parties in a cause about to be tried by a jury, having, in presence dge, made a reference by signed minute to a judicial referee, who pronounced an award, and the Court having been moved to interpose city thereto—Held that the cause was not out of Court, although the d not authorized the reference by any interlocutor or by his signature nute.

a reference having been made as of the “ whole cause,” the arbiter r to find expenses without any special clause to that effect. *Fairley*, 1836, p. 470.

s, III. 1.—*Lease*, 7.—*Agent and Principal*, 2.—*Judicial Refe-*

is.

as cautioner for the payment of a bill of £500, paid the contents on dishonoured, but subsequently received from an endorser £475 to and the cautioner ranked on the sequestrated estate of the drawer hole sum, acknowledging the indorser's payment in his affidavit. rser gave in no claim, but a creditor of his used arrestment in the the trustee, with the view of attaching the dividend payable to the , as truly belonging to the indorser. In a process of forthcoming, unction of the ranking, Held,

hat the indorser not having ranked, no arrestment, as of funds be- o him, could attach funds in the hands of the trustee ; and,

hat the scheme of division not having been objected to within the period, could not be afterwards set aside by a process of reduction.

Nov. 19, 1835, p. 27.

ents having been used on the dependence of an Admiralty summons Court of Session, a bill for letters of loosing was presented, with a.

ARRESTMENT (Continued.)

bond of caution, in common form: the bill was passed, but the letters were never expedite, the pursuer of the action dispensing with this being done—Held that the cautioner was nevertheless bound. Thomson, Jan 16, 1836, p. 227.

3. A wife having raised an action of adherence and aliment against her husband, and having used arrestments on the dependence, and thereafter obtained decret of adherence and aliment, which was for some years regularly paid by the husband; and having subsequently, on the decret, arrested certain funds “to remain under sure fence,” &c., till he should adhere: The diligence held to be incompetent, and the arrestments recalled without caution. Macgregor. March 11, 1836, p. 707.
4. In a process of forthcoming, one of the defenders, an arrestee, admitted that he had funds in his hands at the date of the arrestments, but alleged that, subsequently, the common debtor had discharged all claim against him, and had taken a new debtor in his place: arrestee found liable, in respect (inter alia) that he failed to prove that allegation. Pitcairn, July 7, 1836, p. 1101.

See *Bankruptcy*, 1.—*Cessio*, 4.

ASSIGNATION. See *Entail*, 8.

AUDITOR. See *Expenses*.

BANKRUPTCY.

1. Arrestments were used within sixty days of a sequestration—the arresters refused to loose their arrestments except on the condition of getting their expenses paid by the trustee—the trustee offered to reserve their preference, if they had any, but refused to pay in the mean time, and he obtained a judgment from the Sheriff, decerning for delivery of the goods under the above reservation:—Opinion by a majority of the Court, at passing a bill of suspension on caution, that the arresters were under no obligation to loose their arrestments, and if called on to do so by the trustee, might exact such condition as to expenses as they saw fit. Allan, Nov. 28, 1835, p. 80.
2. In a petition for discharge, under section 61 of the Bankrupt Statute, it is requisite that an actual concurrence be produced from the statutory proportion of creditors, and mere neutrality by a creditor is not enough; and there is no difference between the case where a bank is the neutral creditor, and that where a private individual is so. Charles, Dec. 12, 1835, p. 139.
3. The Bankrupt Act, § 72, permits a trustee to apply for his discharge, “provided always, that, before making any such application, he shall make out a full state of his accounts, &c., and shall call a meeting of the creditors,” &c.—Held, that a petition, being presented before such meeting was held, was irregular; that it was not validated by the circumstance, that a meeting had been held before the petition was finally reported to the Court; and that a new, or supplementary petition was necessary. Wyllie, Dec. 17, 1835, p. 179.
- 4.—(1). Question, whether a sequestrated bankrupt is, by the statute, under a legal obligation to convey to the trustee, for behoof of the sequestration creditors, property subsequently acquired by him, so that, in virtue of such obligation, the trustee may adjudge in implement?
(2.) Held that, without an express agreement, a claim for behoof of the creditors, for a conveyance of subsequent acquisitions, may be barred by the conduct of the trustee and commissioners on a sequestrated estate, implying an acquiescence in a course of trading by the bankrupt for his own behoof. Christie, Dec. 19, 1835, p. 191.
- 5.—(1.) A judicial trustee, under a disposition omnium bonorum, held preferable to prior heritable creditors on the proceeds of an heritable property, for expenses necessarily or profitably incurred by him in relieving the title-deeds from hypothec, completing his titles, managing the property, and bringing it to sale, but not for other expenses or commission.
(2.) An allegation, that at the time of taking infestment the testing clause in a disposition was not filled up, not a relevant objection to a seisin.

Continued.)

objection under the stamp laws, to a bill payable on demand without stamp for such bill, that it was not presented for six months. Circumstances in which a promissory note, payable on demand, was not been duly negotiated, although not presented for payment until six months and a half after its date.

Notary taking the protest on a bill of exchange, being the drawer of the bill,—Held that the protest and the diligence following were invalid. *Leith Banking Company*, Jan. 22, 1836, p. 332.

Having been elected trustee on a sequestrated estate, and being allowed for the creditors of another bankrupt, and in that character engaged in litigation with the estate in question, the Court refused to confirm the same. *Scott*, Feb 20, 1836, p. 552.

Lent money on a second heritable security over certain house obtained from B and others a personal bond in corroboration, binds himself to pay the interest of his debt, and also the interest of the same together with the annual feu-duty and the expense of keeping up the same: B's estates were sequestrated and a discharge granted under a new contract, no claim having been made by A: the debtor subsequently became bankrupt, and the prior heritable creditors entered into possession of the subjects—

Held, in an action by A against B and the cautioners for his composition, although A averred that he could put no value on the heritable property for his £700, he was entitled to insist for payment of the composition only on the interest thereof, but on the interest of the prior debt to the creditors therein, on the feu-duty to be paid to the superiors, and the expense of insurance termly as these sums fell due, unless B should discharge the same.

Question as to whether A was entitled to demand a composition on the basis of these annual payments, converted into a capital sum, superseded. *Mar. 3, 1836*, p. 624.

One under the Bankrupt Act, presented a petition and complaint as former trustee who had resigned, and whose resignation had been approved by the creditors; the petition craved an order for accounting, and for payment of any balance found due: Held that this summary application was not valid, notwithstanding the resignation of the former trustee. *Swanson*, 1836, p. 652.

Cases in which the personal disqualification of adverse interest was held to be, *hoc statu*, sufficiently established against a candidate for the office of trustee on a bankrupt estate. *Reid*, May 21, 1836, p. 809.

An ex-trustee on a sequestrated estate admitted that he had a large sum of trust-funds in his hands "subject to a deduction of such farther sum as he can instruct,"—ordained to consign such balance, and interim payment to be made, unless consignment should be made within a certain short time. *Swanson*, July 9, 1836, p. 1120.

A composition, payable at six, twelve, and eighteen months, after the approval by the Court, was unanimously accepted by the creditors; a caution for the amount was signed by the bankrupt, and by a cautioner approved by the creditors; the bankrupt then died, and a petition was presented by the trustee alone, praying the Court to approve of the composition, to remove the trustee, and to discharge the bankrupt's heirs: after the consideration, the Court granted the petition, which was not opposed. *Mar. 23, 1836*, p. 993.

Where the bankrupt is abroad, and a petition for his discharge is presented, in the absence of the trustee and the requisite proportion of creditors—superseded, in respect the Court will not grant commission to take the oath abroad. *McClery*, June 23, 1836, p. 998.

A man, while solvent, granted bond to his children by a first marriage, to

BANKRUPTCY (Continued).

pay them the net amount of rents uplifted by him from heritage which had belonged to their deceased mother, since her death, or which should yet be uplifted by him, during his life ; these rents were the father's absolute property, in virtue of the settlement of his deceased wife, and the bond narrated that it originated in the father's " own free motion ;" it reserved power to the father to distribute the amount of its contents, in such shares, among his said children as he chose, and no part of them was payable until after his death, nor was interest to begin to run till after that event ; the bond contained a clause of registration for execution : the father, some years after, became bankrupt ;—Held, that the children were not creditors of his, under the bond, and could not compete with his creditors. Geddes, July 5, 1836, p. 1084.

14. A father, by settlement, disposed an estate to his son, under the burden of certain provisions to his wife and daughters, which were declared real burdens ; after his death the son entered into possession, but made up no titles, and in a few years became bankrupt ; the trustee gave him a special charge to enter heir of line to his father, passing by the settlement, when his proceedings were challenged by the family of the deceased : Held that it was the right and the duty of the trustee to make up a title to the heritage, passing by the settlement, and leaving the family of the deceased on the footing of mere personal creditors for their provisions, as they were at the date of the bankruptcy. Miller, July 5, 1836, p. 1087.

15. Kirkland, July 8, 1836, p. 1118.

16.—(1.) In a petition and complaint against the trustee on a bankrupt estate, competent for the Lord Ordinary, after closing a record, to pronounce judgment himself if he sees cause.

(2.) Where a complaint was found incompetent, so far as contrary to a resolution of creditors, which had not been complained of within the thirty days the Court, in the circumstances, remitted to the Lord Ordinary to sist farther proceedings for a reasonable time, till a reduction or challenge, if the resolution should be brought. Walker, Dec. 3, 1835, p. 99.

17. A party whose estates were sequestrated in June, offered a composition in October, and in November, with the concurrence of the requisite proportion of creditors then ranked, he applied for approval of composition and discharge : thereafter, an additional creditor appeared, and opposed the application, his claim rendering the concurrence obtained no longer sufficient—Held, that the creditor was not bound to pay the expenses previously incurred in the application as a condition of his being allowed to oppose it. Forbes, Jan. 29, 1836, p. 380.

18. A resolution of the creditors in a sequestration was complained of as having improperly awarded an allowance to the bankrupt : the trustee was not originally called, and the complaint was not served on him until more than thirty days had elapsed after the date of the resolution—Held that he ought to have been made a party to the complaint from the first, as he was officially bound to obey the resolution of the creditors until legally interpellated ; and petition dismissed with expenses, in respect he had not been duly called. Henderson, May 19, 1836, p. 797.

19. Circumstances in which an action and conjoined supplementary action, which were raised with concurrence of the Lord Advocate, to reduce a discharge and composition-contract under the Bankrupt Act, and which were founded on charges of perjury and fraudulent bankruptcy, were dismissed as not competently or regularly laid, reserving to the pursuer to institute any new proceeding in proper form. Stewart, June 21, 1836, p. 989.

See *Arrestment*, 1.—*Diligence*, 4.—*Minor—Right in Security*, 3.—*Title to Pursue*, 4.—*Personal Protection*.

BASTARD.

1. Evidence which held to amount to *semiplena probatio* in an action of *fil-*

tinued.)

natural child, so as to admit of the mother's oath in supplement. May 21, 1836, p. 815.

on of filiation of a natural child, evidence which held to amount to probatio, so as to entitle the pursuer to her oath in supplement. May 31, 1836, p. 852.

Land Wife, 1.—*Process IV.*—X. 34, 35.

PTIONS. See *Process, III.* 8.

ANGE.

party intimated to the law-agents of an alleged debtor, that he had made, and, at the agents' request, transmitted a statement of his which rested on a bill of exchange; both parties then allowed the bill to run over for nine years—Held, that the course of prescription on the bill had not been interrupted.

circumstances in which, held, that a party was not barred personally from pleading the prescription of a bill of exchange. Ewing, Nov. 1, 1835, p. 1.

cases in which, held to be proved that a letter, containing notice of the dishonour of a bill, and addressed to the drawer thereof, was duly put into the post-office, and, accordingly, that recourse was preserved against him. Ewing, Dec. 12, 1835, p. 139.

objection under the stamp laws, to a bill payable on demand without a proper stamp for such bill, that it was not presented for six months.

circumstances in which a promissory-note, payable on demand, was held to have been duly negotiated, although not presented for payment until more than six months and a half after its date.

the notary taking the protest on a bill of exchange, being the drawer of the bill—Held that the protest and the diligence following were invalid. Leith Banking Company, Jan. 22, 1836, p. 332.

married woman, the holder of a bill of exchange which was payable to her, indorsed it away without her husband's concurrence; she was engaged in trade, and the indorsation was not granted in consequence of her acting falling under her præpositura; and the indorsee was aware that the husband had been carefully kept ignorant of the matter—Held, that the indorsee had obtained no valid conveyance to the bill, and charge at his option against the acceptor, suspended simpliciter.

a bill of suspension was passed, which alleged no ground of suspension except that of forgery; reasons and revised reasons of suspension were given which alleged no other ground—Held competent, in re-revised reasons to state other facts and pleas, such as the charger's having no valid title to the bill, even if genuine—in respect that the record was not yet closed and the charger had not been called on to abide by the bill, nor the bill to be consigned. Binny, Jan. 26, 1836, p. 355.

drawee drew three several bills, at intervals, on a house in London, each of the same date: he successively discounted them, with a bank in Aberdeen, along with each, a relative letter by a third party, "guaranteeing regular acceptance:" the bank's correspondents in London did not cash any of the bills for acceptance until the period of payment, when the first fell due, the drawer had failed, and the drawees refused to accept—Held, that the cautioner was not liberated, but remained liable for his guarantee. National Bank of Scotland, Feb. 3, 1836, p. 1.

drawer of a bill indorsed it to a party who paid him a large proportion of the value, but retained in his hands an extra sum beyond the legal rate of discount; the acceptors failed during the currency of the bill, and the indorser charged the drawer for the whole bill, he suspended, alleging that the extra sum was retained in consideration of guaranteeing the insol-

BILL OF EXCHANGE (Continued.)

vency of the acceptors, and that, but for this consideration, the transaction must have been usurious: the charger denied this, and alleged that the extra sum had been retained for certain purposes which he specified—Held that, in the circumstances, he must prove for what purposes the sum had been retained, or the Court would suspend the charge. *Christie*, Feb. 12, 1836, p. 472.

7. In an action on a bill of exchange vitiated in the date, where an averment "that the vitiation proceeded from a mistake of one of the acceptors when writing the bill, which was corrected with consent and in presence of the other acceptors," was considered relevant to elide the nullity arising from the vitiation—evidence which held insufficient to substantiate this averment. *Whitehead*, Feb. 19, 1836. p. 544.

8. Terms of an oath on reference which held to prove the indorsee of two promissory notes to have been an onerous holder. *Macgill*, March 11, 1836, p. 708.

9. A was employed by B to execute wright work on his house to an extent exceeding £300, and had received various payments to account: he addressed to B the following letter, dated November 16, 1831:—"SIR,—Pay the bearer the sum of £40 sterling, and charge the same against my account of wright work for your house." B signed the letter in token of acceptance of the order contained in it:—Held that it was essentially a bill of exchange, and not being written on stamped paper, was of no legal effect. *Isles*, June 23, 1836, p. 996.

10. The drawer of a bill induced the holder to delay presenting it for payment when due; after the protracted term had elapsed, the drawer, at his own request, had the bill sent to him by the holder to receive payment, and thereafter protested it for non-payment, but neglected to use any measures of diligence against the acceptor, who became insolvent;—Held, that the drawer was liable in payment of the contents of the bill, and was barred from pleading want of due negotiation. *Cairn's Trustees*, June 23, 1836, p. 999.

See *Arrestment*, 1.—*Foreign*, 1.—*Stamp*, 3.—*Cautioner*, 1.

BILL OF HEALTH. See *Prisoner*, 1.

BREACH OF INTERDICT.

(1.) A party having been fined £20 by a Sheriff, on a complaint, for breach of interdict, at the instance of the heritors of a parish and the procurator-fiscal of a county, for the public behoof, suspension of a charge for payment of the fine and expenses of process refused.

(2.) The Lord Ordinary having refused a bill of suspension, and the suspender, on presenting a second bill, having objected to the interlocutor specially on the ground that it did not contain findings of the facts held to be established by the proof in the Inferior Court—Question, Whether the 6 Geo. IV. c. 120, § 40, applies to such a case. *Beattie*, Nov. 14, 1835, p. 6.

See *Interdict*.

BURGH.

1.—(1.) Held, that magistrates of a burgh have no power to sell right to a private party to erect an arch over part of a public street or lane within the extended royalty; at least where it cannot be absolutely demonstrated that the operation is *innocuæ utilitatis*.

(2.) Terms of an Act of Parliament which held not to authorize the magistrates to grant such right in the circumstances of the case. *Scott*, Nov. 18, 1835, p. 18.

2. An action containing reductive, declaratory, and petitory conclusions, having been brought by certain parties, burgesses and town-councillors of a burgh, against the magistrates and council, to try the legality of an act of council in reference to an alleged alienation of the property of the burgh, on the passing

tinued.)

son of B wished to continue to operate on the credit, and the letter, framed by the bank, was signed by him, and by two out of the surviving co-obligants, and was addressed and delivered to the bank on the request of the bank, that the credit of £1000 in name of B, on the bonds, may be continued thereon, in name of his son, &c., in the extent of our said bonds, which shall continue in full force for the sums, &c. due from him, in like manner with any sums, &c. due under the terms of these bonds:” the son was allowed by the bank to continue on the credit for several years, after which he failed, the whole was drawn out:—Held that the two surviving co-obligants who signed the letter were jointly and severally liable to the bank, for the whole sum of the cash-credit, although they alleged that they had only signed the letter, but that their letter imported nothing more than a continuance of the credit under the bonds; that under the bonds they had had a third party against whom, if he had signed the letter, they would have had a claim; and that the bank were not justified in giving credit to the son on the strength of the letter, unless it was first signed by all the surviving co-obligants on the bonds. Blair, July 1, 1836, p. 1068.

cases in which a guarantee to a malster for payment “of any quantity of malt may be furnished by you to the L. Distillery Company to the value of £100, 6s. 8d.,” was held not to be continuous, but to cover only one year. Baird, Nov. 21, 1835, p. 41.

A probative letter of guarantee is validated by homologation and ratification.

Cases in which held that a cautioner was liable (and had a right of reimbursement) for the difference in amount between two inventories of goods, which had been adopted by him as indicating the quantity of goods at the beginning, and again at the end, of the intromissions. A cautionary letter was held to apply. Taylor, June 10, 1836, p. 1068.

2.—*Title to Pursue*, 2.—*Process*, VI. 1.—*Bill of Exchange*, 5. 1.—*Bankruptcy*, 7.—*Interest*, 2.

Court “found a pursuer entitled to the benefit of the cessio, on a disposition omnium bonorum, and becoming bound to the pursuer on a disposition to make payment to him for the creditors of £100 per annum.”—Held competent for the pursuer, before extract (on the allegation of a change of circumstances as made it impossible for him to comply with the above condition of paying £100 per annum), to present a petition to the Court to resume consideration of his case, and to find him entitled to the benefit of the cessio, on assigning a smaller sum.

Cases in which a pursuer was found entitled to the cessio (on the part of parties) on assigning £70 per annum to his creditors. Blair, Jan. 21, 1836, p. 314.

Creditors are at issue as to the proper person to be named trustee in a disposition omnium bonorum in a process of cessio, the Court remit the matter to the sheriff of the county where the bankrupt resided to name the trustee. Blair, Jan. 23, 1836, p. 339.

Cases in which, where the pursuer of a cessio was said to possess a right in a subject, exempt from the diligence of creditors, it was arranged, that the disposition omnium bonorum should neither specially reserve, nor specially reserve, that subject. Hill, Feb. 3, 1836, p. 401.

Cases in which, in a process of cessio, conveyed his whole property to two trustees, who, for more than twelve years never took up or acted on the disposition, but the trustees having, after the date of the conveyance, used arrestments in the hands of the truster’s debtor—held, in a competition with a third party, that the arrestments used in the hands of the same debtor, both

CAUTIONER (Continued.)

2. A party became cautioner for a factor loco tutoris, and died some years before the conclusion of the factor's management, leaving children in pupilary, and naming tutors, who on his death appointed one of their number to act for them; the factor had given up no inventory, and failed to render his accounts—Held, in an action raised after his death for a balance due on the factory accounts, against the cautioner's representatives,

(1.) That the cautioner's surviving child, in so far as lucratus by his father's succession, was liable for the balance due at his death, and that the tutor, who had intromitted for behoof of the children, was subsidarie liable.

(2.) In the account of charge and discharge of the factor's intromissions, in which termly payments were received by him, and termly disbursements made for specific purposes, a prior arrear not extinguished by payments for these specific purposes subsequently made.

(3.) (*Note.*) A clerical mistake in an interlocutor, which has been signed by the presiding judge, may be corrected on a petition being presented, but not on a motion at the bar.

(4.) Expenses not having been moved for, when judgment on the merits was pronounced, the Court refused, as incompetent, a petition subsequently presented, to have the point of expenses disposed of. Kerr, Dec. 17, 1835, p. 180.

3.—(1.) Circumstances which held not sufficient to infer that a letter of guarantee was granted in reliance on an offer of security made more than three months before, and with reference to a different transaction.

(2.) Question, whether at common law the keeper of a bonded warehouse has a lien over goods deposited, for payment of an extrinsic debt? Reid, Jan. 16, 1836, p. 223.

4. A party guaranteed to a bank payment of the balance of a bill that might remain after "their ranking upon the estates" of the acceptors, two in number—that of the one being at the time sequestrated under the bankrupt statute, and the effects of the other being under sequestration at the instance of his landlord for rent. The bank neither claimed nor took any steps as to the latter, who, after some years, died without leaving any funds, but who had, in the mean while, paid a composition of 5s. in the pound to certain of his creditors—Held, that by the neglect of the bank the cautioner was totally liberated, and that any enquiry as to what might have been recovered by the bank was irrelevant and inadmissible. Drummond, Feb. 1836, p. 437.

5.—(1.) Circumstances which held insufficient to relieve the cautioner in certain confirmations of his liability for the intromissions of the executors confirmed.

(2.) The septennial limitation found not to apply to an obligation as cautioner in a confirmation.

(3.) Terms of a summons according to which, held, that interest on certain sums found due could be charged only upon such portions of those sums as were principal sums at the date of the action. Gallie, March 4, 1836, p. 647.

6. Circumstances in which held, that, although certain parties confirmed as next of kin to a deceased, and gave up a sum of £90 as due to him on a bank deposit receipt, and uplifted that sum as executors, yet their cautioners in the confirmation were not liable in repetition to the bank, though the money had never been due to the deceased. Brown, May 17, 1836, p. 767.

7. Two parties along with a third (B) signed a bond to a bank for a cash-credit of £1000, to be kept in name of B; the two parties died, and their representatives, along with B, and a fourth co-obligant, signed a bond of corroboration; B died, at which time a sum of £695 was at his debit in the cash

med).

ling in Glasgow, the defence of no process sustained, although
d brother, who were also defenders and regularly cited, had
form the pursuer where he was to be found. Robertson, June
1850.

e, in executing a citation of a complaint under the Small Debt
the copy-citation that the defender was to answer "at the in-
above designed Alexander Brodie:" the complainer's name was
Thomson, and the copy of the complaint, to which the copy-cita-
mended, correctly set forth the name and designation of Thomson,
or: a regular and correct execution of citation of the defender
prehended, was returned: decree passed in absence, and was
ncarceration:—Held, in the circumstances, that both Thomson
table were entitled to be assoilzied from an action of reduction
which was founded on the irregularity of the citation. Brodie,
6, p. 983.

Entail, 5.—Sheriff's Small Debt Act.

truction of the settlements of a deceased party, that substitute
il taking under those settlements were, in their order of succes-
ly liable to pay the provisions of certain parties beneficially inte-
t; but all questions as to the effect and application of this find-
to any individual heir-substitute, reserved. Kerr, Feb. 9, 1836,

*iferent—Right in Security, 2.—Conditional Institution—Mar-
ict—Testament—Trust—Entail—Husband and Wife, 3, 4.—*

ee Cessio, 8.—Church.

e Heir and Executor.

ee Agent and Client, 2.

F POLICE. See Public Officer, 1.

was led, and the term was circumduced in a process of divi-
ionty, and the clerk to the process drew up a prepared state, in
1, under the instructions of one of the parties to the process—
was entitled to decree for his account, against all the parties to
conjunctly and severally, reserving to them their relief, inter se;
was alleged by some of the parties, that, in the special circum-
ould appear that no part of such expense should be ultimately
. Brodie, July 7, 1836, p. 1097.

lied to have his tenant's effects sequestrated for payment of the
ne warrant to sequesterate was served, the tenant died; the effects
sold, the sheriff made an order for payment of the proceeds to the
vious to which, however, the medical attendant of the deceased
claim for the deathbed charges; the sheriff, without recalling the
red the surgeon's claim to the landlord's—held in an advoca-

the surgeon's claim for the deathbed charges was preferable to
s under his hypothec.

in such a question the duration of the period of deathbed was not
e sixty days before death.

the circumstance of the landlord having raised sequestration be-
nt's death was of no consequence as in a question with the medi-
t.

; the decree of preference in favour of the surgeon was good,
e order for payment to the landlord had not been recalled.
Dec. 15, 1835, p. 159.

VII.—Entail, 8.

COMPENSATION. See *Lease*, 4.

CONDITIO SI SINE LIBERIS.

1. A father, in his settlement, disposed his whole heritable and moveable estate, which was considerable, to his eldest son, and the heirs of his body; whom failing, to his second, third, and youngest sons, seriatim, and the heirs of their bodies respectively; whom failing, to his own nearest heirs and assignees whomsoever: he had two daughters, and he burdened the succession of his eldest son with payment of £200 to each of the younger sons, "their heirs and assignees," and of £100 to each of his daughters; the second and third sons were each burdened, if they succeeded, with an additional sum, payable to the younger son or sons, "their heirs and assignees," and an additional sum payable to each of the daughters; the fourth son, if succeeding, was burdened with a sum payable to each of the daughters, "their heirs or assignees:" these provisions were declared real burdens upon the lands, and appointed to be engrossed in the infestments; the deed declared the provisions to younger children to be in lieu of all legitim, &c.; the eldest daughter predeceased her father, leaving issue, and those of the sons who seriatim succeeded, did not make up titles under the settlement:—Held that the conditio si sine liberis applied, and that the provisions in favour of the eldest daughter did not lapse by her predecease. *Wilkie*, July 9, 1836, p. 1121.
2. A party having settled certain provisions on his younger children, and the heirs of their bodies, leaving the residue of his succession to his eldest son (who had a family at the date of the settlement), without mention of heirs, and the eldest son having predeceased the testator by one day,—Held that the provision to him did not lapse, but transmitted to his children as conditional institutes. *Dixon*, June 10, 1836, p. 938.

CONDITIONAL INSTITUTION.

It was declared by a marriage-contract, that, in the event of there being only one child of the marriage a sum of £5000 was provided to it, and if three or more children, a sum of £10,000: the provision was payable to each child at marriage or majority, but not till after the father's death; and it was declared, "that if any child or children shall die before the said sum hereby provided to him, her, or them, shall be paid or become payable, then the sum provided to such child or children shall revert and belong to the surviving children:" there were three children born, two of whom died in infancy, and afterwards the marriage was dissolved by the death of the mother—Held, in a question between the father and the surviving child, that, from the express terms of the contract, the child was a conditional institute in the whole provision of £10,000, and was not restricted to the £5000, which would have been the provision if no other child had ever been born. *Broomfield*, Nov. 24, 1835, p. 51.

CONFIDENTIALITY. See *Agent and Client*, 9—*Process*, X. 5.

CONFIRMATION. See *Cautioner*, 5, 6.

CONSIGNATION.

Where a defender consigned a sum sued for, in a bank which was selected by both parties, to await the orders of the Court, and the pursuer ultimately obtained decree in terms of his libel, but the bankers had failed in the interim: held, in the special circumstances, that the loss, arising from the failure of the bankers, should be mutually borne by the pursuer and defender. *Scott*, Feb. 26, 1836, p. 574.

See *Lease*, 4.

CONTRACT. See *Stamp*, 2.—*Sale—Ship—Proof*, II. 1.

CO-OBLIGANT. See *Cautioner*, 1, 7.

CORPORATION.

1. Held—

(1.) That the Incorporation of Fleshers of Canongate, in virtue of a seal of cause obtained from the Lord of Regality of the Burgh of Canongate, on which possession had followed, and which had been judicially recognised, were

continued).

exclusive corporate privileges, although the Lord of Regality had authority from the Crown grants to confer such privileges.

at part of the act 1703, c. 7, permitting all persons "to sell and of flesh every day, in the towns and burghs of the kingdom," till in force, but not to extend to the slaughtering of cattle. *amongate*, Dec. 11, 1835, p. 135.

at existing record-book of the joint Corporation of Wrights and Aberdeen, a prior law of the corporation was, of date 1694, "made and approved," whereby, in presence of two of the Bailies of Aberdeen, had been statute and ordained unanimously by the whole trade, and a cooper should be chosen deacon alternately, each year, and the same order should also be observed as to the councillors; both prior to 1694, a usage in conformity with this regulation prevailed, when, by a vote of the majority, it was resolved that the rotation should no longer continue, in terms of which resolution an order was made in place;—Held, that such resolution was ultra vires of the corporation, and that the election following on it was illegal. *Gray*, 6, p. 1061.

unusual to appoint more persons than one to the office of curator bonis; the Court make such appointment in special circumstances; and where a father named trustees to administer an annuity for his deceased son, the Court, on their application, appointed "them, and the survivor of them, curator bonis" to the fatuous person. *ibid.*, 1836, p. 814.

instances in which, where a Scottish peer, resident at Paris, before the Court appointed a curator bonis to his lordship, with the result, notwithstanding the subsistence of a trust-deed previously made by the lordship for behoof of his creditors: the Court observing, that the appointment did not prejudice any question either as to the validity of the trust-deed, or the rights created by it.

usual service of the petition ordered, besides the usual intimation, and motion of the petitioners. *Sir John H. Dalrymple*, June 25, 1836, p. 1.

cases in which the Court authorized a curator bonis to accept of a composition of less than 10s. per pound, and to grant a discharge to three persons who were debtors to the lunatic, and one of whom confessedly paid the whole debt—in respect that such a measure was the most beneficial that could be adopted for the lunatic's estate, and the next of kin concurred in the application. *Dalmahoy*, July 9, 1836, p. 1.

the Court had authorized a curator bonis to sell the heritage of a lunatic for his suitable maintenance and protection, and the proceeds were reported to the Court,—authority granted to the curator bonis to put out the free balance in the purchase of a suitable annuity (£55) on secure and advantageous terms; and curator directed thereafter to report the proceedings, and what surplus remained in his hands.

It was observed, that, if the relations of the fatuous person were willing to pay an annuity than the insurance offices would do, there was no objection to their entering into the transaction, if they gave undoubted security. *Finlayson*, Jan. 16, 1836, p. 219.

Factor—Partnership, 2.—Minor.

Ades. See *Burgh*, 3.

Contests. See *Competition*.

EDITOR.

engaged in extensive cash and bill transactions, in which his

DEBTOR AND CREDITOR (Continued).

father was more or less concerned, and the father having died, and the party subsequently become bankrupt and been sequestrated; Circumstances which held not to infer any claim of debt against the father's estate, on the part of the trustee in the sequestration, on account of these transactions. *Mansel*, Dec. 10, 1835, p. 128.

See *Diligence*, 3.—*Right in Security—Trust*, 2.—*Proof*, II. 2.

DECREE IN FORO. See *Process*, IV.

DILIGENCE.

1. A party claiming a Scottish peerage, having brought a suspension of a charge, to the effect of being found entitled to exemption from personal diligence, on the ground of his being a peer of Scotland, and having voted at two elections of representative peers to the British Parliament—the Court remitted to pass the bill, but on caution only. *Earl of Stirling*, Jan. 16, 1836, p. 221.

2.—(1.) An essential part of the will in letters of inhibition being written in a marginal note, signed by the writer to the signet, but not otherwise noticed.—Circumstances in which held that the diligence was not thereby rendered inept.

(2.) Erasures which held not to be in essentialibus. *King*, Jan. 23, 1836, p. 351.

3.—(1.) Circumstances in which, where the holder of a heritable bond for £7000, admitted payment of £1788, and gave a charge for the balance to the debtor, who alleged that only £4752 was due, the Court passed a bill of suspension, in regard to that part of the balance which was in dispute; the suspender paying the £4752 to the charger, and consigning the disputed balance.

(2.) Heritable creditor ordained, at the same time, to discharge the incumbrance affecting his debtor's lands.

(3.) Where a bond restricted the rate of interest, for the first five years to four per cent—Question, whether that restriction was proved, by the transactions of the parties, to have been afterwards continued, till the creditor's death. *Stocks*, Feb. 13, 1836, p. 478.

4. After a minute by the commissioners on a sequestrated estate, ascertaining the net proceeds realized by the trustee, he made up a scheme of division, acknowledging that amount to be in his hands, and advertised the creditors of their respective dividends due out of it; he then became bankrupt, before paying the dividends, and a new trustee was appointed: held competent for the new trustee to register the bond of caution of the ex-trustee, and give a charge for the net amount contained in the minute, and relative scheme of division, in respect that the amount of the debt charged for was thereby liquidated.

A B, June 29, 1836, p. 1030.

See *Bankruptcy*, 5.—*Stamp*, 1, 4.—*Presumed Payment*, 1.

DIVORCE.

A husband raised an action of divorce, on the head of adultery, in 1833; his wife, besides denying her own guilt, inserted in her statement of facts recriminatory charges of adultery against the husband; in 1836, she raised an action of divorce on the head of adultery, after which, her husband, in his action, in which the record was closed, moved for a commission and diligence to lead a proof—Held,

(1.) That the wife was not entitled, *hoc statu*, to a proof of her recriminatory charges, in that action.

(2.) That she was not entitled to have her husband's proof delayed, until the report of her oath *de calumnia* should be returned to Court, from the place where she resided abroad; and,

(3.) After the report of her oath was returned, that, as her husband refused to close in the action at her instance, on summons and defences, it must proceed and be prepared in common form, without allowing her *hoc statu* a proof, and without delaying the proof in the action at her husband's instance;

tinued).

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actor—*Partnership*, 2.—*Minor*.

IDES. See *Burgh*, 3.

NSES. See *Competition*.

EDITOR.

engaged in extensive cash and bill transactions, in which his

ENTAIL (Continued.)

declarator of irritancy, or otherwise) whatever may be the length to which these proceedings have gone; and,

(2.) That the principle of the decision in the case of Smollett was that length. Ross, Feb. 9, 1836, p. 453.

- 5.—(1.) In an action to reduce the infeftments of an entailed estate, and to declare it liable to the debts of the heir in possession,—preliminary defence repelled, that all the heirs-substitute were not called.

(2.) Circumstances in which observed, that a defender was sufficiently designed and cited, *dummodo constet de persona*. Scottish Union Insurance Company, March 8, 1836, p. 667.

6. A party having by a holograph deed conveyed to trustees the whole heritable and moveable property “belonging to him at the time of his decease,” with directions, after payment of debts and legacies, to “pay over” the whole free residue to his son, “hereby declaring his will to be” that the truster should entail the whole amount on the heirs-male of his son, whom failing, on certain other substitute heirs; and the party having thereafter died—

(1.) Held, in a process of multiplepoinding and declarator at the instance of the trustees, that, as it was evidently the party's intention that an effectual entail should be executed, the trustees were bound, after purchasing lands, to settle them by strict entail, and to apply the fetters thereof to the son as institute, as well as to the substitute heirs.

(2.) Opinion intimated that the sum to be invested in lands was the free residue of the estate as at the date of the testator's death without any accumulations of interest. Campbell's Trustees, May 17, 1836, p. 770.

- 7.—(1.) Terms of a marriage-contract, exercising reserved powers under an entail, by which it was held, that a provision granted to younger children, and consisting of three years' rents, so far as the land was “free and unaffected, at the time, with liferents”—entitled the succeeding heir to deduct the liferent locality of the granter's widow, from the rental, before computing the children's provisions.

(2.) Formula for computing the amount provided respectively to a widow and children, where, on the one hand, the widow's provision is first to be deducted, before the free rental is ascertained, as the basis for computing the children's provision; and, on the other hand, the amount of the widow's provision is to be a proportional part of the rental, after deducting the interest of the children's provision.

(3.) Succeeding heir not entitled, in the question of the children's provision, to deduct a sum, allotted by him, under 10 Geo. III. c. 51, to pay the burdens for improvement-expenditure imposed by his predecessor under said statute. McDonald, May 18, 1836, p. 785.

8. An heir in possession under a strict entail conveyed the estate to himself in liferent and to his eldest son in fee, by a disposition bearing express reference to the original entail, to which it was substantially conform, though varying in certain points, particularly in so far as the fetters were not applied to the institute nominatim; the disposition was not recorded in the register of tailzies—Held, after the decease of the granter, that this disposition was not to be considered as a new entail of the lands, requiring to have been registered in the register of tailzies, and to have the fetters laid on the disponent nominatim, but was merely an instrument for propelling the tailzied fee to the next heir,—and therefore, that an adjudication for a debt of the granter was ineffectual to attach the estate. Turnbull, June 29, 1836, p. 1031.

9. An heir of entail made improvement-expenditure on his estate, prior to Martinmas, 1816, in terms of the statute 10 Geo. III. c. 51, to such extent that three-fourths of the amount, being £2459, exhausted the whole sum with which the next heir succeeding could be charged; the heir-disburser took

d.)

amount, on 11th February, 1818, specifying that it arose from prior to Martinmas, 1816; he had previously assigned the debt that expenditure, with the whole vouchers thereof, for a full wards made large expenditure, and took decree for three-fourths, being £7115, specifying that the expenditure was subsequent 1816, and he assigned this debt and decree to another party in 1800; after his death, the second assignee made notarial intimation heir succeeding, and claimed a preference on the rents, as it completed right—Held,

the two assignments related to different subjects, and that it was between them, whether intimation was made or not.

the debt against the next heir was created, so soon as the expenditure was made in terms of the statute, and might be effectually assigned to the disburser, before taking decree of declarator of its amount;

as the expenditure and relative debt, contained in the first assignment, related to the whole debt chargeable against the next heir, the subsequent assignment was nugatory as a means of rearing up any debt against the next heir, and the assignee thereto could not compete with the first assignee, if an heir-disburser assigns the same sum of expenditure, and relative debt, to two several assignees, what are the criteria, as between such assignees? *Cochrane*, June 30, 1836,

Executor—Clause.

Diligence, 2.

LEG. See *Corporation*, 1.

was liferented in the whole of her husband's means and estate, for to test on £2000 thereof if she did not re-marry, but was an annuity of £100 in the event of re-marriage—Held that she was a general disponent to the effect of being preferred to the office of competition with the next of kin, who were to have the fee in the event of her surviving her, failing which event, it was destined away to third son—*Gown*, Dec. 4, 1835, p. 105.

Pursue, 1.—*Cautioner*, 5, 6.

TITLE-DEEDS. See *Right in Security*, 1.

party was found entitled to expenses, and he claimed £72, and a sum was taxed off, the Court subjected him in one-half of the auditor's report, Nov. 18, 1835, p. 24.

he brought an action of damages, laid at £5000, for verbal and real injury; the defender made a tender of £50, and previous expenses, which was refused; a trial ensued, and the jury found for the pursuer, damages £500—Held that the defender was entitled to expenses subsequent to the tender. *Anderson*, Nov. 24, 1835, p. 54.

he was bound by his lease of a shop to leave it in a proper state of repair; he took down the shelving, and removed a great part of his stock; the landlord having complained of this, and demanded compensation, the tenant made a specific offer either to replace the shelving or to pay its estimated value; the landlord did not accept this offer, and brought an action against him, concluding for damages laid at £500, on the premises having been deserted before the letting term, and the stock taken down; the tenant repeated judicially his tender, which was refused; and a trial having taken place, the jury found for the pursuer, damages at £25, as for the value of the shelving; the pursuer and defender then made counter motions for expenses—Held, that the pursuer was entitled to expenses. *Ewing*, Nov. 26, 1835, p. 69.

ENTAIL (Continued.)

- declarator of irritancy, or otherwise) whatever may be the length : which these proceedings have gone ; and,
- (2.) That the principle of the decision in the case of Smollett went that length. Ross, Feb. 9, 1836, p. 453.
- 5.—(1.) In an action to reduce the infeftments of an entailed estate, and to declare it liable to the debts of the heir in possession,—preliminary defence repelled, that all the heirs-substitute were not called.
- (2.) Circumstances in which observed, that a defender was sufficiently designed and cited, *dummodo constet de persona*. Scottish Union Insurance Company, March 8, 1836, p. 667.
6. A party having by a holograph deed conveyed to trustees the whole heritable and moveable property “belonging to him at the time of his decease,” with directions, after payment of debts and legacies, to “pay over” the whole free residue to his son, “hereby declaring his will to be” that the truster should entail the whole amount on the heirs-male of his son, whom failing, on certain other substitute heirs ; and the party having thereafter died—
- (1.) Held, in a process of multiplepoinding and declarator at the instance of the trustees, that, as it was evidently the party’s intention that an effectual entail should be executed, the trustees were bound, after purchasing lands, to settle them by strict entail, and to apply the fetters thereof to the son as institute, as well as to the substitute heirs.
- (2.) Opinion intimated that the sum to be invested in lands was the free residue of the estate as at the date of the testator’s death without any accumulations of interest. Campbell’s Trustees, May 17, 1836, p. 770.
- 7.—(1.) Terms of a marriage-contract, exercising reserved powers under an entail, by which it was held, that a provision granted to younger children, and consisting of three years’ rents, so far as the land was “free and unaffected, at the time, with liferents”—entitled the succeeding heir to deduct the liferent locality of the granter’s widow, from the rental, before computing the children’s provisions.
- (2.) Formula for computing the amount provided respectively to a widow and children, where, on the one hand, the widow’s provision is first to be deducted, before the free rental is ascertained, as the basis for computing the children’s provision ; and, on the other hand, the amount of the widow’s provision is to be a proportional part of the rental, after deducting the interest of the children’s provision.
- (3.) Succeeding heir not entitled, in the question of the children’s provision, to deduct a sum, allotted by him, under 10 Geo. III. c. 51, to pay the burdens for improvement-expenditure imposed by his predecessor under said statute. McDonald, May 18, 1836, p. 785.
8. An heir in possession under a strict entail conveyed the estate to himself in liferent and to his eldest son in fee, by a disposition bearing express reference to the original entail, to which it was substantially conform, though varying in certain points, particularly in so far as the fetters were not applied to the institute nominatim ; the disposition was not recorded in the register of tailzies—Held, after the decease of the granter, that this disposition was not to be considered as a new entail of the lands, requiring to have been registered in the register of tailzies, and to have the fetters laid on the disposee nominatim, but was merely an instrument for propelling the tailzied fee to the next heir,—and therefore, that an adjudication for a debt of the granter was ineffectual to attach the estate. Turnbull, June 29, 1836, p. 1031.
9. An heir of entail made improvement-expenditure on his estate, prior to Martinmas, 1816, in terms of the statute 10 Geo. III. c. 51, to such extent that three-fourths of the amount, being £2459, exhausted the whole sum with which the next heir succeeding could be charged ; the heir-disburser took

)
 mount, on 11th February, 1818, specifying that it arose from
 r to Martinmas, 1816; he had previously assigned the debt
 t expenditure, with the whole vouchers thereof, for a full
 irds made large expenditure, and took decree for three-fourths
 eing £7115, specifying that the expenditure was subsequent
 316, and he assigned this debt and decree to another party in
 0; after his death, the second assignee made notarial intima-
 t heir succeeding, and claimed a preference on the rents, as
 t completed right—Held,
 he two assignations related to different subjects, and that it was
 between them, whether intimation was made or not.
 he debt against the next heir was created, so soon as the ex-
 made in terms of the statute, and might be effectually assigned
 disburser, before taking decree of declarator of its amount;

s the expenditure and relative debt, contained in the first assign-
 ed the whole debt chargeable against the next heir, the subse-
 iture was nugatory as a means of rearing up any debt against
 and the assignee thereto could not compete with the first assign-
 n, if an heir-disburser assigns the same sum of expenditure, and
 ative debt, to two several assignees, what are the criteria
 , as between such assignees? Cochrane, June 30, 1836,

Executor—Clause.

Diligence, 2.

LEGE. See *Corporation, 1.*

was liferented in the whole of her husband's means and estate,
 r to test on £2000 thereof if she did not re-marry, but was
 an annuity of £100 in the event of re-marriage—Held that she
 eneral disponee to the effect of being preferred to the office of
 ompetition with the next of kin, who were to have the fee in the
 surviving her, failing which event, it was destined away to third
 Gown, Dec. 4, 1835, p. 105.

rsue, 1.—Cautioner, 5, 6.

TITLE-DEEDS. See *Right in Security, 1.*

rtty was found entitled to expenses, and he claimed £72, and a
 was taxed off, the Court subjected him in one-half of the auditor's
 on, Nov. 18, 1835, p. 24.

ed an action of damages, laid at £5000, for verbal and real in-
 fender made a tender of £50, and previous expenses, which was
 ury trial ensued, and the jury found for the pursuer, damages
 —Held that the defender was entitled to expenses subsequent to
 e tender. Anderson, Nov. 24, 1835, p. 54.

s bound by his lease of a shop to leave it in a proper state of
 ok down the shelving, and removed a great part of his stock be-
 n; the landlord having complained of this, and demanded com-
 e tenant made a specific offer either to replace the shelving or
 as its estimated value; the landlord did not accept this offer,
 n action against him, concluding for damages laid at £500, on
 e premises having been deserted before the letting term, and the
 on down; the tenant repeated judicially his tender, which was
 ; and a trial having taken place, the jury found for the pursuer,
 ages at £25, as for the value of the shelving; the pursuer and
 ing then made counter motions for expenses—Held, that the
 entitled to expenses. Ewing, Nov. 26, 1835, p. 69.

EXPENSES (Continued.)

4. Though the Court was unanimously of opinion that an interlocutor of the Lord Ordinary, in preparation of the cause for the Jury Court, should not have been reclaimed against, their Lordships refused to subject the reclaimer in any expenses, *hoc statu*, there being a question of fraud involved in the discussion still remaining. Burnet, Nov. 27, 1835, p. 74.
5. Campbell, Dec. 15, 1835, p. 154.
6. Where a debtor, by improperly alleging himself to be a creditor, and making demands, as such, against his creditor, forced the creditor to raise an action against him, and occasioned unnecessary expense by improper pleading, the Court subjected him in the pursuer's expenses, notwithstanding that the summons contained an extravagant and groundless conclusion for damages, of which their Lordships disapproved. Fairbairn, Dec. 17, 1835, p. 178.
7. In taxing an account, the expense of counsel attending an examination of havers previous to a trial, not allowed except in particular cases. Fairly, Feb. 11, 1836, p. 470.
8. Where co-defenders were subjected in joint and several liability for £2810, with the exception of one, whose liability was restricted to £500 of that sum—Held (in the circumstances) that his liability for the pursuer's expenses should be restricted to such proportion of the whole thereof as the sum of £500 bore to the sum of £2810. Blaine, Jan. 28, 1836, p. 361.
9. Where a question arises out of the construction of a trust-settlement, and litigation is made necessary in consequence of its not being clearly expressed, the Court award the expenses of the competing parties out of the trust-fund. Rigg, Feb. 12, 1836, p. 472.
10. A party against whom a claim of £66 odds was made, tendered £55, 7s. 4½d. as the amount really due: this was refused, and an action raised for the £66: ultimately the sum due was found to be £55, 14s. 9d.: the Court subjected the pursuer in expenses. Bruce, Feb. 12, 1836, p. 476.
11. In taxing the account of expenses in a jury case tried at the sittings in Edinburgh, a charge for an additional precognition by the Edinburgh agent disallowed, a previous precognition of the same witnesses having been taken by the country agent. Patullo, Feb. 12, 1836, p. 477.
12. Where a jury, at returning a verdict in favour of a defender, gave a recommendation that the pursuer should not be subjected in expenses, the Court, at modifying the amount of expenses awarded against him, intimated that they kept the jury's recommendation in view, in so doing. Dick, Feb. 13, 1836, p. 478.
13. Where tradesmen, before raising action for their account, offered to accept a smaller sum than that for which they ultimately obtained decree—Held entitled to the expenses of process, notwithstanding that the litigation had been conducted by them with unusual pertinacity. Blaikie, Feb. 5, 1836, p. 429.
14. Held by a majority composed of seven judges—
 - (1.) That where a judgment of the House of Lords exhausts the whole merits of a cause, and contains no remit or special finding as to expenses, it is incompetent for this Court to dispose of the expenses prior to appeal, although the judgment of the House of Lords contains a general remit "to proceed in the cause as shall be consistent with this judgment."
 - (2.) That where a judgment of the House of Lords does not exhaust the whole merits, and the cause returns to this Court for farther discussion on the merits, after applying the judgment, it is competent for this Court, after such discussion, to dispose of the whole expenses incurred in this Court whether before or after appeal; though no special remit or finding may have been made by the House of Lords on the subject of expenses.
 - (3.) Circumstances in which, held incompetent to dispose of the question of expenses prior to appeal. Stewart, March 11, 1836, p. 602.
15. *Circumstances in which pursuers were subjected in the expenses of an*

d.)

ay had raised prematurely, and carried on nimiously, after the ction was removed by the defenders timefully granting the luded for. Ralston, May 19, 1836, p. 792.

20, 1836, p. 806.

21, 1836, p. 315.

of examining a witness by commission, whose deposition was essary at the trial, in consequence of admissions made two allowed to a gaining party,—the Court observing, that before mination in question, the agent should have applied to the to ascertain if the admissions would be made. Swayne, June 1.

the Court considered that modified expenses, generally, should a pursuer, their Lordships, in the circumstances, modified the ano, by awarding them up to a certain stage in the cause; this ld equivalent to a general award of modified expenses, and be f modifying, at the same time with deciding the cause itself. 24, 1836, p. 828.

ition, decree in absence passed against the respondent, who ght a suspension and reduction of the decree, which processes ; after the production had been satisfied, the defender moved the expenses in the action in which he had obtained decree— this stage of the proceedings, the motion for expenses was in- Dutch, Nov. 26, 1835, p. 68.

arded by a judgment taken to appeal were paid under a war- execution, a bond of caution to repeat in the event of a rever- ted as usual; and the judgment having been reversed, and the , but with express powers to give orders as to all expenses pre- ed—held, that the appellants were not entitled, de plano, to get f caution that they might operate repetition, but the question s issue of the cause. Oswald, Nov. 28, 1835, p. 82.

which the Court had pronounced specially as to certain points, nsideration of any other points in the cause, and remitting the Lord Ordinary—Held, that it was not incompetent for the r, the remit having taken place, to award to one of the parties incurred in the previous litigation. Murray, May 14, 1836,

nd Vassal, 3, (2); 6, (3.)—*Title to Pursue*, 2; 4, 5, 8.—*Cau- rovice*, 1.—*Arbitration*, 4.—*Mandatory*, 2.—*Lease*, 6.—*Agent* —*Inhibition*, 3.—*Process*, III., 8, 8; IX. 2; X. 19.

FORIS. See *Cautioner*, 2, (4.)—*Judicial Factor*.

T.

marriage-contract which held to import that there was not a fee l, but a mere liferent. Young, Dec. 2, 1835, p. 85.

duced, in respect that it was passed under a precept of clare g from a superior who merely held a liferent right by constitu- son, Feb. 19, 1836, p. 540.

See *Property—Superior and Vassal—Process*, X. 21.

te Sir Alexander Don, while detained in France during the war, drafts, or bills of exchange, drawn by Fagan, a French mer- of Lippmann, domiciled in France. The drafts were ad- r Alexander, at the Hotel Richelieu in Paris, and bore no of payment. In 1810, before they fell due, Sir Alexander re- ain, the country of his domicile, where he remained until his . He left no effects in France. After the drafts fell due, and nthe after Sir Alexander had returned home, Lippmann adopted t the French courts against both Fagan and Sir Alexander,

Special Service, or Service as Heir of Provision.

Procuring the brieve executed, and intimation to agent, .	L.0	3	6
Attending in Court at service—framing the minutes, and recording,—			
First sheet,	0	6	0
Each other,	0	2	0
Framing the retour,—			
First sheet,	0	15	0
Each other sheet,	0	10	0
Engrossing the retour,—each sheet,	0	2	0
Extracts from the record of service, when required,—each sheet,	0	2	0

Infestments.

Drawing instrument of sasine on Chancery precepts,—			
First sheet, 250 words per sheet,	L.0	15	0
Each subsequent sheet,	0	10	0
Extending the same,—			
First sheet, 250 words per sheet,	0	3	0
Each subsequent sheet,	0	2	0
Besides the stamped vellum or parchment.			

And that the clerk receive for taking infestment thereon, when the rent of the property does not exceed L.100 per annum, .	1	1	0
L.100, and not exceeding L.200,	2	2	0
L.200, and not exceeding L.500,	3	3	0
L.500, and not exceeding L.1000,	4	4	0
And for every additional L.1000,	1	1	0
But not to exceed in all,	10	10	0
And if the distance exceed three miles, each additional mile, until it exceeds ten miles,	0	5	0
But, under this charge, not to receive more per day than	2	2	0
Besides travelling charges.			
Extracts of minutes of procedure of freeholder meetings, when required,—per sheet,	0	2	6
Each person taking the oaths to Government, when the oaths are not administered at a county meeting,	0	2	0
Certificate thereof, when required,	0	3	0
Qualifying a peer to vote at an election,	2	2	0
Extract of the fiars, each year,	0	1	6
Receiving each precept from the Court of Session, making up list of jury, and instructing officer to summon, and making return,	0	5	0
Receiving countermand of trial, and instructing officer,	0	5	0

LIFE (Continued.)

an English executor, was left to Mrs Trapaud; it was not by way, nor "reduced into possession" by Governor Trapaud, or question arose between the executor of the governor, and the Mrs Trapaud, regarding their respective rights to the legacy: it is the Opinion of English counsel, that, though the legacy had been left to Trapaud, during the marriage, yet, as the governor had not reduced it into possession," no right had vested in him by the law of England. The legacy would be held to have become the absolute property of the wife, and of her representatives—Held, that Governor Trapaud had lost his English domicile, and was domiciled in France.

though the law of England might be referred to, to determine the character of a fund, there situated, was heritable or moveable, the law of Scotland alone must determine whether the *jus mariti*, under which was contracted, and constantly subsisted, in Scotland, made such a moveable fund which had vested in the wife, during the marriage, though such fund was locally situated abroad.

Accordingly, the legacy fell under the governor's *jus mariti* and went to his executor; and,

the fund had, under a previous arrangement of parties, been paid to the wife of a person in England, under a power of attorney granted by the Governor to Mrs Trapaud,—order pronounced, decreeing her "to concur with the governor's executor, in enabling him to uplift and receive the said legacy for that purpose to grant a power of attorney." Clark, Feb. 16,

was executed by a widow, accepting of special provisions in her husband's will in lieu of *jus relictæ*, and ratifying the settlement, and renouncing her *jus relictæ*, though such deed was only executed after her husband's death, has the same effect in causing a bi-partite division of his succession between his wife and his children, as if it had been executed during the husband's life.

Question whether such provisions were, in a certain settlement, laid down as a condition of accepting that provision. Andrews, March 2,

Question whether a settlement was so expressed as to make one of the parties who was named executor and universal legatee, give up all claim to the residue of the estate on a condition of accepting that provision. Andrews, March 2,

by, by a postnuptial contract, provided to his wife, in the event of his death, two several sums of £200 each, the second to be paid to her out of the money conveyed by the contract by her to her husband; she received the first sum for eleven years; and, while regularly drawing the interest on the first sum, made no claim for the second; shortly after her death, the trustees of her husband's trustees and legatees, her representatives, on a sum of £210, agreed to grant a discharge of all claims at their death, and held that they were notwithstanding entitled to payment in addition of the second sum of £200, but only with bank interest.

which was held to be demonstrative and not taxative. Moon's case, 28, 1836, p. 1026.

Exchange, 4.—*Arrestment*, 3.—*Trust*, 9.—*Divorce*—*Executor*—*Interest*, 1.—*Interest*, 5.—*Marriage*.

DEED (See *Lease*, 6.—*Competition*.

DEBT (See *Right in Security*, 1.

AGENT'S. See *Process*, X. 16.

OF REVOCATION.

made a general disposition, conveying to his only son the whole of his moveable estate, presently belonging to him, or that should be at his death, with a clause of absolute warrandice: the convey-

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3

INDEX OF MATTERS

IN

VOLUME XIV.

of accounting, in which the Lord Ordinary approved of an account, and repelled the defender's objections thereto, in respect whether expressly repelled by, or fell within the principle of a preceptor, to which the Court had adhered. To this judgment the Lord Ordinary adhered, and awarded additional expenses. *Home, or Paul*, May 18,

a cash-credit with a bank, and took receipts from the bank for the amount advanced by him, but gave back these receipts at the annual settlement of accounts, which took place on an examination of vouchers and of the cash, after which a balance was struck and signed by the bank and the cash was carried to a new account: This annual settlement was continued for seven successive years, when the party paid up the whole balance and retired his cash-credit bond: Party held entitled, in defence of a subsequent action by the bank, to object to go into a question of account in respect of an error calculi, which, the bank alleged, appeared in the books prior to all these settlements, and consisting of an entry in his credit, without any such sum having ever been paid by him. *Fullerton*, July 18, 1836, p. 780.

An action of accounting, brought by a judicial factor on the estates of a deceased partner, against the trustees of the last surviving partner, for their intromission with the company funds, in violation of a decree pronounced against the trustees, to pay to the judicial factor the sum of 8, 17s. 7d., being the balance of company funds which they admitted to have received, without applying to company purposes; but this on the ground that the trustees, and the company debtors who had made payments to the factor, could be duly credited for the amount, and secured against second intromission. *Fullerton*, July 8, 1836, p. 1115.

4, 5, 6.—*Interest—Minor—Cautioner*, 2.—*Partnership*, 1.
See *Adjudication*, 1.

See *Bankruptcy*, 4.—*Property*, 4.

A person incarcerated by one party and arrested in prison by another, presented a petition for aliment under the Act of Grace, which he intimated to the court in whose favour he executed a disposition omnium bonorum, on which the writ of detainer was withdrawn: thereupon he presented an incidental petition for aliment.

JUDICIAL FACTOR (Continued.)

- (2.) Petition granted without previous remit to the Lord Ordinary. Fergusson, Jan. 14, 1836, p. 213.
3. Circumstances in which the Court appointed a judicial factor upon an estate contained in a trust-settlement, the trustees named by the deceased being equally divided as to the administration of the estate, and the trustee who was named factor by the deceased, consenting to the judicial appointment. Adie, Dec. 19, 1835, p. 185.
 4. Circumstances in which powers granted to a factor loco tutoris to borrow money and grant heritable security over the estate of a pupil. Somerville's Factor, Feb. 6, 1836, p. 451.
 5. Circumstances in which the Court granted authority to a judicial factor, to accept the renunciation of a lease which had three years to run, and to relet the farm after due advertisement. Milne, Feb. 25, 1836, p. 561.
 6. A party was appointed curator bonis to a lunatic, who soon after died, leaving a deed of settlement executed at a former period, and in liege pousie, whereby the same party was nominated trustee, and he thereafter confirmed and managed the estate—Having applied to be discharged from his office of curator, the Court, on the consent of the lunatic's nearest of kin in Scotland being obtained thereto, granted the discharge, although there was no concurrence from certain of the nearest of kin supposed to be resident in America. Laird, March 5, 1836, p. 653.
 7. Circumstances in which the Court granted authority to a judicial factor to accept renunciations of leases, and to relet the lands. Milne, March 10, 1836, p. 681.
 8. Held incompetent to sequester lands, there being no competition among the heritable creditors. Tweedie, July 2, 1836, p. 1078.
 9. Circumstances in which the Court, at the instance of the heritable creditors on the entailed estate of a party erroneously supposed to have been drowned, and to whom titles as heir had been made up by his son, granted sequestration of the unuplifted rents, past, current, and future, of his estates, and appointed a judicial factor thereon, reserving all questions as to rights of preference. Forbes, July 5, 1836, p. 1093.

See *Process*, VIII. 2.—*Burgh*, 4.—*Trust*, 10.—*Curator Bonis*—*Factor Loco Tutoris*.

JUDICIAL REFERENCE.

1. Circumstances in which, after an award by a judicial referee, the Court refused to interpose their authority, but remitted to the referee to hear parties farther. Baxter, Feb. 20, 1836, p. 549.
2. After an award in a judicial reference, remit to the referee to hear parties farther refused, although the referee, on being examined, admitted that he was not himself acquainted with the practice of merchants in a certain branch of trade out of which one of the claims referred to in his award arose, and that, having previously expressed his willingness to receive evidence on that point, he ultimately decided without such evidence. Low, June 2, 1836, p. 869.

See *Arbitration*.

JUDICIAL ADMISSION. See *Proof*, III.

JURISDICTION.

1. A workman having quitted the service of his master in England, with whom he was regularly bound, and thereafter come to Scotland and entered into a new contract of service—procedure in reference to his apprehension which held to be criminal and not reviewable in the Court of Session. Asbury, Feb. 13, 1836, p. 481.
2. Circumstances in which the Court exercised jurisdiction as to the right to a fund, which was locally situated in England, and had been the subject of certain procedure in the English courts. Clarke, Feb. 16, 1836, p. 488.

(Continued.)

withstanding the peculiar phraseology of 6 Geo. IV. c. 120, § 24, the judges of one Division require the Opinions of the judges of Division, and of the permanent Ordinaries, on questions in writing, not to be pronounced is not to be according to the opinion of the the judges so consulted, where such opinion is opposed to that of y of all the judges taken together. Stewart, March 11, 1836,

y—*Burgh*, 2.—*Expenses*, 14.—*Mandatory—Process*, X. 24.

See *Process*, III.

EL RELICTÆ. See *Husband and Wife*, 2. 3.

o TENANT. See *Lease—Competition*.

a holograph lease, which, although of an unusually imperfect and character, was held to contain all the essentials of a lease, and to be give a real right, if followed with possession. Burnett, Nov. 27,

of lease for nineteen years was executed in 1825; it contemplated rent extending of a fuller minute or agreement, and it also con- certain rise of rent in 1831, and a new mode of computing that 28 a fuller minute was extended, specifying, inter alia, the precise mputing the increase of rent in 1831; the tenant signed this mi- ok a copy of it; he made no objection to its terms till 1831, when that it materially varied from the minute 1825, and had been un- impetrated from him; but his averments were held only to his, "that he had not sufficiently adverted to the precise terms of nt;"—Held, that the minute 1828 was binding, and irreducible, inter alia, that the tenant had signed it, and took a copy of it as possession, and possessed under it for several years without ob- arruthers, Feb. 11, 1836, p. 464.

of lease being unstamped, the Court refused to allow it to be on. M'Niven, March 10, 1836, p. 685.

ual actions were depending between a landlord and tenant, three rent fell into arrear: the Court ordained the tenant to consign all e mean time, although he alleged that the action of damages at his s ready to be sent to the jury roll. Carruthers, March 11, 1836,

agricultural lease for nineteen years contained a stipulation that in f the bankruptcy of the tenant, he should have no power to con- possession directly or indirectly for behoof of his creditors; the ag become bankrupt in the third year of the lease, and his credi- given up the lease at the first term thereafter, though the landlord is that they should continue the possession till the expiry of the he landlord having let the farm of new at a reduced rent;—Held ulation in question was in favour of the landlord, who might avail t or not at his option, and that he had a claim of damages against or the loss arising on the years to run of the original lease.

dence which held insufficient to prove that the landlord had made to act upon the above stipulation, as importing a termination of the tenant's bankruptcy.

: Lord Ordinary, in remitting a cause for trial by Jury on a cer- having in his interlocutor expressly found that the evidence in egard to that point, founded on by one of the parties, was not er se to prove his case;—Held, that such finding was not liable to Kinloch, June 7, 1836, p. 905.

are a landlord uses sequestration, in security of current rents, and are punctually paid when the terms of payment respectively arrive

LEASE (Continued.)

—held, that the expense of the sequestration must fall on the landlord, although he alleged that the tenant was in arrear for part of the rent of the previous year, and the lease was expiring.

(2.) A pottery, a mill, and a farm were included in one lease, and a sequestration was used in security of the current rents of them all; the sequestration included certain horses, and also certain stacks of oats; the horses were sequestrated for the whole rent indiscriminately, payable for the three subjects: held, that it was no breach of sequestration to consume two of the stacks of oats in feeding the horses, though it was alleged that the horses were employed for the pottery and not for the farm. *Gordon*, June 11, 1836, p. 954.

7. A father and his three sons took a lease of certain subjects in Glasgow for the purpose of carrying on a dye-work, which it was declared should be forfeited "in the event of the bankruptcy by sequestration of the party or parties carrying on the work;" the parties to the lease also agreeing to refer all differences arising out of it to a certain arbiter named: one of the sons subsequently quitted the concern, without withdrawing his name from the lease, and thereafter the parties carrying on the dye-work failed and were sequestrated, while the other continued solvent, and entered into partnership with the arbiter named in the lease: the landlord having died, his trustees, who were in right of the subjects, brought an action against the four lessees, to have the forfeiture of the lease declared, and for a removing, some of the trustees having taken infetment only after the summons was called in Court, —Held,

(1.) That the arbiter named in the lease having subsequently become the partner in business of one of the defenders, who was also cautioner for the composition of the others, was disqualified from acting on account of his interest.

(2.) That the action being a declarator, the trustees were in titulo to insist in it, though they had not been infet till after it was in Court; and that, being infet, they were entitled to obtain a decree of removing, as consequent on the declarator.

(3.) That, in consequence of the bankruptcy by sequestration of the parties carrying on the dye-work, the solvent party having retired therefrom, the lease was ipso facto forfeited, in terms of the clause to that effect. *Tennent*, June 16, 1836, p. 976.

See *Inhibition*, 2.—*Judicial Factor*, 5, 7.—*Right in Security*, 5.—*Process*, IX.—*Competition*.

LEGACY. See *Testament*.

LEGITIM. See *Husband and Wife*, 3.—*Heir and Executor*, 2.

LIEN. See *Cautioner*, 3.—*Right in Security*, 1.

LIFERENT. See *Fee and Liferent*.

LITIGIOSITY. See *Entail*, 4.

LOCALITY (PROCESS OF). See *Teinds*.

LUNATIC. See *Curator Bonis*—*Judicial Factor*, 1.

MAGISTRATE. See *Burgh*.

MANDATARY.

1. Circumstances in which the Court found that a pursuer, who had gone to America, must sist a mandatory, although possessed of heritable property in Scotland. *Dempster*, Dec. 19, 1835, p. 189.

2. Where a party appears personally in Court,—held not bound to sist a mandatory or to find caution for expenses, though he was resident in England, and, it was alleged, had come to Scotland expressly to attend the discussion, and thereby avoid sisting a mandatory, and was about to return to England as soon as the hearing of the cause was over. *Clarke*, Feb. 16, 1836, p. 489.

See *Title to Pursue*, 2, 3.

nsively granted, with consent of both parties, for the purpose of another, not admissible to constitute marriage. *Stewart*, Feb. 4, 1827.

and Wife.

ONTRACT.

antenuptial contract, under which the Court found that a child of age had right to a proportional share of £1000, therein provided, and *etim.* *Fraser*, Dec. 17, 1835, p. 174.

Liferent, 1.—*Interest*, 5.

SERVANT.

ns of a bank having dismissed their manager, not bound to justify dismissal, and an issue on that point refused. *Mitchell*, Jan. 26, 1836,

tion, 1.—*Reparation*, 1, 2.—*Prescription Triennial*, 3, 4.—*Pro-*
17, VI. 4.

See *Cessio*, 8.—*Church*.

WIDOWS' FUND. See *Church*.

d, leaving a large apparent estate, but affected by a certain amount in order to its extrication, his minor heir, with consent of his tutors, who had omitted to give up inventory, granted a heritable £4000; bankruptcy, in a few years, became apparent, and a ranking of the estate was brought, in which the onus was laid on the heritable to prove that the contents of the bond for £4000 were applied bene-: behoof of the minor; some of the curators had apparently had in-: with a considerable amount of curatorial funds, and had allowed to get into their accounts; another of them, who alone received the applied it chiefly in paying debts for which the minor was liable, or disbursements in the management of his affairs, but partly also in partial payment to the younger children of the deceased, of the to them under a bond of provision by him: Held, in the circum-: that the application of the £4000 for behoof of the minor was suffi-: oved, 1st, because the privilege of inflicting on curators the severe of 1672, c. 2, is personal to the minor, and does not pass to his cre-: and 2d, because the payments to the younger children (for their board-: ition) were made bona fide to account of the provisions for which-: ld have been creditors of the heir, but for the insolvency of the-: state, and were made before insolvency was expected, or any dili-: ie. *Harkness*, June 28, 1836, p. 1015.

and Curator.

NDING. See *Process*, VII.

See *Superior and Vassal*, 1, 6.

e *Bill of Exchange*, 3.

BITI. See *Obligation*.

LUMNIA. See *Divorce*.

ERENCE.

es in which, held, that a party, to whose oath a reference had been was not in a state of mind in which an oath could properly be ad-: l to him; and his deposition therefore ordered to be withdrawn from *Campbell*, Feb. 17, 1836, p. 505.

Exchange, 8.—*M'Nee*, June 7, 1836, p. 892.

es which held to show,

hat a certain debt was not the debt of a company, but of a partner, the acknowledgment thereof was signed in name of the company

hat, granting it to have been a company debt, novation had taken *Isleod*, June 30, 1836, p. 1057,

ONUS PROBANDI. See *Proof—Process*, III. 13, 22, 26, X. 1.

PACTUM ILLICITUM.

1. Issue allowed to try whether a legacy bequeathed to a female had been left in implement of an illegal agreement, as the consideration of her entering into or continuing a criminal intercourse with the testator. *Johnstone*, Dec. 4, 1835, p. 106.
- 2.—(1.) The partner in an illegal adventure, being sued by a co-partner for his share of the loss which had arisen on the adventure, was assoilzied on the plea of pactum illicitum: he afterwards made a claim for remuneration on account of services performed for behoof of the adventure—claim disallowed.
(2.) The captors of a confiscated vessel having allowed one of the partners in the vessel to retain a certain portion of the proceeds of the sale of the vessel, for his own behoof—Held, that his co-partner had no right to call him to account in relation to these sums. *Gibson*, Dec. 16, 1835, p. 166.

PARTNERSHIP.

- 1.—(1.) Circumstances held sufficient to establish the existence of a joint adventure.
(2.) Where the existence of a joint adventure is proved, and also the number of the joint adventurers, but the shares of each are not specially proved, the Court must presume that each has an equal share, and regulate their mutual accounting accordingly. *Fergusson*, June 3, 1836, p. 871.
2. A heritable subject was feudally vested in the individual members of a joint-stock company, and their heirs and assignees; one of the partners died, leaving a general trust-conveyance of all his heritage and moveables, and also leaving a son, to whom a curator bonis was appointed, in respect of his insanity; it became necessary to make up a title to the deceased partner's pro indiviso share in the heritable subject, it being sold by the joint-stock company, which was a losing concern: authority granted to the curator bonis (on the application of the joint-stock company, to which no opposition was made) to make up a title by precept of clare constat in favour of his ward, but not at the expense of the ward; and curator bonis authorized to concur in conveying to the purchaser. *Dickson*, June 11, 1836, p. 958.
3. A party, who was charged as a partner of a certain company, on a bill of exchange accepted by the company firm, having presented a bill of suspension on the allegation that he was not a partner, there being no prima facie evidence of his being so—Held that the charge was competent, but the bill of suspension passed to try the question of the partnership. *Anderson*, May 26, 1836, p. 834.
4. Held that a partner must be presumed cognizant of the contents of the books of the company; and that, where a sum of money was confessedly advanced to retire a bill due by the company, and a question afterwards arose whether the money was lent by A (a stranger) or B (a partner), it was sufficiently proved against another partner of the company to be the money of A, by entries, in the company's books, made to that effect, at the time; and by cotemporaneous letters of the company's cashier and book-keeper of a similar import. *Kenney*, May 20, 1836, p. 803.

See *Inhibition*, 1.—*Joint Property—Obligation—Pactum Illicitum*.

PAYMENT.

In 1827, a party sold a house for £340, and granted a disposition containing an unqualified receipt for the price; in 1832 the purchaser granted this letter to Orr, the agent of the seller:—"Sir, Although you delivered up to me the disposition by the seller, I only paid you £320 of the price, and the balance thereof I have accounted for, to him: at least I will relieve you of the same at his hands;" it did not appear (farther than this letter might imply) at what date the disposition was delivered to the purchaser, and it did not very clearly appear whether Orr had not acted, at the sale, as the agent of both seller and purchaser; in 1833 the seller raised an action against the purchaser for the balance of £20 of the price, as still due:—Held, in an advocacy, that the effect of the receipt in the delivered disposition was not taken

ued.)
 of 1832, and that such receipt afforded evidence of full payment
 been made. Clark, June 14, 1836, p. 966.

d Payment.

diligence, 1.

Bankruptcy, 19.

SECTION.

d a reduction of a decree which he stated in the summons to have
 nced in two processes, which were conjoined; he repeated,
 rd, an explicit averment that there had been a conjunction of the
 the Lord Ordinary assoilzied from the reduction; and the party
 and stated, in a minute, that the processes had never been conjoin-
 t only one of the processes was before the Judge who pronounced
 tator of conjunction, and therefore that the subsequent decree was
 irregular and inept—Held, that the party was not entitled to state
 a relative to the non-conjunction. Kerr, Feb. 6, 1836, p. 444.

Security, 4. (2.) 5.—Bankruptcy, 6. 9.—Bill of Exchange, 10.
-Process, VI. 2.

TECTION.

was cited as a haver under a diligence for recovery of writings,
 n refuge in the sanctuary, and being in consequence prevented from
 ss to his papers, the Court granted him a protection from personal
 r such times as at any diet of examination should be necessary for
 o his repositories in order to produce the writs called for, and there-
 to the sanctuary. Paton, March 8, 1836, p. 679.

REAL. See *Clause*.

ing that certain effects, pointed on a farm for the debt of the te-
 ged to him, and founding on an unstamped deed of assignation,
 bill of suspension and interdict of the sale, although he had pre-
 sented an application for the same purpose to the sheriff, which he
 lly abandoned—the Court refused the bill. Kincaid, Dec. 19,
 38.

THE GROUND.

assignee and disponee to an heritable bond on which sasine had
 , though not himself infeft on the conveyance in his favour, entitled
 a pointing of the ground.

eing stated in defence that the bond had been granted without va-
 ce for the recovery of writings to establish this allegation, refused.
 Jan. 22, 1836, p. 337.

Burgh, 6.

Process, IV. 1.

icate of poverty, in support of an application for the poor's roll,
 be attested by the minister and elders of the parish where the
 esides, and a certificate by the minister and elders of a dissenting
 n is not sufficient. Elphinstone, Feb. 11, 1836, p. 463.

arty petitioned for the benefit of the poor's roll, in order to raise a
 of a decree of adjudication, and made relevant averments to support
 ion, but adduced no evidence in support of these averments,—Held,
 amstances, that she ought to be admitted, in respect, inter alia, that
 she should be able to recover evidence, under the compulsitor of
 , which compulsitor was not competent, till after her action should
 Wilkie, March 8, 1836, p. 668.

nan of middle age, and fit for work, had a sum of £50 laid past in
 and had, a few years before, paid £200 for heritage now yielding
 r annum—Held that he was not in such circumstances as to be
 be put on the poor's roll. A B, June 14, 1836, p. 965.

POOR'S ROLL (Continued).

4. A B, June 30, 1836, p. 1040.

5. A B, July 8, 1836, p. 1114.

6. Oal, July 9, 1836, p. 1120.

PORT AND HARBOUR.

(1.) Held that the royal charters in favour of the City of Edinburgh confer a right to levy harbour, &c. dues, on all vessels and goods loaded and unloaded from and upon the shore of the Frith of Forth between St Nicholas' Chapel and Wardy Brow, or at least from and upon any part of the shore opposite to a certain property at Trinity or Trinity Bay, as freely and to the same extent, and as fully, as, by virtue of their royal charters, they are entitled to do at the port of Leith; that the owner of the said property has no right to occupy the shore, for making piers, or similar purposes, or for loading and unloading goods, &c., without paying the harbour, &c. dues to the city, exigible under its charters; and interdict granted against his making any erection, so as to interfere with the rights vested in the city.

(2.) Question, whether, if there had been a second crown-grant of harbour in the immediate vicinity of a prior crown-grant, on the faith of which prior grant a port had been erected, the prior grantee could restrain the second grantee from exercising his right in respect of its being an unwarrantable encroachment on his prior right. *Magistrates of Edinburgh*, June 10, 1836, p. 922.

POSSESSORY JUDGMENT.

Held that a party may be entitled to the benefit of a possessory judgment regarding a servitude of fish and entry to a plot of ground, though he held such ground under a bounding charter, making no reference to such servitude, and containing no clause of parts and pertinents. *Liston*, Dec. 3, 1835, p. 97.

PRECOGNITION. See *Process*, III. 3, 14.

PRESCRIPTION (LONG).

2.—(1.) One of two daughters, passing by her father's settlement, took infeftment under a precept of clare constat as eldest heir-portioner, in 1778: by submission between the daughters, and decree-arbitral in 1780, the extent of the precipuum of the eldest was fixed; forty years elapsed before the son of the youngest daughter expedie a service and was infeft as heir-portioner of provision under his grandfather's settlement, and challenged the decree-arbitral, alleging that the eldest daughter had no right of precipuum under her father's settlement; held that his right to impugn the decree-arbitral was cut off by the negative prescription, and that it was competent to the defenders to plead this, whether the positive prescription had run in their favour or not.

(2.) Question whether a title was fortified by the positive prescription. *Earl of Dundonald*, May 12, 1836, p. 737.

2.—(1.) The tenant of a coal-work having been allowed to form a canal to a neighbouring seaport, passing through the lands, not only of his own landlord, but of an intervening proprietor, but without obtaining any written title to the ground occupied by the canal, and the canal being thereafter possessed by him, and subsequently by his landlord, and succeeding tenants in the coal-work, for upwards of forty years, paying yearly to the intervening proprietor a certain sum, fixed originally by a valuation, as damages—Held, in an action by the intervening proprietor (no prescription having taken place by reason of his minority), that the owner of the coal-work had no right of servitude, so as to retain the use of the solum for the purpose of a canal, but was a precarious possessor, without title, whom the intervening proprietor might at any time remove.

(2.) An act of removing, under the Act of Sederunt, 1756, not a competent form of proceeding for removing such a possessor. *Campbell*, May 19, 1836, p. 798.

See Corporation.

SEPTENNIAL.) See *Cautioner*, 5.

INIAL.) See *Bill of Exchange—Foreign*, 1.

INIAL.)

gh solicitor, in use to be employed by a country agent to conduct s, had a general account current, consisting of various separate r behoof of different individuals, clients of the country agent, un- e death of the latter, the last item being of a date shortly before

Thereafter he recovered from the clients of the country agent the more recent business accounts. For the prior parts of the last item of which was dated more than three years before the nt's death, the Edinburgh agent raised action libelling on them not founding on the continuation which had been subsequently clients—Held, That it was competent to refer to the general taining the continuation to elide the plea of prescription. Fisher, 186, p. 660.

It was also the political agent of his client ; his agency continued to 1813, and his account included not only ordinary law agency m, &c., but also cash advances ; travelling charges for journeys to te., in support of the client's election ; fees paid to the town clerks entary burghs for extracts from their minutes, or for commissions to it elections ; and fees due to the agent himself as town clerk of one urchs ; after 1813 the agent received, at intervals, four letters from but one only came through the post-office, and it was received above s prior to the client's death ; the account was rendered a month client's death, which happened in 1817 ; action was raised for pay- against the client's representative in 1831 ;—Held,

at the triennial prescription applied to that part of the account isted of charges for business done as a law-agent, and that this was by the postage of the letter, seeing that it occurred more than three to the client's death ; and,

at prescription did not apply to the account so far as composed of f money, or travelling charges, or town-clerk's fees. Moncreiff, 836, p. 830.

nces in which held, that a claim of remuneration was substantially wages, as a housekeeper or servant ; and therefore fell under the escription, though there had been no express agreement as to the on. Smellie, Nov. 17, 1835, p. 12.

on for wages, raised five years after the death of the master, the presentative admitted that the pursuer was in the employment of ed, as a servant, at the time of the death ; but he disputed the ges. He also admitted, that he had not paid the wages in ques- d,

at, in regard to all wages, within three years prior to the death, so presumption that they had been paid by the deceased ; and the proving non-payment since the death, they must, therefore, be o be still resting-owing.

at, where judicial admissions suffice to elide prescription, there is r a reference to the defender's oath ; and,

at the rate of wages, being disputed, must be the subject of a proof. n. 15, 1836, p. 216.

MENT.

was given for payment of the contents of a bond, no demand having upon it for twenty-nine years, and certain other circumstances to throw suspicion on the existence of the debt,—the Court re- ass a bill of suspension on juratory caution, although there were for payments, and the bond remained in the hands of the charger. ec. 15, 1835, p. 156.

umstances in which a party, who was appointed by a regular tterney to intromit with a certain succession, in 1816, and who

PRESUMED PAYMENT (Continued.)

intromitted to an extent of more than £1000, was presumed, in 1830, to have already sufficiently accounted (except as to an admitted item), without any discharge whatever being produced, or any receipts except such as were irregularly signed and unstamped; in respect, inter alia, that the accounting arose out of transactions between near relations, who were in a very humble line of life, and were illiterate, and kept no books; that various payments were admitted; that the original parties lived for a considerable number of years, and died without any allegation being made of a short accounting; and that the claim against the executors of the one party had been bought by the pursuer, for an insignificant sum, from the children of the other. *Stuart, Feb. 4, 1836, p. 412.*

3. Circumstances which held not sufficient to import that certain sums paid by a father to his sons, without taking any vouchers, or making any entry to their debit in his books, were donations on his part, he having funds of theirs in his hands. *Black, Dec. 8, 1835, p. 113.*

PRISON.

Where there has been a very recent examination and report as to the condition of a building, on which the Court of Justiciary granted warrant to use it as a temporary legal prison for criminal prisoners; held, that the Court of Session may grant a similar warrant, as to civil prisoners, without any new examination or report. *Magistrates of Forres, June 23, 1836, p. 991.*

PRISONER.

- 1.—(1.) Where a prisoner applies for liberation under the Act of Sederunt 1671, held that the Magistrates are not bound to cause intimation to be made to the incarcerating creditor before granting the application.

(2.) Where the oath of a physician, in support of a petition for liberation, was taken down in writing, and preserved by the town-clerk, held not necessary that it should be recorded in the town-books. And

Observed, That it might be recorded there at any time. *Emond, Dec. 10, 1835, p. 124.*

2. A debtor took refuge within the sanctuary of Holyroodhouse, and contracted a debt there, and the creditor incarcerated him in the Abbey jail, under an act of warding granted by the bailie of the Abbey: After a twelvemonth's imprisonment, he petitioned the Court to grant warrant for transmitting him to the Canongate jail, and detaining him there till liberated in due course of law, his object being to qualify himself thereby to raise a process of cessio: Held that the Court could not grant the petition. *Bayly, March 3, 1836, p. 619.*

3. Intimation was made, on 6th February, to the agent of an incarcerating creditor, that the sum for aliment, consigned under the Act of Grace, was exhausted on 4th February; the debtor was liberated on 8th February, there being no farther aliment yet lodged; on 10th February, the creditor, alleging that the failure to lodge aliment arose from his agent's neglect of instructions, reincarcerated the debtor under the same diligence: Held, at passing a bill of suspension and liberation,

(1.) That the creditor could not be permitted to plead that the failure to lodge aliment arose from mere inadvertency; and,

(2.) That where a creditor deliberately allowed the aliment to be exhausted, and liberation to ensue, it was irregular to reincarcerate the debtor, within two days thereafter, where no change of circumstances had occurred in the interval. *Crawford, March 11, 1836, p. 688.*

See Reparation, 3.

PROCESS.—I. SUMMONS.

1. A summons, containing alternatively declaratory conclusions, and reductive conclusions, in the event of failing in the other, not proper for the reduction roll, but must be taken up in the ordinary action roll. *Tod's Trustees, Dec. 12, 1835, p. 144.*

- 2.—(1.) A summons of declarator set forth, that, in a previous process be-

MONS (Continued.)

me parties, a judgment, favourable to the pursuers of the declaration by the Court of Session ; that subsequent interlocutors, with this one, were afterwards pronounced by the Court ; that then appealed, and the whole interlocutors were affirmed ; the assumed that all the subsequent interlocutors, though their meaning doubtful or obscure, were “ utterly illegal, null and void, and operating or receiving legal effect ; ” and it concluded for declaration of parties, in terms of the first interlocutor, and in contrahe subsequent interlocutors :—Held, that the summons was y laid, in respect that it contained no reductive conclusions, to e interlocutors which were repugnant to the judgment craved ; formal and probative judgment of this Court is equally effectual formal and probative judgment (however erroneous either may), so long as both are unreduced.

stances in which the Court refused to admit a minute of of the libel. Ross, May 27, 1836, p. 845.

5 (3.)—*Infra*, III. 1.

ING AND OPENING RECORD.

ion, the defender, before satisfying the production, gave in de- g, inter alia, a title to exclude, but not stating any plea that the no title to insist : the Lord Ordinary afterwards, of consent, or- duction to be satisfied, “ reserving all the preliminary defences mces on the merits were subsequently ordered, the first of which pursuer had no title to insist : a record was made up and closed plea being inserted in it, but, at the debate before the Lord Or- defender was allowed, without the pursuer’s consent, to superin- a, de plano, upon the record : the Lord Ordinary then sustained to the pursuer’s title, and dismissed the action—Held, that this was incompetently pronounced, and should be recalled, “ in re- ection to the pursuer’s title was no part of the record.” Cubbi- 1836, p. 327.

es in which a record was appointed to be opened up, in respect not satisfactorily prepared : and cause decided under the new art, Feb. 4, 1836, p. 412.

es in which, Held, as to an allegation of *res noviter veniens*, made in the Sheriff Court after the record was closed, that the not allowed sufficient scope to the party to bring his averments out, and that this ought still to be done, reserving expenses. e 2, 1836, p. 866.

a concluding alternatively for declarator of marriage and legiti- r damages on account of seduction, a record having been closed, taken before the Commissaries, by remit from the Court, and an thereon pronounced, assoilzieing the defender from the conclu- marriage and legitimacy ;—Motion by the pursuer to have the d up and a new record prepared on the conclusions for damages, the cause remitted for trial by jury, refused. Stewart, July 5, 4.

Y TRIAL.

re was effected with a company over certain property which was stroyed by fire ; the party insured claimed the sum in the policy, fused, and the claim submitted to arbitration ; the arbiters found perty was not over-insured, and that the company were liable ; then brought a reduction of the submission and decreet-arbitral, ring obtained leave at an advanced stage of the proceedings to mmons, they averred, as additional grounds of reduction—

since the action was raised they had discovered that the insur- adulently made with the intention of having the property des- and obtaining an exorbitant sum from the insurance office.

PROCESS.—III. JURY TRIAL (Continued.)

- (2.) That the property was actually destroyed by the defender by fire—Held, that the first averment was relevant to set aside the submission and decret, and that the pursuers were not precluded by the fact of the arbiters having found the sum in the policy not to be excessive from obtaining an issue on the first as well as on the second averment. *Hercules Insurance Company*, Dec. 12, 1835, p. 147. See *infra*, 12.
2. Action dismissed, in respect of no notice of trial having been given by the pursuer, within a year after the final adjustment of issues, no reasonable cause having been assigned for the delay. *Inglis*, Dec. 15, 1835, p. 155.
3. Where a defender makes such allegations on the record as render it necessary for the pursuer to have certain witnesses in attendance at a jury trial—the pursuer is entitled to the expense thereby incurred, though he be spared from adducing these witnesses, by an intimation from the defender during the trial that the defender is to lead no evidence. *Thom*, Jan. 14, 1836, p. 215.
4. See *Dick*, Jan. 16, 1836, p. 218.
5. *Anderson*, July 14, 1836, p. 1131.
6. *Moncrieff's Tutors*, July 15, 1836, p. 1131.
- 7.—(1.) Where a letter is to be objected to, by a defender, as inadmissible as evidence, the pursuer is not permitted to read it to the jury in opening his case; but he may state the substance of it, as part of the case which he undertakes to prove.
- (2.) Circumstances in which it was held to be proved that the signature of one of the witnesses at an execution of search was a forgery. *Dempster*, July 20, 1836, p. 1135.
- 8.—(1.) Where a trial broke down, and a verdict was found for a defender, in consequence of a document being rejected for the want of a stamp: Held, in the circumstances, that it was essential to the ends of justice to allow a new trial, on the pursuer's paying the defender's frustraneous expenses of the previous trial; though the objection on the stamp laws did not take the pursuer by surprise.
- (2.) Question, Whether a bill of exceptions is competent against a judgment of the Court allowing a new trial. *Wallace*, Feb. 19, 1836, p. 541.
- 9.—(1.) Where a paper maker raised an action of damages, to the amount of £10,000, against an upper heritor and his tenants, as for polluting the stream, and thereby injuring the quality of the paper, and the character of the manufactory: pursuer ordained, of consent, to produce specimens of the damaged paper, in process, that the defenders might examine them before the trial.
- (2.) Question, Whether the pursuer, in the circumstances of this case, could be called on to specify his alleged damages under distinct items. *Collins*, Feb. 25, 1836, p. 560.
10. Held, that, although there are several defenders in a cause, the whole body of defenders have right only to four peremptory challenges of jurymen, just as if they formed, quoad hoc, but one party defender. *Wallace*, March 17, 1836, p. 720.
- 11.—(1.) In a reduction of three deeds on the ground of imbecility and circumvention, two sets of issues having been framed applicable to each of the deeds respectively, the one set putting in question whether the deed was not the deed of the granter, and the other, whether the granter was facile and weak, and the defender by fraud and circumvention took advantage thereof;—how those issues are to be considered by the jury.
- (2.) To reduce a contract on the ground of mental incapacity, the law requires a less degree of incapacity to be proved, than in the reduction of a mere testamentary deed. *Dewar*, July 18, 1836, p. 1132.
- 12.—(1.) A letter alleged to be confidential having, in the course of making up the record, been recovered from one of the parties, by a diligence at the instance of the other party, and no motion having been made for its withdrawal from process—Objection to its production at the trial repelled.

JURY TRIAL (Continued.)

witness not allowed to be called by the defender to disprove what pursuer's witnesses had stated on cross-examination.

evidence having been led by both parties as to the character and pro-
a certain person, on the footing of his being a party in the cause,
ice having been given in the opening for the defender that he was
ced as a witness—Held that the defender was, notwithstanding,
call him. *Hercules Insurance Company*, July 26 and 27, 1836,
See *supra*, 1.

me refused (by the Lord Ordinary), in the circumstances, to try
action which turned out to be ill-founded, had been raised mali-
d without probable cause.

an action for judicial slander and wrongous arrest, where want of
ause is to be proved by the pursuer, slight evidence thereof held
throw on the defender the onus of proving probable cause.

es taken by the presiding judge at a trial, in the course of pre-
ial proceedings, held not to be evidence. *Hallam*, Dec. 22, 1835,

ons of damages against a sheriff-substitute, alleged that a criminal
by a private party, with concurrence of the procurator-fiscal, was
to him, on which he granted warrant to cite witnesses before him
gnition, without any notice to the party accused; that he refused
the examination of the witnesses, and that the examination was
by the agents of the accuser, and before an under clerk in the
k's office, without any magistrate being present; that the declara-
he witnesses were never authenticated; that the sheriff-substitute,
precognition, granted warrant to apprehend the party for examina-
he sheriff-depute having taken his declaration, and being ignorant
anner in which the precognition was taken, committed him to jail
nd in due course of law; that the party was innocent of the accu-
those proceedings of the sheriff-substitute were irregular, oppres-
sionable:—Held, in making up issues for jury trial, that "malice"
inserted in the issues. *Railton*, July 5, 1836, p. 1081.

tances in which the Court held it inexpedient to remit to a jury, a
sh involved disputed questions of fact, raising the plea of vitious
on: and directed a diligence to be granted, and a proof on commis-
allowed, if found necessary. *Boswell*, Jan. 29, 1836, p. 378.

See intimation by the Court, on refusing leave to appeal, *infra*, 16.
art recalled the interlocutor of a Lord Ordinary, which remitted a
ne jury roll; one of the parties conceiving himself, by the terms of
cutor, to be deprived of all recourse to jury trial at any future stage
ise, presented a petition for leave to appeal: the Court refused the
respect that, "according to the true meaning of their interlocutor,"
e should, in the first place, be granted for recovering documentary
but that afterwards, it was open to the Lord Ordinary to judge by
le of proof any farther investigation into disputed facts might, if
be conducted. *Montgomerie*, March 10, 1836, p. 681.

an action of damages by a leather-japanner for seducing a workman
employment, and bribing or inducing the workman to reveal secrets
with his employer's trade, the pursuer having declined to specify
descendence the nature of the secret which he charged the defender
obtaining—Held that he was not entitled to an issue upon the
of the defender having unlawfully got possession of such secret.

an action for seducing a workman from his employer—verdict for
ler. *Rutherford*, March 19, 1836, p. 732.

tion of damages by the proprietors of a steam-coach for injury done
uence, as was alleged, of certain operations by the trustees on the
which it ran, repeatedly stated in the summons and condescendence

PROCESS.—III. JURY TRIAL (Continued.)

to have been done by the trustees maliciously as well as with the purpose of injury—held that it was not necessary to insert malice in the issue on which the cause was to be tried, and that the intent to injure might be proved under an issue, whether the defenders performed the operations wrongfully. *Danney*, June 29, 1836, p. 1037.

19. After the last day has elapsed which the Court had duly fixed and intimated, for giving notice of trial at the ensuing jury sittings, the Court refused to allow notice to be given, although there were still fifteen free days to run before the expiry of the sittings. *A B*, July 5, 1836, p. 1083.

20. A cause having been set down for trial by a special jury, and a sufficient number of special jurors not appearing on the day appointed, there being common jurors, however, in attendance, Question, whether a tales in terms of the 28th section of the 55 Geo. III. c. 42 was competent? *Milligan*, July 13, 1836, p. 1127.

21. Verdict finding that a certain deed of settlement was not the deed of the party *ex facie* executing it; and also that it was obtained by fraud and circumvention, to the lesion of that party. *Scrimzeour*, July 21, 1836, p. 1136.

22.—(1.) Under an issue, whether the defender wrongfully and violently took possession of certain premises in Belfast, and wrongfully ejected the pursuer therefrom—held that the question of the legal right of tenancy in the premises was raised, and it was incumbent on the pursuer to establish such right of tenancy in his own person according to the law of Ireland, in order to enable him to maintain to any effect the affirmative of the issue.

2. Question, whether, when a party has excepted at a trial to the judge's direction in law, and has had a note of such exception signed by the judge, it be competent, on a motion for a rule to show cause, to apply to have the verdict set aside on the ground of surprise as well as of misdirection. *Sandera*, Nov. 24, 1835, p. 62.

23.—(1.) Proof of the *veritas convicii* not admissible, where an issue in justification has not been taken.

(2.) Circumstances in which this rule applied.

(3.) An action of damages was raised for judicial slander by irrelevant and malicious statements respecting a person who was not a party to the process; the judge did not charge the jury to try whether the defender disbelieved the relevancy as well as the truth of these statements; and he charged the jury that the statements were irrelevant—Held that the charge was unexceptionable, and bill of exceptions refused accordingly. *Brodie*, Jan. 20, 1836, p. 267.

24.—(1.) In an action for slander, contained in a letter charging the pursuer with a crime which deserved the gallows, the defender having in his defences adhered generally to the substance of the charge, and stated circumstances which went not properly to justify, but only to palliate, the writing of the letter—held that evidence of those circumstances was admissible, although there was no issue in justification.

(2.) In an action for written slander where the defence was that the pursuer had used indecent liberties with the defender's female servant—verdict for the defender. *Ogilvie*, March 19, 1836, p. 729.

25. Where excerpts from the books of a party were recovered under a diligence against havers, and the party was in attendance on the Court at the subsequent jury trial; held, that the excerpts could not be put in evidence without calling the party as a witness to give any requisite explanation as to his books. *Reid*, March 16, 1836, p. 720.

26.—(1.) In an action for wrongous apprehension on a *meditatio fugæ* warrant, with a view to a suit which ultimately failed,—Verdict for the defenders.

(2.) Evidence which held not sufficient to throw upon the defenders in such action the onus of proving probable cause. *Swayne*, March 18, 1836, p. 726.

TRIAL (Continued.)

Cases in which

an affidavit which had been emitted in an unopposed service, was
admitted at a jury trial, though the deponent had died in the

position which had been taken in presence of both parties, to
was held not to be admissible, though the deponent could
court; and

actions of interest and relationship were sustained in a trial,
regarding a question of pedigree.

that a record of burials, containing the gratuitous addition
of a person buried, which addition was inserted on hearsay, could
be of the age. *Watson*, May 10, 1836, p. 734.

of a trust-settlement, raised by an apparent heir of conquest,
the deceased was not possessed of a disposing mind, two
were defenders as well as the trustees; the trustees alleged that
they possessed peculiar opportunities of intimate personal inter-
course, down to the period of his death, and that they had
acted for the purpose of stopping their mouths as witnesses;
legacies, and renounced all claim of repetition, in any event

legatees discharged them, and the representatives of the
claim under the settlement: the Court thereafter, on the
pleas, and after a record was closed, assoilzied the legatees,
sent to trial with the trustees. *Shirreff*, June 18, 1836, p. 981.
in which it was found proved that an acceptance at a bill
of exchange, *Intyre*, July 20, 1836, p. 1134.

of a trust-settlement, on the ground of fraud, facility and le-
t for the defenders. *Shirreff*, July 19, 1836, p. 1133.

in which, case remitted to the jury roll, for the purpose of
stated facts, before disposing of certain pleas in law which
were decided by the issue of the jury trial. *Anderson*, June 16, 1836,

action—Lease, 5.

ITS, INTERIM-DECREES, &c.

cases in which the Court held an extracted decree by a
in a previous process, to have been pronounced in foro, and
pursuer to open it up, though it affected his legitimacy, and
through poverty, he had been unable to bring it under review,
acted.

cases in which it was held that an interlocutor necessarily
of the illegitimacy of the pursuer, though it contained no
more. *Kerr*, July 7, 1836, p. 1104.

that, when an action relating to a special heritable subject, is de-
pursuer, on the ground of illegitimacy, and such pursuer
in an action, relating to other subjects, against the same defender, the
of illegitimacy is to be held *res judicata* in the second action.
ibid., p. 1104.

ING NOTE.

if default has been pronounced against a defender who has
defences in due time, it is competent for him to present a re-
companied with the defences, at any time before extract,
twenty-one days from the date of the decree reclaimed against.
Insurance Company, July 8, 1836, p. 1114.

ing note had a copy of the revised condescendence and an-
but no summons or defences—held incompetent, although,
of the cause, the summons had been boxed to the Court.
ibid., Jan. 12, 1836, p. 208.

in annexing certain correspondence as an appendix to a re-

PROCESS.—V. RECLAIMING NOTE (Continued.)

claiming note, printed portions of the letters in italics, for which mark of emphasis there was no warrant in the letters themselves, the Court intimated their disapprobation of such a practice as being irregular. *Milne*, Feb. 19, 1836, p. 533.

VI. ADVOCATION.

1.—(1.) Final decree being pronounced in a Sheriff Court against John Mann, he presented a bill of advocation, with a bond of caution for “the whole expenses incurred before the sheriff, &c., in the process against the said John Mann, &c. ;” “and whatever sum shall be awarded against the said John Mann, in name of expenses in the Court of Session, upon the result and issue of the bill of advocation, &c.” During the process of advocation, John Mann died, and his eldest son was decerned executor qua next of kin, and was duly assisted as his representative ; after which the process went on and involved a jury trial, in consequence of which a large sum of expenses was ultimately found due by John Mann’s representative,—Held that the cautioner was liable for the whole expenses, though he denied that any notification of John Mann’s death had ever been made to him.

(2.) Held, in conformity with *Forsyth* (ante, XIII. 42), that a mercantile company may give a charge on a bond, in name of the social firm by which they grant obligations, though the name of no individual partner be specified as a charger. *Wilson*, Jan. 20, 1836, p. 262.

2.—(1.) A proof in an inferior court was led by the pursuer, and the diets were attended by both parties, but several of the dispositions were unauthenticated by the commissioner’s signature—Held, in an advocation by the defender, that the advocator was not barred from objecting to the regularity of the proof ; that it was *pars judicis* to enforce the objection which appeared *ex facie* of the proof ; and that the judgment proceeding on such proof must be recalled, and remit made to the inferior court “with instructions to recal the interlocutors complained of, and to grant commission, and allow a proof of new, if so required.”

(2.) Observed, that, under the remit, the error might be cured by the Commissioner calling the witnesses before him in presence of both parties, causing their depositions to be read over to them, and, on their adhering thereto on oath, authenticating the depositions with his signature.

(3.) Observed that a general commission to lead proofs, not having reference to the proof in any individual cause, will not authorize the Commissioner to act as such in any individual cause, but that there must be a commission or remit in his favour made in any cause in which he is to lead and report a proof.

(4.) Circumstances in which objections to a summons, as not being relevant, or not sufficiently specific in time or place, repelled. *M’Phun*, Jan. 23, 1836, p. 339.

3. Special circumstances in which, although an advocator had stated, in limine, an objection to the competency of a petition to the sheriff, yet he became a party to so much subsequent procedure in the Sheriff Court, especially after this petition was conjoined with another at his own instance, that he was held personally barred, in his subsequent advocation, from recurring to the plea of incompetency : the Court, at the same time, observing, that the case was extremely peculiar, and not to be drawn into a precedent. *Hallyburton*, June 1, 1836, p. 859.

4. A petition, alleging that a mill-spinner had deserted her service, prayed the sheriff to imprison her till she found caution to return to her service, and faithfully work till the expiry of her term ; and also to find her liable in damages and expenses :—after a closed record, and a proof, the sheriff ordained her to return to her service at the mill, and to work there till the expiry of her term, “with certification ;” he found her liable in expenses, and reserved *to her master any claim of damages he might have, and to her her defence.*

ADVOCATION (Continued.)

The clause "and decerns," was omitted:—The servant brought to which the master objected that it was incompetent, in respect of the sheriff's judgment had not finally exhausted the case, and did not decerniture so as to be capable of extract: Objections rejected.

The judgment had exhausted the whole merits of the petition, and the question of expenses;

The words "with certification" did not affect the finality of the judgment.

The omission of the word "decerns" might prevent extract, but not prevent advocation. Anderson, June 1, 1836, p. 863.

Refusal of a competing brief from a sheriff to the Court of Session, having been taken to the form of the letters, that they contained no allusion for an advocation—the Court repelled the objection, because that the will of the letters bearing a warrant for advocation was without defect. Grant, June 16, 1836, p. 975.

MULTIPLEPOINDING.

Sequestrated his estate in trust for behoof of his creditors; the estate and the proceeds, with the exception of a small balance, divided among the creditors, none of whom made any objection; one of the trustees, alleging irregularities in the management of the trust-estate, sought a process of multiplepoinding and exoneration—held that, as there was no double distress or conflicting claims, the process was unnecessary. Home, Nov. 18, 1835, p. 24.

Cases in which the Court dismissed a process of multiplepoinding as frivolous, though the real raiser was a creditor to the extent of £1500, and the fund was the estate of a deceased insolvent, not liable to sequestration—there were about 200 claims made against it, which involved questions; but as to which the most of the claimants had acceded to the trust for winding up the estate extrajudicially. Crichton, March 1838.

June 11, 1836, p. 957.

—*Infra*, IX. 2.

RANKING AND SALE.

The Lord Ordinary, after advising with the Court, that the common ranking and sale, was entitled to appear and insist for production of the non-agent's minute-book and official correspondence, in process. . 25, 1836, p. 559.

A factor on a trust-estate presented a petition, stating that certain portions formed a part of the trust-estate had been improperly included in the ranking and sale of a third party's heritage; and he craved authority to set aside a feudal title to the lands; petition refused, *hoc statu*, as unnecessary to respect that the judicial factor's proper remedy was to apply to the court to be struck out of the ranking, and that he was entitled to present his petition, without making up a feudal title. Mackenzie, June 1, 1836.

SUSPENSION.

A suspension having been presented (on the ground of forgery), to a bill of exchange, the narrative in the bill being extremely short, and the suspender, on a reclaiming note being presented, having stated adduced the bar, in reference to the forgery;—the Court refused the bill, and it competent to the suspender to put in a new bill with a fuller narrative of facts. Wyllie, Feb. 20, 1836, p. 553.

In a case of multiplepoinding, a claimant obtained successive decrees by default, through delay on the part of the nominal raiser; the claimant's agent obtained an interim decree for expenses, and charged; the raiser presented a petition for revocation—

ELLANEOUS (Continued.)

petition and complaint on the part of the magistrates, and a them, to have free access to, and use of, certain burgh books, of the acting clerk, refused as unnecessary and incompetent being willing to discharge the duties of his office, and the being sub judice in the process of suspension. Magistrates 5, 1835, p. 111.

containing alternatively declaratory conclusions and reductive the event of failing in the other, not proper for the reduction taken up in the ordinary action roll. Tod's Trustees, Dec. 4.

by a final interlocutor, in a previous stage of a cause, that the ving certain articles in his condescendence, was entitled to de- ur; and such proof being adduced—Decree pronounced in his penses. Boyes, Jan. 14, 1836, p. 214.

n, the defender, before satisfying the production, gave in de- inter alia, a title to exclude, but not stating any plea that the title to insist: the Lord Ordinary afterwards, of consent, or- action to be satisfied, "reserving all the preliminary defences ces on the merits were subsequently ordered, the first of which ar- suer had no title to insist: a record was made up and closed as being inserted in it, but, at the debate before the Lord Or- mder was allowed, without the pursuer's consent, to superin- de plano, upon the record: the Lord Ordinary then sustained the pursuer's title, and dismissed the action—Held, that this s incompetently pronounced, and should be recalled, "in re- tion to the pursuer's title was no part of the record." Cubbi- 836, p. 327.

ence for examination of havers, circumstances in which com- acted to report specially upon the appearance of a ledger exhi- i the parties. Fraser, Jan. 28, 1836, p. 377.

se estates were sequestrated in June, offered a composition in November, with the concurrence of the requisite proportion en ranked, he applied for approval of composition and dis- fter, an additional creditor appeared, and opposed the applica- ending the concurrence obtained no longer sufficient—Held, r was not bound to pay the expenses previously incurred in as a condition of his being allowed to oppose it. Forbes, Jan. 10.

y the Lord President that the hearing of a cause would no ed, merely on account of the absence of senior counsel, unless circumstances, and that the junior must always be ready to , Feb. 16, 1836, p. 489.

ner cannot appoint a mandatary for a principal out of the apster, Feb. 18, 1836, p. 521.

y the Lord President, that the practice of calling upon junior on, in the absence of the senior, was to be adhered to, as a cept only in very special instances, requiring a deviation from msay, Feb. 26, 1836, p. 570.

esented against a Member of the College of Justice, praying ordain him to deliver up certain documents over which he s had a right of hypothec, dismissed as incompetent. Mac- 1836, p. 588.

ion was raised in the Court of Session, in name of Cowan and without the authority of Cowan: after a record was closed, a disclaimer, and the other pursuers made no farther appear- mders obtained from the Lord Ordinary a judgment of absol- mses against all the pursuers, and Cowan reclaimed: the de- ised an action against the law-agents of the pursuers, to free

ELLANEOUS (Continued.)

abolished by 1 Wil. IV. c. 69; the Judge-Admiral had pronounced interlocutors which were final in that Court; the cause was brought into the Court of Session, by a joint note of the parties, under the statute;—Held, that the interlocutors of the Judge-Admiral were of finality in this Court, but were liable to be impugned as erroneous; and that the above transference of the cause was substantiated by both parties, and let in the power of review of this Court the procedure in the Admiralty Court, as a necessary preliminary to bringing out the process to a conclusion in this Court. *Macarthur*, p. 820.

When the Court was closed, but before any interlocutor was pronounced, the pursuer, who had previously inferred absolutor, the pursuer of a reduction of a deed, came before the Court craving the Court to allow him to abandon the action, and to be relieved of his expenses; he did this avowedly for the purpose of bringing the Court, “in respect the pursuer had abandoned the case, the defenders from the whole conclusions of the libel, and decerning the defenders entitled to expenses:” the pursuer raised a new deed, to which the defenders objected, that as there was no continuation of a right of new action in the previous interlocutor, and the previous interlocutor had “assoilzied” from all the conclusions, in place of continuing the action, the pursuer was not within the benefit of 6 Geo. 2, § 10, and Act of Sederunt, 11th November, 1828, § 115; a new action was therefore incompetent:—Held that the new action was incompetent, notwithstanding the phraseology of the previous interlocutor; and that, in so far as such interlocutor interfered with the pursuer’s statutory right of new action, it should be viewed, in the circumstances, as a clerical error, and disregarded accordingly. *Sheriff*, May 25.

In the summons of declarator set forth, that, in a previous process between the parties, a judgment, favourable to the pursuers of the declarator, was pronounced by the Court of Session; that subsequent interlocutors, with this one, were afterwards pronounced by the Court; that the same were then appealed, and the whole interlocutors were affirmed; the pursuers submitted that all the subsequent interlocutors, though their meaning was doubtful or obscure, were “utterly illegal, null and void, and not operating or receiving legal effect;” and it concluded for declarator in favour of the parties, in terms of the first interlocutor, and in contra-venance of the subsequent interlocutors:—Held, that the summons was not laid, in respect that it contained no reductive conclusions, to the interlocutors which were repugnant to the judgment craved; and that the formal and probative judgment of this Court is equally effectual as the formal and probative judgment (however erroneous either may be) so long as both are unreduced.

In the circumstances in which the Court refused to admit a minute of the libel. *Ross*, May 27, 1836, p. 845.

After having executed a trust-disposition for payment of his debts, the pursuer inserted a clause declaring that during the subsistence of the trust he was entitled to receive from the trustee, out of the annual produce of the trust, such sums of money as might be necessary for providing a suitable maintenance for himself and family; and having thereafter, founding on this clause, brought an action against the trustee for payment of a yearly aliment, and the trustee having made great avizandum therewith—held that this clause was not per process of aliment to be summarily disposed of as such, and was to be considered as a libel against the trustee. *Brown*, May 31, 1836, p. 856.

In the circumstances in which the Court assoilzied a defender, in respect that the facts which had been adduced or offered by the pursuer went to in-fer a different ground of action from that which was libelled in the summons, and were not mentioned on the record.

CELLANEOUS (Continued.)

a wife was not entitled, *hoc statu*, to a proof of her recrimination in that action.

he was not entitled to have her husband's proof delayed, until her oath *de calumnia* should be returned to Court, from the time she resided abroad ; and,

the report of her oath was returned, that, as her husband, refused to appear in the action at her instance, on summons and defences, it must be prepared in common form, without allowing her *hoc statu*, a delay in delaying the proof in the action at her husband's instance ; and, however, that that action would not be ultimately disposed of without full opportunity to adduce all competent proof. Warrender, p. 1099.

instances in which the Court held an extracted decree by a party, in a previous process, to have been pronounced in *foro*, and allowed a pursuer to open it up, though it affected his legitimacy, and that, through poverty, he had been unable to bring it under review, was not extracted.

instances in which it was held that an interlocutor necessarily finding of the illegitimacy of the pursuer, though it contained no finding of fact. Kerr, July 7, 1836, p. 1104.

whether, when an action relating to a special heritable subject, is brought by a pursuer, on the ground of illegitimacy, and such pursuer brings another action, relating to other subjects, against the same defender, the finding of illegitimacy is to be held *res judicata* in the second action. Kerr, July 7, 1836, p. 1104.

Change, 4.—Cautiomer, 2.—Cessio, 1, 7.—Curator Bonis, 2.—Mandatum — Personal Objection — Prisoner — Service —

TEN.

of in an inferior court was led by the pursuer, and the diets were attended by both parties, but several of the depositions were unauthenticated by the Commissioner's signature—Held, in an advocacy by the defender, the Commissioner was not barred from objecting to the regularity of the proceedings, and it was *pars judicis* to enforce the objection which appeared ex facie of the proof ; and that the judgment proceeding on such proof must be remitted to the inferior court " with instructions to recall the proceedings complained of, and to grant commission, and allow a proof of regularity." *Commissio.*

ordered, that, under the remit, the error might be cured by the Commissioner calling the witnesses before him in presence of both parties, causing the depositions to be read over to them, and, on their adhering thereto on signing the depositions with his signature.

ordered that a general commission to lead proofs, not having reference to any individual cause, will not authorize the Commissioner to lead proofs in any individual cause, but that there must be a commission or order in any individual cause, in which he is to lead and report a finding of fact.

circumstances in which objections to a summons, as not being sufficiently specific in time or place, repelled. M'Phun, Jan. 1839, p. 339.

illegitimately granted, with consent of both parties, for the purpose of obtaining a divorce, not admissible to constitute marriage. Stewart, Feb. 4, 1839, p. 339.

correspondence relating to the subject-matter of an existing suit between the parties and two persons who acted for him in the matter but were not professional agents, held not to be protected against disclosure.

PROOF.—I. WRITTEN (Continued.)

a diligence for the production of such correspondence, although admitted to have been of a confidential character.

(2.) Question, whether communications made to an intermediate person by a party, to be conveyed to a professional agent, are protected? *Stuart*, May 26, 1836, p. 837.

4. In 1827, a party sold a house for £340, and granted a disposition containing an unqualified receipt for the price; in 1832 the purchaser granted this letter to Orr, the agent of the seller:—"Sir, Although you delivered up to me the disposition by the seller, I only paid you £320 of the price, and the balance thereof I have accounted for, to him: at least I will relieve you of the same at his hands;" it did not appear (farther than this letter might imply) at what date the disposition was delivered to the purchaser, and it did not very clearly appear whether Orr had not acted, at the sale, as the agent of both seller and purchaser; in 1833 the seller raised an action against the purchaser for the balance of £20 of the price, as still due:—Held, in an advocacy, that the effect of the receipt in the delivered disposition was not taken off by the letter of 1832, and that such receipt afforded evidence of full payment having been made. *Clark*, June 14, 1836, p. 966.

See *Process*, III.

— II. PAROLE.

1. A contract for raising a certain quantity of iron-stone at a specified rate per ton, payable fortnightly, having been entered into by written missives, and the work having been performed, and payment made once a-fortnight, for the first half, at the specified rate, and for the second half, at a lower rate—Held in a subsequent action for payment of the difference as to the second half, that it was competent to prove by parole that it had been reduced to the lower rate under a verbal agreement between the parties. *Thompson*, Feb. 2, 1836, p. 393.

2. Though a claim be only for a debt of £4. 17s., yet if this be the balance of an alleged loan of £10, which loan is only proved, or offered to be proved, by parole evidence:—Held that no competent proof of the debt of £4. 17s. is either brought, or offered to be brought. *Clark*, June 14, 1836, p. 966.

- 3.—(1.) A witness for the pursuer having, on cross-examination, deposed that he had not said to a certain person that he would swear for either party for a twenty pound note,—This person not allowed to be called by the defender to disprove the witness's statement.

(2.) Under an issue, whether the defender assaulted and wrongfully struck the pursuer, to his loss, injury, and damage,—evidence admitted that the pursuer was of a violent and quarrelsome disposition, there being a statement to that effect on the record. *Walker*, July 13, 1836, p. 1128.

See *Process*, III.

— III. CONFESSION OR ADMISSION OF PARTY.

In a process of forthcoming, one of the defenders, an arrestee, admitted that he had funds in his hands at the date of the arrestments, but alleged that subsequently, the common debtor had discharged all claim against him, and had taken a new debtor in his place: arrestee found liable, in respect (*inter alia*) that he failed to prove that allegation. *Pitcairn*, July 7, 1836, p. 1101.

See *Bill of Exchange*, 2, 7.—*Presumed Payment*—*Oath on Reference*—*Partnership*, 1.—*Proving of the Tenor*—*Bastard*—*Process*, X., 11.

PROPERTY.

1. Circumstances in which the proprietor of a forest, from the borders of which certain parties were in the use of casting and carrying away peats, having presented a bill of suspension and interdict, the bill was passed, but interdict refused. *Murray's Trustees*, Nov. 28, 1835, p. 84.

inued.)

e in which a conveyance to certain lands " cum lacubus " held
ient title to the solum of a loch, one side of which was bounded
in question. Baird, Feb. 2, 1836, p. 396.

rchased two lots of the same property: A was taken bound to
way from B's lot along the east boundary of his, and also to
upon, a certain area into which two doors from a tenement on
ed, and which area it was declared should be " mean property
ervation of light;" B, on the other hand, had inserted in his
unter-part privilege of cart entry—Held that this area was not
perty, and that while A had right to a cart-way along the east
was not entitled to occupy the area for the purpose of loading
carts thereon. Baird, Feb. 18, 1836, p. 528.

tenant of a coal-work having been allowed to form a canal to a
seaport, passing through the lands, not only of his own land-
an intervening proprietor, but without obtaining any written title
d occupied by the canal, and the canal being thereafter possessed
subsequently by his landlord, and succeeding tenants in the coal-
wards of forty years, paying yearly to the intervening proprietor
m, fixed originally by a valuation, as damages—Held, in an ac-
intervening proprietor (no prescription having taken place by rea-
inority), that the owner of the coal-work had no right of servi-
o retain the use of the solum for the purpose of a canal, but was
possessor, without title, whom the intervening proprietor might
remove.

act of removing, under the Act of Sederunt, 1756, not a compe-
proceeding for removing such a possessor. Campbell, May 19,
3.

s proprietor of a certain tenement of land, situated immediately
ridge of Dunkeld, and declared in the title-deeds to be bounded
th by the water of Tay;" the statutory trustees under an act of
empowered to perform whatever operations on the bank of the
be requisite or convenient for the maintenance of the bridge, form-
s of deposits of rubbish, an embankment extending into the river
f the tenement;—Held, that, at common law, it was not compe-
party, by artificial operations in the alveus of the river, to acquire
property between the tenement above mentioned and the water,
or the provisions of the statute, the ground so gained was subject
ate use and command of the statutory trustees, so far as necessary
the protection, repair, or preservation of the bridge, or for any
as thereto,—but that it belonged in property to the proprietor of
t. Fisher, June 3, 1836, p. 880.

ving applied for interim interdict against a neighbouring proprie-
ing on certain lands, which, although not distinctly specified in
e alleged to be included in the party's seisin therein referred to;
granted as to tenements nominatim set forth in the seisin. Car-
2, 1836, p. 1079.

Judgment.

Bill of Exchange, 3.

E TENOR.

ces in which the Court decerned in a proving of the tenor of a
which was signed by notaries, though none of the names of the
witnesses were specified. Merry, Nov. 21, 1835, p. 36.

g of the tenor of a personal bond, where there was sufficient
the bond not being, de facto, a retired instrument—Held, that it
assary to state and prove a special casus amissionis. Mackenzie,
35, p. 144.

ces in which the Court decerned in a proving of the tenor of a

PROVING OF THE TENOR (Continued)

minute or act of thirlage by the town-council of Brechin in 1637 relative to the mills of the burgh. Magistrates of Brechin, Dec. 15, 1835, p. 154.

See *Teinds*, 2.

PROVISIONS TO WIVES AND CHILDREN. See *Conditional Institution—Bankruptcy*, 13, 14.—*Minor—Entail*, 7.—*Conditio si sine liberis—Presumed Payment*, 8.—*Implied Power of Revocation*.

PUBLIC OFFICER.

1. Opinion by the Court, that, in voting for a general commissioner of police in Glasgow, by depositing a written note or ticket within the box set up to receive the votes, an elector has exercised his right of voting, and cannot at his discretion recal the vote. Burnet, Dec. 4, 1835, p. 104.

2. Circumstances in which, while the Court found that a sheriff-clerk had committed an irregularity, they held it unnecessary to pronounce any further deliverance, on a petition and complaint by the Lord Advocate for malversation in office, observing that that course of procedure was not called for. His Majesty's Advocate, March 3, 1836, p. 622.

See *Process*, III., 14.—A.S. regulating fees of Sheriff and Stewart-Clerks, in Appendix.

PUBLIC RECORDS.

Authority granted to transmit a royal warrant from the records of Chancery to the Home Secretary's office to have a misnomer therein corrected. Whiteside, Feb. 6, 1836, p. 450.

PUBLIC RIGHT. See *Port and Harbour*.

RANKING AND SALE. See *Process*, VIII.

REAL INJURY. See *Reparation*.

RECLAIMING NOTE. See *Process*, V.

RECORD. See *Process*, II.

REDEMPTION, RIGHT OF. See *Wadset*.

REFERENCE. See *Oath—Arbitration*.

REGISTER ACTS. See *Ship*.

REI INTERVENTUS. See *Writ*, 1.—*Lease—Accounting—Homologation—Teinds*.

RELIEF. See *Consignation—Sale*, 3.—*Testament*, 1.

REMOVING. See *Lease*, 7.—*Property*, 4.—*Process*, IX., 4.

REPARATION.

1. Circumstances in which road-trustees consented to a verdict for £250 damages against them in favour of the widow of a carter who had lost his life through the misconduct of a servant in their employment, who neglected to take proper precautions for the safety of the public, though he knew that the road was in a dangerous state. Aitken, Jan. 5, 1836, p. 204.

2. Circumstances in which a Canal Company were found liable in damages to the amount of £100, in consequence of personal injury sustained by a woman who was crossing one of the drawbridges over the canal when the bridge was raised, without warning, by the bridge-keeper in the service of the Canal Company. Hunter, March, 16, 1836, p. 717.

3.—(1.) Evidence which held to prove that a party had been apprehended.

(2.) A pursuer having been apprehended, and detained in virtue of an irregular diligence, circumstances in which the jury found one shilling damages. Inch, July 14, 1836, p. 1129.

See *Trust*, 1, 6.—*Agent and Client*, 4, 6.—*Sale*, 3.—*Process*, III.—*Consignation—Lease*, 5.—*Citation*, 2.

RES JUDICATA. See *Process*, IV.—*Foreign*, 1.—*Teinds*, 5.

RES NOVITER VENIENS. See *Process*, II., 3.

RETENTION. See *Interest*, 2, (2.)

REVERSION, RIGHT OF. See *Wadset*.

RIGHT IN SECURITY.

1. The creditor in a heritable bond having raised action against the debtor,

RITY (Continued.)

magistrates of a burgh, concluding for exhibition and delivery of deeds of the subjects conveyed, "to be used and disposed of as his evidents of the subjects;" and the magistrates having decerned in the libel, and the creditor having given a charge accordingly, the burgh there were circumstances in the conduct of the debtor tending that the deeds were not safe when in his custody, reduced the trust too extensive, reserving to the creditor his legal right to call on of the titles, according to law. M'Neill, Nov. 17, 1835,

of a heritable trust-bond of a liferent annuity under which held, that of a conveyance of part of the annuity to a new creditor should be by the creditor and not by the debtor. Bell, Nov. 13, 1835,

of a bankrupt's sequestration, a catholic creditor held a security on two estates, the larger of which had been sold by the bankrupt before, and the purchaser had omitted to get the burden discharged; the estate was covered with postponed securities; the purchaser paid for the catholic creditor, and took a conveyance to his security, hereafter discharged, so far as affecting the larger estate, but kept the smaller:—Held, that he could not rank on the price of the estate, except for such proportion of the catholic security as rated to the value of that estate. Earl of Moray, June 4, 1836,

party granted three personal bonds for borrowed money, and executed disposition of a certain estate for the special purpose of securing the same by the creditor was declared to be assigned into the full benefit of the estate created by the former conveyance, and intimation thereof was made to the trustees; thereafter, in security of another loan, he granted a disposition of the same estate on which the creditor was duly infeft—Held, in a competition the declaration and assignation in question were ineffectual to the security preferable to the last creditor's infeftment.

Circumstances which held ineffectual to bar the last creditor's claim. July 1, 1836, p. 1074.

was the tenant of premises belonging to his son; he concurred with his son in stating that his rent was £20, and thereby induced a heritable loan to be made on the subjects—Held liable to the heritable creditor, in a subsequent competition for the rents and duties, for a rent of that amount, though he alleged the subjects to be worth less, and to have been let to him for less. M'Niven, July 1, 1836, p. 685.

Warrant of Privilege, 5, 7.—Poinding of the Ground.

Property, 5.

TRUSTEES.

Trustees assoilzied from a claim for an account for surveying a line of road in respect of the land-surveyor's failing to instruct employment by them. June 18, 1836, p. 938.

Cases in which interdict was granted against the trustees of one district of roads, from erecting three check-bars which would intercept the tolls of another sub-district; in respect, inter alia, of the sub-districts having previously formed one district, and having incurred a cumulo debt, a division of that debt took place when the sub-districts were formed, and a proportion of the cumulo debt was allocated upon each sub-district, corresponding to its existing tolls. Carmichael, June 28, 1836, p. 1013.

Intimation, 1.

SALE.

1. A question arose between the purchaser and the seller of a lot of corn, as to the right of possession and disposal of the lot. At the commencement of the proceedings, the purchaser consigned a bank receipt for the price; much litigation ensued, occasioned by unnecessary pleas on both sides, in the course of which, the corn was alleged to be deteriorated—Held, in the circumstances, that immediately on consignment of the receipt, the purchaser should have been found entitled to the possession and disposal of the corn, and as the seller had improperly obstructed this, the purchaser was no longer bound to accept the corn in its state of alleged deterioration, but was entitled to get back the consigned receipt. *Potter*, Jan. 14, 1836, p. 210.
2. Circumstances in which, held, that a correspondence relative to the purchase of a land estate, did not amount to a concluded contract. *Milne*, Feb. 19, 1836, p. 533.
3. A trustee for creditors concluded a sale of a landed estate, forming the trust property, to a party who became bound to pay the price by certain instalments and at certain terms; the trustee thereupon intimated to a heritable creditor on the estate that the sum in his bond would be paid by a certain day, which intimation was accepted and acted upon; the buyer having made no payment till nearly a year after the last of the stipulated terms, the trustee was unable to fulfil his engagement to the creditor, who raised action against the trustee for the loss and damage thereby sustained—Held that the buyer was liable to the trustee in relief thereof. *Mansfield*, Feb. 27, 1836, p. 585.
4. Where a bill of suspension and interdict was presented, against offering certain feu-duties for sale, in respect of an allegation that they were already sold to the suspender;—Held, in the circumstances that the alleged sale had not been completed, and therefore, bill refused. *Boyd*, March 5, 1836, p. 653.

See *Agent and Principal*, 1, 2.—*Trust*, 8.

SALMON FISHING.

1. In an application at the instance of a proprietor and lessee of salmon fishings for an interdict against the use of fixed machinery in the firth of Dornoch, which was alleged to be an arm of the sea—bill of suspension passed, but interdict refused in hoc statu. *Duchess-Countess of Sutherland*, June 11, 1836, p. 959.
- 2.—(1.) A right of salmon fishing cannot be constituted by a grant "*cum piscationibus*" and subsequent use of taking salmon by means of rod fishing only.
(2.) Question whether a right to fish salmon with a rod can be constituted by feudal grant either directly or by reservation. *Duke of Sutherland*, June 11, 1836, p. 960.

SANCTUARY. See *Prisoner*, 2.—*Personal Protection*.

SASINE. See *Bankruptcy*, 5.—*Fee and Liferent*, 2.—*Trust*, 8.

SCHOOL.

- 1.—(1.) The situation of schoolmaster in a school on a private foundation, in connexion with a dissenting chapel, held not to fall under the rules which regulate the cases of parochial schools and public chartered academies.
(2.) Terms of an agreement with a teacher which held not to import an appointment *ad vitam aut culpam*. *Mason*, Jan. 23, 1836, p. 343.
- 2.—(1.) The directors of an academy established under a royal charter, which required a quorum of seven directors—appointed votes to be taken by ballot, and gave no power to vote by proxy, removed a master by an unanimous open vote of a meeting, at which, unless proxies were counted, there was no quorum, and the master was thereafter excluded from the academy: The Court passed a bill of suspension, and granted interdict against any proceedings in virtue of the resolution of that meeting.

ed.)

tion as to the powers of directors in such academies as to the masters. Gibson, March 11, 1836, p. 710.

BATIO. See *Bastard*.

. See *Bankruptcy—Lease*, 6.

OF LANDS. See *Judicial Factor*, 8, 9.

Whether the Crown can be found entitled to expenses. His Majesty, Jan. 12, 1836, p. 209.

of competition of brieves, advocated to the Court of Session, a law having occurred as to the construction of a deed of entail, the competitors severally claimed to be served;—Held that it was to have the question of law decided before the brieves went to Grant, July 5, 1836, p. 1096.

VI., 5.

See *Possessory Judgment—Property*, 4.

residing in Edinburgh stood on the register as sole owner of a ship and made oath to that effect at the Custom-House, and held a bill of lading in his own favour—Held liable for necessary furnishings, provisions, &c, made in London, on the order of the master, in fitting preparation for an outward voyage to Australia, though the party alleged that the master was the only owner, and that he himself was merely a credit-master, holding no true right in the vessel, excepting in security of the bill, June 23, 1836, p. 994.

V.

ALLEGED. See *Process*, III., 13.

ALL DEBT ACT.

Issuance of a decree under the Sheriff's Small Debt Act, for a sum "per account," passed on the allegation, that no account was rendered, and that the citation did not bear that it was served, although it was duly set forth in the execution. M'Laren, Dec. 12, 1835,

SHIPS' FEES (A.S. regulating). See Appendix.

On giving an assignation to a decree for a debt, which was executed with a stamp of 10s., gave a charge to the debtor, who presented a petition for suspension, on caution, in respect that the assignation should have been executed with a stamp of the value of £1, 15s.:—Bill passed, and motion to delay disposing of it, until the assignation should receive a stamp of 15s. Lillie, Dec. 10, 1835, p. 127.

Contract for building a chapel was entered into by missives, and the balance of the price of the chapel—Held that the contract, not being stamped, could not be received in evidence, and verdict was accordingly. Wallace, Jan. 6, 1836, p. 205.

When a record had been closed and judgment pronounced by the Lord Ordinary in an action of reduction of certain bills, a reclaiming note was presented, and the attention of the Court was then called to the circumstance that the bills were null under the stamp laws, as a new obligant had been added to them, after they were issued as completed instruments:—

That it is *pars judicis* to enforce such objection, and that no party can prevent this by pleading that a record is closed, or that the cause is at a certain stage; and,

That, in the circumstances of the case, it was competent (after reference, however, to the Lord Ordinary, with power to open up the record) to declare the bills null and void without making up any record on the facts.

STAMP (Continued.)

or pleas regarding the objection on the stamp laws. *Home*, June 7, 1836, p. 898.

4. A suspender objected to a charge by the assignee of his creditor, that the assignation was written on an inadequate stamp: the charger got it stamped new in the Bill-Chamber, but the Court remitted to pass the bill of suspension: the charger then intimated that he abandoned his first charge, and he gave a second charge, of which a bill of suspension was presented, contending that the expenses of the first bill should be taxed and paid, before the second charge could be sustained,—plea repelled, and letters of charge found orderly proceeded. *Lillie*, March 11, 1836, p. 687.

See *Poinding—Bankruptcy*, 5.—*Presumed Payment*, 2.—*Lease*, 3.—*Bill of Exchange*, 7, 9.

STENT. See *Annuity-tax—Church*, 3.

STEWART-CLERK'S FEES (A.S. regulating). See Appendix.

STIPEND. See *Superior and Vassal*, 3, 5.

SUBMISSION. See *Arbitration*.

SUCCESSION. See *Trust—Testament*.

SUMMONS. See *Process*, I.

SUPERIOR AND VASSAL.

1. Circumstances in which held, of consent, where a vassal had lain out unentered, under some misapprehension as to the nature of his rights, that the non-entry duties, subsequent to citation in a declarator of non-entry, should not be computed for a longer period than one year. *Marshall*, Nov. 20, 1835, p. 30.
2. Circumstances in which held, that the superior in a building feu was entitled to insist upon the vassals in the subdivided portions of the feu taking charters containing an obligation for payment of the whole cumule feu-duty, and of the relief in the entry of heirs, but that the vassals were entitled to have inserted in the charters an obligation by the superior to grant an assignation to the effect of enabling them to recover from the co-feuars whatever sum should be exacted from them beyond their own proportion of the cumule feu-duty and relief. *Wemyss*, Jan. 19, 1836, p. 233.
- 3.—(1.) Certain feu-duties, kail and carriage services, being payable out of lands held in feu, together with certain teind-duties, payable by the investiture to the superior, or, at his option, to the minister of the parish, which teind-duties were within the share of stipend allocated upon the lands in successive localities; and no settlement having taken place with the superior for several years—Held, in an action at his instance for payment of the value of the arrears of these prestations,
 - (1.) That the superior was entitled, either to delivery of the kail in kind, or to the market value thereof in the several years;
 - (2.) That the carriages not having been required to be performed in each year, he was not entitled to demand any estimated value thereof, retrospectively; and,
 - (3.) That the payments of stipend by the vassal under the different decrees of locality, must be considered as payments of the teind-duties in question, by consent of the superior, in terms of the investiture.
- (2.) A party, whose interest was only indirect, having been allowed to assist himself as a defender, and having unnecessarily given in separate pleadings, contrary to the expressed opinion of the Lord Ordinary, found liable in the expense of making up the separate record, while the other defender was found entitled to expenses. *Duke of Hamilton*, Dec. 15, 1835, p. 162.
4. A party having acquired right to certain heritable subjects, which he held under separate feudal titles, conveyed the whole property by one disposition

SAL (Continued.)

reditors, to a trustee, who took infeftment, drew the rents, other acts of possession—Held, that the trustee had adopted personally bound, in a question with the superior, to implections contained in the feu charters. Marquis of Abercorn, p. 168.

als in a feu-charter being bound “to pay the hail cess and the and payable furth of the said lands, of which they shall out of the first end of their money feu-duty,”—“and that arden and exaction whatsoever;”—Held that the superior to relieve the vassals of payments of stipend allocated on the load the teind-duty stipulated in the charter.

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nt, 2.

nnuity-tax—*Process, IX.*

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TEINDS (Continued.)

3. The magistrates of a burgh received authority from the council to dispose of certain lands, the property of the burgh, in the description of which in the articles of roup there was no mention of teinds; a sale was accordingly effected, of which, as conform to the articles, the council by a minute approved; thereafter the magistrates granted a disposition both of the lands and the teinds thereof, with absolute warrandice, the narrative referring expressly to the minutes of council and articles of roup on which the purchaser was duly infeft—Held that this was not an effectual disposition of the teinds, and that the magistrates and town-council were not bound under the clause of warrandice to relieve a singular successor of the original disponee of payments of stipend allocated on the lands. Blair, June 10, 1836, p. 945.
4. Where the pursuer of a reduction of a final decree of augmentation and locality, failed to prove that his lands were comprehended within an old decree of valuation 1635, the Court, on assoilzieing, refused to award expenses to the defender, the minister, in respect of the difficulty of the case. Hamilton, June 14, 1836, p. 966.
- 5.—(1.) In a process of augmentation and locality, decree of augmentation was pronounced, and remit was made to the Lord Ordinary to prepare a scheme of locality; his Lordship, in March, 1810, pronounced an interlocutor, assoilzieing a class of heritors from the process, and finding them not liable in teind; notwithstanding a lapse of nearly twenty years, this interlocutor never was reported to, or approved by, the Court, and no final scheme of locality had been made up, when a reduction was raised by the other heritors, of the interlocutor of March, 1810:—Held,
 - (1.) That the heritors, without the concurrence of either the minister or the titular, had a title to pursue the reduction; and,
 - (2.) That as the interlocutor was never approved by the Court, it never became final, and there was no *res judicata*.
 (2.) Question, whether the actings of parties to a process amounted to a homologation of an interlocutor, so as to bar them, by personal exception, from challenging it. Marquis of Queensberry, June 28, 1836, p. 1021.

See *Superior and Vassal*, 3. 5.

TESTAMENT.

1. Terms of a holograph testamentary writing by a wife, which, viewed in connexion with certain relative deeds by her husband, were held to establish,
 - (1.) That he had placed a sum of £2000 of his, at her disposal;
 - (2.) That she had effectually bequeathed £500 of that sum to the pursuer; and,
 - (3.) That the defender, who took up an estate as heir of provision under a deed executed by the husband, which burdened such heir with the said sum of £2000, was liable to the pursuer for her legacy, whether the defender might, in the circumstances, have any claim of relief against the husband's general representative or not. Smith, Feb. 17, 1836, p. 502.
2. A party having conveyed by a trust-settlement the sum of £1000 to trustees, with directions that they should "set it apart" and apply the yearly interest as an annuity to A during his life; and, on his death, that they should "divide and apply" it in a certain manner, paying £400 thereof to B, and the remainder to other parties and "to their respective heirs in case of their death,"—Held, that the right to the £400 had vested in B on the testator's death, and was not suspended till the death of A. Marchbanks, Feb. 18, 1836, p. 521.
- 3.—(1.) A bequest in a trust-deed of settlement of the residue of the testator's estate to trustees, with power to keep up the trust by assumption of new trustees for the purpose of applying the proceeds "in yearly payments to faithful domestic servants settled in Glasgow, or the neighbourhood, who can

tinued.)

monials of good character and morals from their masters or mis-
 en years' service ; no one to be entitled to more than £10 ster-
 nt as much less as my said trustees may think proper," or in
 the residue not amounting to £600, to distribute the same " to
 le and benevolent purposes " as the trustees might think pro-
 t to be void through uncertainty.

iferent interest of a certain sum appointed to be lent out on se-
 bequeathed to a legatee, and it being declared that the capital
 death, " payable to the trustees,"—Held that there was no
 e trustees individually, but that the capital was to merge
 d fund of the trust-estate. *Black's Trustees*, Feb. 23, 1836,

as in which held, in construing a trust-settlement which was not
 ressed, that it was only by a liberal and rational interpretation
 t could give effect to the true intention of the testator ; and that
 t should be liberally and rationally construed, to the effect of
 an unforeseen surplus should be applied for the testator's family
 ay as he had directed, regarding the only surplus which he had
 provided for. *Ramsay*, Feb. 26, 1836, p. 570.

expenses, 9.—*Implied Power of Revocation—Trust.*

on (Charles) and three daughters of a party deceased were con-
 ors dative, and they appointed two factors and commissioners
 l realize his whole estate, with power to invest it for their be-
 ommissioners raised an action for the price of articles bought
 er at a roup of the effects of the deceased. During the action,
 ted a trust-disposition of all his effects for behoof of his credi-
 ontained a clause of revocation of the factory and commission.
 trustees was the defender in the above action, but a majority of
 gave authority to the commissioners to recover, under the ac-
 t might be due by the defender, and account to them for the
 rles—Held, that the defender could not found on the trust-
 g away from the commissioners the right to pursue, either as
 rth belonging to Charles, or the three-fourths belonging to his

of a missive letter, and of an admission on the record, which
 t to instruct a cautionary obligation which had been ver-
 ed for one of the bidders at a roup. *McCuaig*, Jan. 22, 1836,

no had raised action along with a mandatary, moved afterwards
 him and sist a new mandatary, to whom no objection was
 defenders. The pursuer farther craved the Court, on caution
 st expenses being found, to declare the first mandatary free of
 nd stated as a ground for this, that the mandatary was related
 ore whom the cause might come, and who would be disqualified
 ary was not withdrawn : the defender refused to consent,—
 Court had power to declare the mandatary free of all liability,
 or to that effect pronounced accordingly. *Anderson*, Jan. 22,

raised an action of declarator, implement, and damages, in name
 who was abroad : the grounds of action consisted of certain
 dure, adopted towards the client during his absence from this
 action was raised without the client's knowledge, and was dis-
 nt of a mandate : before a reclaiming note was advised, a man-
 uced from the client, homologating the agent's whole proceed-
 orizing the action—Held that the original objection to the title

TITLE TO PURSUE (Continued.)

to insist was thereby cured, and remit made to the Lord Ordinary to proceed with the action. Wylie, Feb. 5, 1836, p. 430.

4. Circumstances in which the Court found that an undischarged bankrupt was entitled to insist in an action of damages, without finding caution for the expenses of process. Young, May 19, 1836, p. 794.
5. Circumstances in which the Court repelled an objection that a party was bound to find caution for expenses before wakening an advocacy in which he was respondent. Johnston, June 4, 1836, p. 885.
6. Question as to the title of proprietors and occupiers of houses in a city parish, and sitters in the parish church, to pursue a declarator that the magistrates of the city had no right to exact seat rents from proprietors and occupiers of houses within the parish, or generally from sitters in the church. Abercromby and Others, June 7, 1836, p. 902.
7. A party executed a settlement in 1820, under which his second son, John, had a beneficial interest in part of the lands; the party executed a new settlement and disposition in 1825, under which his eldest son, James, obtained immediate possession of the whole estate, which he burdened (including the portion previously destined beneficially to John) with heavy debts: James predeceased his father without issue, and John, after his father's death, in the character of heir-at-law of his father, raised a reduction of the settlement 1825, as having been fraudulently impetrated by James — and also of the heritable securities granted by James: the heritable creditors objected that John had no interest, as heir-at-law, because, even if the settlement of 1825 was cut down, there would be no intestate succession, as the settlement of 1820 would be revived:—Held that the pursuer, who was heir under the last investiture prior to 1825, and who had a special interest under the settlement of 1820, was entitled to pursue. Anderson, June 16, 1836, p. 972.
8. A summons having been raised in name of the Commissioners of Woods and Forests, and called also in their name after the intermediate passing of an act declaring the right to sue in such matters as the action regarded not to be in them, but in the Lords of the Treasury, and the latter having craved to be sisted therein—Held,
 - (1.) That the summons was incompetently called in name of the Commissioners of Woods and Forests, and that there was no process in which the Lords of the Treasury could be sisted.
 - (2.) Expenses awarded against their Lordships. Lords of the Treasury, March 5, 1836, p. 657.

See *Burgh*, 2.—*Inhibition*, 4.—*Process*, VIII.—*Teinds*, 5.—*Trust*, 7.—*Wadset*.

TOWN-COUNCILLORS. See *Burgh*, 2, 5.

TOWN-CLERK. See *Burgh*, 7.

TRUST.

- 1.—(1.) A party by his trust-settlement declared, that, “for the encouragement of my trustees to accept the trust hereby conceived to them, I declare that they shall not be liable for neglect, omissions, or diligence of any kind, nor shall they be liable singuli in solidum, but each only for his personal intromissions,”—Held, that where money was uplifted by a trustee (Paterson) in virtue of a receipt signed by himself and two co-trustees, being a quorum, such uplifting was an act of personal intromission against the co-trustees who signed the receipt, and thereby enabled Paterson to uplift the money.
- (2.) The money so uplifted was allowed to lie for several years in the hands of Paterson, on his promissory-note, without any inquiry after it by the co-trustees, who had taken an obligation from him at uplifting it, to grant a security over his heritage “as soon as possible;” he eventually proved in-

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held that the co-trustees were liable, singuli in solidum, to the beneficiary of the trust.

liability held to attach to the co-trustees who signed receipts for money similarly uplifted and retained by Paterson, but without promissory-note being granted for it, or any obligation to give heritable

liability held to attach to the representative of one of the co-trustees, within a year after the money was uplifted, that co-trustee who had bad health, so as to be unable to attend to business, and had bad health till his death, which happened several years before the death of Paterson.

of the trustees-nominate declined, at first, to accept; he afterwards, to the effect of concurring in the assumption of a new trust-deed of one deceased, which assumption was made by him in the trust-deed, and for the purpose of enabling the trust to be carried out the validity of the trust-actings being exposed to doubt; he was not in communion with any of the intromissions under the trust, or with any trust-administration besides the deed of assumption:—Held not liable for intromissions previously to the deed of assumption or subsequently.

is of a summons of count and reckoning, which held sufficient for the questions.

question whether a trustee under a mortis causa settlement, in which the beneficiary fee, can effectually resign and denude of the fee when incapacitated by bad health from attending to business. 28, 1836, p. 361.

being executed a trust-deed for payment, in the first place, of heritable estate and secondly, of finishing certain houses forming part of the sub-trust, and, after these purposes, for payment of the personal creditors' claims in which held that the personal creditors acceding were not bound for money borrowed and advances made by one of the trustees for the houses. Spratt, Jan. 29, 1836, p. 382.

trust-settlement, under which it was held, that, although a party, the brother, the testator, his share in the succession had not vested, (inter alia) that the party did not live until the period of a general division of the trust-estate; and that the effects of predeceasing such period were placed by the testator on the same footing with predeceasing him—that there was no mala fides on the part of the trustees in delaying division. Thorburn, Feb. 16, 1836, p. 485.

conveyed his estate to trustees, with directions, in a certain event occurred, to apply the annual produce thereof to the aliment of his wife and the aliment and education of her children, the jus mariti of her husband all right in him or his creditors to interfere with the proceeds was denied: of the two surviving and accepting trustees, one resided in England, the other trustee being the husband of the lady benefited in the trust: In an action at the instance of a party who was not a trustee in the trust, alleging that he had made advances on the orders of the trustee in Scotland and of the lady, for behoof of herself and family—that the trustee in Scotland, acting by himself, could not affect the trust for such advances; but that, in so far as advances were made to the trust of the annual proceeds, and applied according to the directions of the trust for the purpose of making up titles, and in the necessary management of the trust, such advances were just debts against the trustees and the trust. Heriot's Trustees, March 8, 1836, p. 670.

executed a settlement in favour of certain trustees who accepted and agreed to act for them: the agent took a disposition to a certain part of the estate from the heir-at-law (who had only a liferent under the

TRUST (Continued.)

trust, but who, passing it over, made up titles as heir), in security of a debt alleged to affect the trust, took infeftment on the disposition, and conveyed it to third parties, and subsequently retired from the agency of the trust;— Found that the agent had acted in mala fide, and was bound, in the first instance, without awaiting the result of an accounting, to restore the estate in integrum against the real security created by the disposition and infeftment. *Stevens's Trustees*, March 8, 1836, p. 676.

6. In an accounting under a trust where the trustees were protected by a clause in the deed declaring them not liable for omissions, &c.—Circumstances which held not to amount to such culpa lata as to infer personal liability against a trustee for losses sustained by the trust-estate in the course of his management. *Cowan*, May 13, 1836, p. 744.

- 7.—(1.) Where the beneficiaries under a trust-settlement refuse to exoner a trustee extrajudicially, he is entitled to bring a process of multiplepounding for his exoneration, though he has not been exposed to actual double distress.

(2.) Where a process of multiplepounding for exoneration of trust-actings and intromissions is raised in name of two surviving trustees, and one disclaims it—Held competent for the other to insist alone, to the effect of obtaining his own exoneration. *Taylor*, May 24, 1836, p. 817.

8. A trust-settlement conveyed heritage to trustees, and to their assignees; it was granted, to pay debts and provide the residue to the granter's family; it contained powers of sale, with a declaration that the purchaser should have no concern with the conditions of the trust, and, from the terms of the deed, there could be no "assignees" contemplated, excepting purchasers; there was an obligation to infeft the trustees, or their assignees, and a procuratory of resignation for new infeftment "to the trustees, under the burdens, &c. of the trust, and to the assignees of the trustees, in due and competent form;" the precept of sasine was in these terms:—"And to the end my said trustees may be infeft in the lands, &c. I hereby desire and require you,

and each of you, &c. that ye pass, &c. and give sasine, &c. to my said trustees, and to the assignees of my said trustees, of all and whole, &c.; but that, in trust always, for the uses, ends, and purposes, with the power, and under the burden, and conditions, and provisions herein before written:" the trustees sold lands, and, without making up a feudal title, conveyed this unexecuted precept to the purchaser, who took infeftment under it:—Held, that he had acquired a good feudal title, and that a party, subsequently purchasing from him, could not object to pay the price. *Cockburn*, June 4, 1836, p. 889.

9. A Scottish lady, along with her younger brothers and sisters, had right to a share of a Scottish heritable bond for £10,000, left by her mother, and payable to her on her marriage; she also had right to a share of two Scottish heritable bonds for sums amounting to £9000, left by her father, under a trust-settlement, which referred, in gremio, to a previous English will, and declared the bonds to be conveyed for the same purposes as certain moveable estate falling under the will; the will contemplated investments being made in the public funds, and directed a daughter's share to be paid at her marriage; but the Scottish settlement contemplated the investment of the said £9000 on Scottish heritage: the lady, by antenuptial contract with a gentleman domiciled in England, conveyed the whole estate, heritable and moveable, belonging or which should belong to her during the marriage, to trustees, for the purpose of paying the interest or yearly proceeds of the sums thereby conveyed, to the spouses or surviving spouse, and thereafter, of paying the said sums to the children of the marriage in such proportions as should be specified by the spouses; failing children, the trustees were to pay the said sums to the heirs and assignees of the lady: the lady died, domiciled in England, but without leaving issue of the marriage, and without having executed any testamentary

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move heritable bonds remained uplifted ; it was admitted that the her heir and representative in mobilibus by the law of England :

as she died domiciled in England, the law of that country must intestate moveable succession, and that her husband was entitled

in so far as her succession consisted of Scottish heritage, the and must point out the heir to whom it descended ; and, as the share of the Scottish heritable bonds was a heritable estate must descend like Scottish heritage, notwithstanding certain (but without any injunctions to sell) which were contained in trust-conveyances affecting them, and notwithstanding the terms, annexion of the father's English will and Scottish settlement. *Mur-* 0, 1836, p. 1049.

licit factor appointed to execute a trust, the trustees having de- cept.

rt refused, in determining the application for a factor, to decide on upon the trust-fund. *Lacy*, July 7, 1836, p. 1112.

Security, 2.—*Judicial Factor*, 3.—*Expenses*, 9.—*Testament*.

Superior and Vassal, 4.—*Bankruptcy*—*Curator Bonis*, 1.—

. See *Pactum Illicitum*.

ATOR. See *Minor*.

e 23, 1836, p. 992.

Bill of Exchange, 6.

See *Teinds*.

ator of a right to redeem a portion of certain lands which had been a proper wadset above 150 years ago—Held sufficient, in point y, for the pursuer to libel that the lands had been onerously ac- his predecessor, from the reverser, under a decree of ranking and gh the pursuer did not specially deduce, in the summons, his right ersion except by giving a special deduction of his title to the lands. une 11, 1836, p. 951.

. See *Superior and Vassal*, 5.—*Teinds*, 3.

Testament.

e *Personal Protection*—*Proof*—*Process*, III.

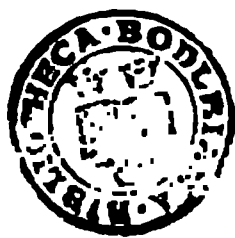
bond of annuity bore the sum of £2000 to have been advanced to ies who were taken jointly and severally bound in payment of the the bond was signed by one of the parties (A), whose signature attested : the signatures of the other two parties (B and C) were y two witnesses, of whom only one was duly designed in the test- : thereafter, on the faith of the bond, the sum was paid over by to A. through the hands of B, as A's agent, or at least in B's pre- d with his knowledge : several terms' annuities were also paid to through the hands of B :—Held, that B was barred by rei inter- om objecting to the error in the testing clause.

his plea of rei interventus not affected by the circumstance that C in the interim, and was alleged to be freed in consequence of the y of the bond, and the rei interventus not extending to him. *Ha-* an. 22, 1836, p. 323.

ie name and designation of the writer of the body of a deed were d, but the name and designation of the writer of the testing clause :—Held that the deed was not affected by any statutory nullity, 31, c. 5. *Andrews*, March 2, 1836, p. 589.

igation—*Proving of the Tenor*.

PPREHENSION. See *Reparation*, 3.—*Prisoner*, 2.





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TITLE TO PURSUE (Continued.)

to insist was thereby cured, and remit made to the Lord Ordinary to proceed with the action. *Wylie*, Feb. 5, 1836, p. 430.

4. Circumstances in which the Court found that an undischarged bankrupt was entitled to insist in an action of damages, without finding caution for the expenses of process. *Young*, May 19, 1836, p. 794.
5. Circumstances in which the Court repelled an objection that a party was bound to find caution for expenses before wakening an advocacy in which he was respondent. *Johnston*, June 4, 1836, p. 885.
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